011/021 Chair's Choice: Adding Value Around the Globe

J. Daniel Fitz
General Counsel
Cable & Wireless

Michael Roster
Executive Vice President & General Counsel
Golden West Financial Corporation

John Scott
Vice President and General Counsel
GPC International

Peter J. Turner
Vice President-Legal Affairs
Foster's Group Limited

Elizabeth Wall
Senior Vice President, General Counsel, and Corporate Secretary
Equant

Faculty Biographies

J. Daniel Fitz

J. Daniel Fitz is group general counsel of Cable & Wireless and is based in the company's London headquarters. Cable & Wireless is a major global telecommunications business with revenue of over $11 billion and customers in 70 countries. Cable & Wireless' focus for future growth is on IP (Internet protocol) and data solutions for business customers.

Prior to joining Cable & Wireless, Mr. Fitz worked at both Baring Brothers, the UK investment bank, and Pillsbury Winthrop, the U.S. law firm.

Mr. Fitz received a BA with honors from the University of North Carolina at Chapel Hill and a diploma in international and comparative politics from the London School of Economics, with diploma distinction. He received his JD with honors from the University of North Carolina as well.

Michael Roster

Michael Roster is executive vice president and general counsel of Golden West Financial Corporation, a $56 billion financial services holding company. He is also chair of ACCA, the founding chair and director of Encirq, an internet start-up company, and chair and director of Insert Therapeutics, a biotech start-up company.

Mr. Roster previously served for seven years as the general counsel of Stanford University and Stanford Medical Center. Prior to that, he was national cochair of Morrison & Foerster's Financial Services Practice Group, a member of the firm's policy committee and managing partner of the firm's Los Angeles office. He was resident in the firm's offices in both Los Angeles and Washington, DC.

Mr. Roster received his AB degree from Stanford University and his JD from Stanford Law School.

John Scott
Vice President and General Counsel
GPC International

Peter J. Turner

Peter J. Turner is vice president—legal affairs of Foster's Group Limited based in Melbourne, Australia. Foster's is one of the world's largest brewing and premium wine companies and is the owner of California's Beringer Wine Estates.

Mr. Turner provides a broad range of legal advice to the Foster's Group and manages its law department. He is also the immediate past president of the Australian Corporate

Lawyers Association and the immediate past chair of the Corporate Counsel’s Committee of the International Bar Association.

Mr. Turner is a native of Melbourne but has lived and worked in Europe, the United States, and Asia for almost 20 years as corporate counsel to the Dutch Philips Electronics group.

He holds Law and Arts degrees from Melbourne University and an MBA from Sophia University in Tokyo.

Elizabeth Wall
Senior Vice President, General Counsel, and Corporate Secretary
Equant

INTERNATIONAL BUSINESS TRANSACTIONS CHECKLIST

Edited by: Leonard Schneidman, Esq., Partner,
Foley, Hoag & Eliot - Boston, Massachusetts
Chair, Lex Mundi International Tax Committee

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II. INVESTMENT ENVIRONMENT

1. **Demography**
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- How long does such approval take?
- Must a national be a participant in the enterprise in order for the investor to benefit from these incentives?

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- Must a national be a participant in the enterprise in order for the investor to benefit from these incentives?

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- Are there restrictions on capitalization?
- What are the investor's tax consequences? (see also Sections XII and XIII)

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- Are joint ventures permitted?
- If so, what is the registration or incorporation procedure?
- How long do these procedures take?
- What costs and fees are involved?
- Must a national of the country or a related state, (e.g. the EEC) be a participant, manager or director?
- What is the investor's potential liability?
- Are there restrictions on capitalization?
- What are the investor's tax consequences?

3. **Limited Liability Companies**
- Are limited liability companies permitted?
- If so, how are they registered or incorporated?
- How long do these procedures take?
- What costs and fees are involved?

- Must a national of the country or a related state be a participant, manager or director?
- Are there restrictions on capitalization?
- What are the investor's tax consequences?

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- Are there restrictions on capitalization?
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- How long does it take to receive authorization?
- What fees are involved?

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- Are there applicable price controls?

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- Is there a minimum number of vacation and sick days to be given?

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- Must the investor employ a minimum number of nationals?
- Must certain positions in the company be held by nationals?
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- What fees are involved?

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- What are the major deductible items?
- What are the major expenses that are excluded from deductibility?

2. **Calculation of Taxes**
- How is the taxable base determined?

3. **Capital Gains**
- What are the federal or national tax rates on capital gains?
- What are the regional or state taxes on capital gains?
- What are the municipal or local taxes on capital gains?

4. **Filing and Payment Requirements**
- When must the corporation file its tax return, if any?
- When must the corporation pay its taxes?
- Are taxes paid in installments or annually?

5. **Miscellaneous Taxes Due**
- Is there a tax on capital?
- Is there a business license tax?
- Is there an apprenticeship tax?
- Is there a training tax?
- Are there other taxes?
- What are the filing and payment requirements?

6. **Registration Duties**
- Are there registration duties due upon the incorporation of a company?
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- Are there registration duties due upon a transfer of corporate assets?
- Are there any other registration duties due?

7. **Sales Tax or Other Turnover Tax**
- What is the system of sales tax (e.g. V.A.T., cumulative)?
- Is input tax creditable against output tax?
- What are the tax rates?
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8. **Social Security and Welfare System Contributions**
- Are social security contributions due?
- Are retirement or pension contributions due?
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- Is the corporation subject to tax on its worldwide income?

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3. **Capital Gains Tax**
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- When must the individual pay his taxes?

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- What kind of assets are subject to tax?
- What are the tax rates?
- Are allowances available?
- What are the payment and filing requirements?

6. **Miscellaneous Taxes Due**
- What are the miscellaneous taxes to which the individual may be subject?
- What are the filing and payment requirements?

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- Is the individual subject to real estate or habitation tax?

8. **Sales Tax**
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9. **Social Security and Welfare System Contributions**
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- Are contributions to the welfare system due?
- If so, what are the payment and filing requirements?

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2. **Calculation of Taxes**
- How is the taxable base determined?

3. **Capital Gains**
- What are the federal or national tax rates on capital gains?
- What are the regional or state taxes on capital gains?
- What are the municipal or local taxes on capital gains?

4. **Filing and Payment Requirements**
- When must the entity file a tax return, if any?
- When must the entity pay its taxes?
- Are taxes paid in installments or annually?

5. **Miscellaneous Taxes**
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6. **Registration Duties**
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- Are there registration duties due upon a transfer of assets?
- Are there any other registration duties due?

7. **Sales Tax or Other Turnover Tax**
- Is the legal body subject to sales tax or any other turnover tax (e.g. VAT., cumulative)?
- Is input tax creditable against output tax?
- What are the tax rates?
- What are the filing and payment requirements?

8. **Social Security and Welfare System Contributions**
- Are social security contributions due?
- Are retirement or pension contributions due?
- Are unemployment insurance contributions due?
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XV. GENERAL TAX CONSIDERATIONS

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- Is there an advance tax ruling that can be used to validate or invalidate the chosen form of doing business?
- Is there a general anti tax avoidance system?
- Can the chosen form of business be treated as a deferent form for tax purposes?

XVI. IMMIGRATION REQUIREMENTS

1. **Immigration Controls**
- Are there immigration quotas?
- Are vaccinations required?
- Are medical certificates required?
- Are entry permits required?
- If so, must you apply for an entry permit before entering the country?
- Are exit permits required?
- Are re-entry permits required?

2. **Immigration Requirements/Formalities**
- Is a residence permit required?
- If so, does the investor have to apply for one before entering the country?
- What information must be supplied to the immigration authorities?
- How long does it take to receive authorization?

3. **Visas**
- Is a visa required for travel or stay in the country?

- If so, for how long is the visa valid?
- How does the investor apply for a visa?
- What documents are required?
- How long does it take to receive a visa?
- What fees are involved?

XVII. EXPATRIATE EMPLOYEES

1. **Cost of Living and Immigration**
- How does the cost of living compare to that in the investor's home country?
- What is the rate of inflation?

2. **Drivers' Licenses**
- Must the investor obtain a driver's license for that country?
- How does the investor obtain a driver's license?
- What fees are involved?
- Is an examination, either practical or written, required?

3. **Education**
- What type of schools are available for the investor's family?
- What fees are involved?
- What is required for enrollment?
- Can the investor or company receive a tax benefit?

4. **Housing**
- What type of housing is available for the investor?
- Can the investor own property?
- Must the investor have housing before he enters the country?
- Can the investor subsidize housing and receive a tax benefit?

5. **Importing Personal Possessions**
- How can the investor import his personal belongings?
- Are import duties payable?
- Are there requirements for clearing the belongings through customs?

6. **Medical Care**
- What level of medical care is available?
- Is there national health care?

7. **Moving Costs**
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- Can the investor receive any tax allowances?

8. **Tax Liability**
- What is the expatriate's tax liability? (see also Section XIII)
- What are the allowances?
- Are there any applicable tax treaties?

9. **Work Contracts**
- Does the investor need a work contract to work in the country?
- If so, does the contract have to be for a certain duration, for the
- performance of a specific job or for a specific position?
- Does the contract have to be with a national or resident of the
- country or related state?

10. **Work Permits**
- Does the investor need a work permit to work in the country?
- How and where does the investor apply for the permit?
- What documents are required?
- What fees are involved?
- How long does it take to receive the permit?
- For how long is the permit valid?

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CARIOLA DIEZ PEREZ-COTAPOS

& CIA. LTDA.

DOING BUSINESS IN CHILE

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Av. Andrés Bello 2711, piso 19, Santiago-Chile * EMAIL cariola@cariola.cl
Casilla 409-V, Correo 21 *Telephone: (56-2) 3604000 *Facsimile (56-2) 3604030

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INTRODUCTION

Chile offers a stable economic and political environment, with excellent growth prospects. It also has an established legal framework which is designed to guarantee the protection of investments and the ability to operate in accordance with normal business practice. Chilean financial markets are well developed, with high domestic savings rate (27.6% in 1995) largely due to its private pension fund system. Chile's external debt is rated A- by Standard & Poor's and Baa1 by Moody's.

This Memorandum briefly discusses the legal framework applicable to any individual or company interested in carrying out business activities in Chile. The foreign investment regulations, corporate structure alternatives as well as the relevant tax provisions are summarized to explain the legal means available to do business in Chile. Naturally the most convenient structure for any given business should be determined on a case by case basis, because this Memorandum is intended only to provide an overview of the most relevant provisions.

Generally, there is no restriction based on the nationality of partners, shareholders or owners of Chilean companies. The only restrictions imposed by law in this respect apply to certain very specific fields of business such as in the fishery and coastal merchant navigation.

I. BUSINESS ORGANIZATIONS IN CHILE

There are several ways in which companies may be organized to undertake activities in Chile. From non-profit organizations to stock corporations, Chilean law sets forth different applicable regimes according to the different needs.

Generally, a foreign company may freely select any of the following forms of organization:

A) Branch of a Foreign Corporation
B) Corporation
C) Limited Liability Company

In the case of banks, insurance companies and pension funds, among others, the law sets out certain regulatory requirements to be fulfilled, i.e. prior authorization by the competent local authority.

As a general rule, no particular structure is mandatory to undertake business in Chile, save for certain specific businesses, e.g. financial services, insurance companies, pension funds, etc. Therefore, the different considerations set out below must be carefully weighed to determine the most appropriate structure.

A) BRANCH OF A FOREIGN CORPORATION (*AGENCIA DE SOCIEDAD ANONIMA EXTRANJERA*)

A branch of a foreign corporation is not an autonomous juridical entity in itself but an agency of the parent company in Chile.

(1) Establishment

To establish a branch of a foreign corporation in Chile, it is necessary that certain duly certified documents be registered with a local Public Notary. Thereafter, the agent must execute a declaration of establishment of the agency. A summary of said declaration must comply with certain publicity requirements. No prior authorization of any governmental body is required.

Copies of the following documents in their original language of execution must be duly certified:

- Articles of incorporation of the foreign corporation.
- By-laws of the foreign corporation.
- Certificate of good-standing of the foreign corporation.
- Power of Attorney granted to the agent that will manage the branch.

If the original documents are issued in a language other than Spanish, they should be duly translated by the Ministry of Foreign Relations of Chile.

Once the referred certification process has been completed, both the original documents and translations thereof must be filed with a Chilean Public Notary.

On the same date of registration of the documents with the Chilean Public Notary, the appointed agent should execute a notarial public deed dealing with the following declarations and representations:

(a) The name , capital , domicile and corporate purpose of the branch in Chile;

(b) That the foreign corporation is aware of the Chilean legislation which shall govern its affairs in Chile, as well as those of its branches, contracts and obligations;

(c) That the foreign corporation shall be subject to Chilean laws, in particular to comply the obligations incurred in Chile; and

(d) That the foreign corporation undertakes to maintain in Chile assets which can be easily sold to meet its obligations in Chile.

According to article 121 of the Corporations Act (law 18.046), the power of attorney granted to the agent must be a general one, with broad authorities, including a clause stating that the agent shall act in Chile under direct responsibility of the foreign corporation, and with broad powers to carry out operations on its behalf. The authorities to represent the foreign corporation before Chilean Courts, in the terms set forth by the Chilean Civil Procedural Code should also be included.

Even though most companies usually do not grant general powers of attorney to their officers or employees as a matter of policy, they must do so if they wish to operate a branch in Chile.

A summary of the notarial public deed must be published in the Official Gazette and registered with the Registry of Commerce within 60 days of the date of its execution.

(2) Liability of the foreign corporation

The foreign corporation is liable for all the activities and business carried out by the Chilean branch, and this liability is not limited to the assets located in Chile. In any case Chilean creditors of the branch will have a preferential right over the branch assets in case of bankruptcy or insolvency of the corporation.

(3) Capital

No minimum capital is required for the establishment of a branch of a foreign corporation in Chile. Any amount of capital may be determined at the time of establishment of the branch, without being mandatory that said capital be paid in on the date of establishment. Furthermore, the capital of the foreign corporation may be changed at any time, either by increasing or decreasing it, in which case said amendment must be executed by the agent by a notarial public deed. The publication in the Official Gazette and registration with the Registry of Commerce of a summary thereof must be arranged within 60 days. Decreases of capital must be authorized in advance by the Internal Revenue Service.

(4) Management

The branch shall be managed by the agent, who shall be vested with broad authorities to represent the foreign corporation.

(5) Remittances of profits

There are no limitations with regard to the remittance of profits from the branch, provided all the pertinent taxes have been paid in and that any foreign investment remittance terms have been complied.

(6) Publication of Financial Statements

The agent must publish the financial statements of the branch every year in a newspaper of the domicile of the branch.

B) CORPORATION (*SOCIEDAD ANONIMA)*

In general terms, Chilean regulations on corporations do not differ much from those of other jurisdictions.

Under Chilean law, corporations may be either open corporations or closed corporations.

Open corporations are those where the shares are publicly traded or those having 500 or more shareholders or in which at least 10% of the shares belong to 100 shareholders, excluding those shareholders who individually exceed such percentage.

Closed corporations are those not falling within the above mentioned definition.

Open corporations are subject to the supervision of the Superintendency of Corporations and Securities (SVS). Closed Corporations are not. However, shareholders in a closed corporation may agree to convert it into an open corporation, therefore becoming subject to the control of the SVS.

(1) Incorporation

Corporations, whether open or closed, are incorporated by the execution of a public deed by at least two founder shareholders. Certain mentions required by the Chilean Corporation Act (law 18.046) must be included, such as the name of the shareholders, their profession and domicile; the corporate name, purpose of the corporation, its domicile; and others.

A summary of the notarial public deed must be published in the Official Gazette and registered with the Registry of Commerce within 60 days of the date of its execution. The public deed will also contain the by-laws of the corporation.

(2) Liability of the shareholders

Shareholders are liable for the amount they have agreed to pay in for subscribed shares only.

(3) Capital

At least a third part of the stated capital must be subscribed and paid in at the time of incorporation. The balance must be paid within three years from the date of execution of the incorporation deed, readjusted pursuant to Chilean inflation rate index.

The capital of the corporation shall be automatically increased, on an annual basis, in accordance with the Chilean inflation rate, once the balance sheet of the company has been duly approved by the shareholders.

Any other form of change of capital of corporations shall require the amendment of the by-laws, which, in turn shall require an extraordinary shareholders' meeting, which must be recorded in a notarial public deed.

A summary of said amendment deed must be published in the Official Gazette and registered with the Registry of Commerce.

Among other means, increases in the Capital of the corporation may be obtained through the capitalization of profits or retained earnings; through capitalization of debts, or through additional contributions in cash or in kind.
In any case, before increasing the corporation's capital by issuing new shares, it is necessary that any existing reserves first be capitalized.

Should the shareholders agree on an increase of capital by issuing new shares, the existing shareholders shall have a preemptive right to proportionately subscribe any new shares, a right which may be freely waived or transferred.

Decreases in the corporation's capital must also be agreed by the general shareholders' meeting and attested to by public deed. A summary of said deed must be published in the Official Gazette and registered with the Registry of Commerce within 60 days of the date of execution of the amendment. Prior authorization by the Internal Revenue Service is mandatory.

Corporations with only few exceptions, may not acquire their own shares.

(4) Management

The management of a corporation is vested on a Board of Directors appointed by the shareholders.The Board shall have not less than three members in closed corporations, and not less than five in open corporations. It is not mandatory that a Director be a shareholder of the company.

A shareholders' meeting may, at any time, remove all of the Directors. The Board of Directors shall delegate some of its authorities upon a General Manager who shall have the legal representation of the company and shall be entrusted with the duty of implementing the resolutions of the Board of Directors. In open corporations Directors can not be managers.

(5) Distribution of Profits

The law requires that open corporations distribute at least 30 % of the net profits each year, except as otherwise agreed by the shareholders' meeting with the unanimous vote of all issued shares.

In closed corporations, shareholders may agree in the by-laws any policy of distribution of profits they may wish.

Interim dividends may be approved by the Board of Directors, provided there are no accumulated losses. Should there be any accumulated losses, each Director shall be personally liable for the reimbursement of such dividends, in the case that the corporation ends up with losses or with a profit in an amount lower than the distributed profits.

(6) Financial Statements

Financial statements of corporations must be audited by inspectors of accounts or external auditors appointed by the shareholders' meeting. Open corporations must publish their financial statements in a newspaper of its domicile, as well as certain relevant information requested by the Superintendency of Corporations and Securities. Additionally, all information requested by such authority must be filed every year by open corporations.

(7) Transfer of shares

Shareholders may freely transfer their shares, except where there exists a limitation in the by-laws or in a shareholders agreement.

In open corporations the by-laws may not limit the free transfer of shares, and any private agreement between shareholders setting forth restrictions must be registered with the company shareholders' registry in order to be enforceable. Transfers of shares must be executed before a Public Notary, two witnesses or an authorized broker in order to be binding to third parties.

(8) Dissolution

A corporation is dissolved and terminated when its term of duration expires, unless it has been incorporated for an indefinite duration. Additionally, corporations are dissolved if it is so agreed by 2/3 of the shareholders attending a meeting called for that purpose, or all the shares are acquired by one shareholder. The by-laws of the company may include other additional events which shall cause the dissolution of the corporation.

Should the dissolution of the corporation take place, its liquidation shall be undertaken by a liquidating committee freely elected by the shareholders.

(9) Minority shareholders

Any minority shareholder is entitled to withdraw from a corporation in the case that certain resolutions are agreed upon by the shareholders' meeting. Among such rulings are: the transformation of the corporation into another legal form; merger; disposal of all of the company's assets or liabilities, or of all of its assets; or in the case that the issue of preferred shares or, the increase or reduction of such preferred shares is agreed.

Some other causes of withdrawal may be incorporated in the by-laws by the shareholders. The withdrawal right implies the corporation's obligation to purchase all of the minority shareholder's shares, either at book value, in case of closed corporations, or at market value, in the case of open corporations.

C) LIMITED LIABILITY COMPANY (*SOCIEDAD DE RESPONSABILIDAD LIMITADA*)

Under Chilean law, the interested parties may set up an unlimited liability company. Since limited liability companies are structured on the same rules set out for those of unlimited liability, except for this one characteristic, below we will refer only to those of limited liability.

(1) Incorporation.

Limited liability companies are incorporated by the completion of a public deed by at least two parties, either individuals and/or limited or unlimited liability companies. Said deed shall also set forth the name of the company, its corporate purpose, capital contributions and so on, as well as the by-laws of the company. A summary of said deed must be published in the Official Gazette, and registered with the Registry of Commerce within 60 days of the day of completion thereof.

Limited liability companies may not have more than 50 partners, either private or legal individuals.

(2) Control.

Limited liability companies are not subject to any supervisory control other than that of the Internal Revenue Service.

(3) Liability.

Partners' liability is limited to the amounts they have agreed to contribute, or to any higher amount indicated in the by-laws.

(4) Capital.

There is no minimum capital requirement to incorporate a limited liability company in Chile. Partners may freely determine terms and conditions for the payment they intend to contribute to the company.

The corporate capital may be amended from time to time, either by increasing or decreasing it. Reductions of capital require the prior approval of the Internal Revenue Service.

Capitalization and increases of the corporate capital may be obtained through contributions in cash or in kind, and/or capitalization of profits, retained earnings or loans.

(5) Management.

The management of a limited liability company may be vested on one or more partners, on a third party or on a Board of Directors specially appointed for that purpose. The quorum and structure of said Board of Directors, in case the partners decided to appoint it, may be freely established in the by-laws.

(6) Distribution of profits.

The terms and conditions of profit distributions may be freely set forth in the by-laws by the partners .

(7) Transfer of interest.

The transfer of equity interests in a limited liability company requires the unanimous consent of all the partners thereof. Otherwise, the transfer shall be null and void.

In the case that the partners agree to the transfer of interests, a public deed should be executed and a summary thereof published in the Official Gazette and registered with the Registry of Commerce within 60 days as of the execution date.

(8) Financial Statements.

No publication of financial statements is required in limited liability companies.

II. FOREIGN INVESTMENT IN CHILE

Foreign investment regimes in Chile are mainly regulated by two legal bodies, the Foreign Investment Statute (D.L. 600) and Chapter XIV of the Compendium of Foreign Exchange Regulations of the Central Bank of Chile.

A) FOREIGN INVESTMENT STATUTE (*D.L. 600*).

This statute regulates the investments made by non-Chilean individuals or companies and by Chileans residing or domiciled abroad. Investments made under D.L. 600 are entitled to the guarantees described below and which are included into an investment agreement entered into between the investor and the Republic of Chile.

(1) Nature of the Investments that can qualify.

(a) Non-Chilean currency converted into pesos in Chile through an entity authorized to operate in the Chilean foreign exchange market at the best available exchange rate;

(b) Physical assets, new or used;

(c) Technology, under certain conditions;

(d) Loans made concurrently with a foreign investment, whose terms and conditions require the prior approval of the Central Bank of Chile;

(e) Capitalization of existing loans made in non-Chilean currency which have been duly registered with the Central Bank of Chile; and

(f) Capitalization of profits which can be remitted abroad in non-Chilean currency.

(2) Term to make the investment.

The foreign investment agreement shall determine the term within the investment shall be implement by the investor. This term shall not exceed eight years for mining projects and three years for other projects. However, the Foreign Investment Committee ("FIC"), by the unanimous vote of all its members, may exceptionally extend this term up to twelve years in cases of mining investments, where previous explorative works are required as well as in the case of investments in industrial or non-mining extractive projects involving an investment of US$ 50 million or more; in these cases, the term may be extended up to 8 years.

(3) Procedure.

The foreign investor must submit an application requesting the approval of the investment to the FIC, whose members are of cabinet level and also includes the Chairman of the Central Bank of Chile. The application shall be accompanied with all the relevant information concerning the project to be funded by the investment and its projected results. The FIC has discretion to approve or reject the application.

Investments exceeding US$ 5 million or relating to sectors or activities normally performed by the Chilean state and those regarding public utility services, communications media and those where the investor is a foreign state or an international agency, will require the approval of the FIC. Other shall be approved by the Executive Secretary of the FIC with the prior approval of its Chairman.

As soon as an investment application has been filed with the FIC, the investor may carry out the investment in Chile. In the event that the application is approved, the corresponding investment shall be governed by D.L. 600 and enjoy the rights granted therein. In the event that the application is rejected, or the investor withdraws it, the investment already made can be, inter alia, repatriated within a term of 90 days.

(4) Capital and dividend repatriations

The investors may repatriate the capital invested in Chile after one year has elapsed since the time the investment was made. Dividends or profits are not subject to any such limitation and may be freely repatriated, after paying the relevant Chilean taxes, irrespective of their amounts.

The foreign exchange regulations applicable to such repatriations may not be less favorable than the ones applied generally to the payment for goods imported into Chile. Additionally, the rate of exchange at which the investor may purchase foreign exchange to make repatriations of capital and profits will be the highest prevailing in the banking exchange market. These features provide a protection to investors against, inter alia, the creation of different exchange markets or artificial exchange rates.

(5) Rights of the foreign investor under D.L. 600.

The basic rights granted by the foreign investment agreement to the investor are the following:

(a) Right to transfer abroad the capital invested, after one year, and the profits derived therefrom, at any time.

Capital repatriations can be made once the relevant Chilean assets purchased with the investment are sold or when the Chilean business is liquidated;

(b) Right that no discrimination will be made by the Chilean Government or its agencies against the investor or the company in which the investment was made.

Should this guarantee not be complied with, the foreign investor could, inter alia, sue the Chilean Government before the Chilean courts;

(c) Right that the capital invested (calculated in its original non-Chilean currency equivalency) will not be taxed when the assets purchased with the investment are sold or the Chilean business is liquidated. Any amount obtained upon such sale or liquidation which exceeds the original capital invested may or may not be taxed, pursuant to the tax rules applicable at that time to capital gains;

(d) Right to freeze all income taxes affecting the investment at a fixed rate of 42% for a period of 10 years from when the foreign investor starts up operations. This right may be waived at any time by the investor in the event that the investor wants to be subject to the general Chilean tax system prevailing at the time the waiver is made;

(e) Right to freeze custom duties and value added taxes affecting the import of the machinery and equipment (with certain limitations) needed to implement the relevant project; and

(f) In cases of investments of US$ 50 million or more, whose purpose is the development of industrial or extractive projects, including mining projects, the investor has the following additional rights:

(i) The right to freeze taxes mentioned in paragraph (d) above may be extended to 20 years;

(ii) Right to freeze all tax provisions, and the resolutions or rulings issued by the Chilean Internal Revenue Service, in force at the time of the execution of the investment agreement with respect to asset depreciation regimes, to loss carried forward and to the treatment of organization and start-up expenses applicable during the implementation of the investment;

(iii) Right to carry accounting records in non-Chilean currency during the life of the investment in Chile; and

(iv) In cases of projects involving the export of goods, (a) the guarantee that no amendments will be made to the legal provisions and regulations in force on the date of the execution of the foreign investment contract with respect to the export of goods and, (b) the right to keep export proceeds in an off-shore account subject to certain arrangements to be agreed upon with Central Bank of Chile to settle expenses required to be made in non-Chilean currency or to repatriate the capital invested or the profits originating therefrom .

B) <u>CHAPTER XIV OF THE COMPENDIUM OF FOREIGN EXCHANGE REGULATIONS OF THE BANCO CENTRAL CHILE</u>

Chapter XIV of the Compendium of Foreign Exchange Regulations of the Central Bank of Chile regulates foreign loans, deposits, investments and capital contributions transferred into Chile from abroad. The new foreign exchange regulations, in force from April 19, 2001, eliminated foreign exchange restrictions, among others, (i) the previous authorization of the Central Bank of Chile ("BCCH") required for the transfer into Chile of funds associated with foreign loans, investments, capital contributions, bonds and ADRs; and for the transfer of capitals abroad and for the return of such capitals, dividends and all benefits related to capital contributions and investments; (ii) the previous authorization of the BCCH to return capital's profits and all other benefits associated with investments of Chilean residents outside Chile; and (iii) the mandatory deposit requirement applicable to foreign capitals transferred into Chile.

Pursuant to the current foreign exchange regulations, all transfer of funds into Chile from abroad as loans, deposits, investments or capital contributions shall be made through the Formal Exchange Market (which is the market made up by Chilean banks and authorized financial institutions) and shall be informed to the BCCH.

(1) Foreign Loans.

(a) Loans may be disbursed in Chile or abroad; in both cases, such loans must be informed to the BCCH.

(b) The terms for repayment of principal and interest may be freely agreed between the creditor and debtor, including the interest rate agreed on by the parties.

(c) In the case of non-compliance of the repayment of principal and/or interest by debtor, the law entitles the guarantor or *aval* to pay and carry out the transfer of the funds. If the guarantee or *aval* was granted in a foreign currency, such guarantee must be informed to the BCCH according to Chapter IX of the Compendium of Foreign Exchange Regulations of the BCCH.

(d) The remittance of principal is not subject to taxes. The remittance of interest is subject to a 35% withholding tax, unless the lender is a bank or a foreign financial institution duly authorized by the BCCH, in which case the payment of interest is subject to a 4% withholding tax.

(2) Capital Contributions, Investments and Deposits.

Chapter XIV of the Compendium of Foreign Exchange Regulations also establishes certain rules applicable to capital contributions, investments and deposits made in Chile from abroad, in foreign currency. Therefore, such regulations do not apply to contributions in kind and are only applicable to those acts that involve payment obligations or the right to transfer foreign currency abroad by individuals or entities with residence or domicile in Chile.

According to the above referred regulations, the capital contributor or the investor does not formally enter into a foreign investment contract with the State of Chile, as in the case of D.L. 600 of 1974, but they have only to inform such acts to the BCCH according to the regulations of Chapter XIV. In addition, payments and transfers from and to Chile, arised from the above referred acts, must be made through the Formal Exchange Market.

Chapter XIV entitles the investors to freely repatriate the capital contributed or invested in Chile and remit the profits obtained from such capital contributions or investments at any time.

(3) Minimum Amount.

Chapter XIV of the Compendium Foreign Exchange Regulations only apply to those transfers from and to abroad under foreign loans, capital contributions, investments and deposits for more than US$ 10,000.

III. CHILEAN TAXATION

A) OVERVIEW

Under to the Constitution of the Republic of Chile, taxes, customs duties and all kinds of public charges must be effected through the enactment of a law passed by Congress.

The initiative to legislate in tax matters rests only with the President of the Republic. Consequently, taxes may not be changed unless the Executive Branch takes action and Congress approves said initiative.

Matters related to fiscal policy are under the authority of the Minister of Finance.

In tax matters, government action is carried out by three different public agencies:

(a) The Internal Revenue Service (IRS), which is in charge of the administration of tax laws and has the power to issue regulations and conduct tax audits;

(b) The Treasury, which is in charge of tax collection; and,

(c) he Customs Agency, which deals with all matters related with custom duties applicable to imports.
If, as a consequence of a tax audit, a claim is filed against a taxpayer, hearings are held before the corresponding regional IRS Director. His decision may be appealed before the corresponding Court of Appeals and, through certain procedures, the case may go up to the Supreme Court.

The main taxes established by Chilean law are the following:

(a) Income Taxes;

(b) Value Added Tax (VAT)

(c) Stamps Tax; and

(d) Real Estate Tax.

B) INCOME TAXES

(1) General Aspects

Under Chilean law, the concept of taxable income is a very broad one and includes all kinds of earnings or profits and, in general, any increase in wealth generated during a fiscal year.

As a general rule, taxpayers domiciled or residing in Chile are subject to taxation on income of any source. Non domiciled and non resident ones are taxed only on income of Chilean source.

(2) Taxes established in the income tax law are the following:

(a) First Category tax: This tax is paid by the business generating the income and aggregates with a tax rate of 15% and is payable on an accrued basis.

The amount of this tax is considered as a credit against taxes, if any, payable by the owners or shareholders of the company following profit distributions.

Monthly provisional payments aggregating 1% of gross income during the first year must be made by the enterprise as an advance against the final tax accrued at the end of the respective fiscal year. After the first year, such provisional payments are calculated according to the ratio between the amount paid for 15% First Category tax and the interim payments.

(b) Second Category tax: This tax is a progressive tax applied on the aggregate amount received by a taxpayer on account of wages, salaries or fees.

The taxation rates start from a level of 3% of the relevant income and may reach as high as 45%.

Second category taxpayers are not subject to any other income taxation, unless they have income from sources other than wages or salaries.

(c) Personal progressive tax: This tax is applied to persons domiciled or residing in Chile on income of any source, including (after the third year of residency in Chile) income originating from outside of Chile and must be anually declared by the taxpayer.

(d) Additional tax: The Additional tax is assessed, as a general rule, on income of Chilean source earned by individuals or entities neither domiciled nor residing in Chile.

This tax is also assessed on certain payments made by Chilean taxpayers abroad, as analysed herein.

The general tax rate is 35 %, although in some cases it might go down to 4%, as explained below.

As mentioned before, the First Category tax paid may be credited against the Additional tax but must also be considered as additional taxable income for the Additional tax.

In some cases the Additional tax must be declared annually by the taxpayer, whilst in others it must be withheld by the person or entity making the payment.

(3) Taxes on enterprises and their owners or shareholders.

Business enterprises of any kind, as already mentioned, are subject to a 15% First Category tax on accrued income.

Thereafter, when profits are distributed to shareholders, partners or owners, and in the case of a branch, when they are withdrawn or remitted abroad, such profits are subject to the Additional tax.

Since the First Category tax may be credited against the personal Progressive tax or the Additional tax, as the case may be, it represents only an anticipation of the final tax burden. In other words, First Category tax affects only the cash flow of the enterprise.

In the case of a foreign-owned enterprise, income withdrawn by its owners or shareholders is subject to 35 % Additional tax.

Pursuant to the above, the overall income tax burden affecting the income of an enterprise owned by a non-Chilean domiciled entity will amount to 15% payable by the enterprise plus 35% payable by the foreign owner, less 15% of distributed amounts, which is accepted as a credit against the 35%. Thus, the effective rate ultimately affecting the Chilean income will aggregate 35%, as shown below:

Profits before taxes	100
First Category tax	(15)
Profit after corporate tax	85
Additional tax (35% on 100)	35
less credit	(15)
Additional tax payable 20	(20)

Profits after taxes	65
Total tax burden (15+20)	35

(4) Investments made under D.L. 600 (Foreign Investment-Statute)

Under article 7 of D.L. 600 foreign investors may freeze the overall income tax rate applicable to the Chilean income at the rate of 42% for a term of 10 years, beginning with the commencement of activities, rather than opting to pay the normal 35% tax burden described above. This term can be extended up to 20 years for manufacturing or extractive projects over US$ 50 million.

Calculation of taxes under DL 600:

Profits before taxes	100
First Category tax	(15)
Profits after corporate tax	85
Additional tax payable (27% on 100)	(27)
Profits after tax	58
Total tax burden (15 +27)	42

Foreign investors may waive at any time their right to be taxed as aforesaid and opt to be taxed under the normal Chilean taxation system. (see section III B(3)).

(5) Depreciation.

Depreciation on fixed assets, except for land, is tax deductible by the straight-line method based on their useful lives in accordance with the guidelines of the Chilean Internal Revenue Service (IRS), calculated on the restated value of the assets . However, the taxpayer may opt for accelerated depreciation for new assets when acquired locally, or for new or used assets when imported, with useful lives of over five years. For this purpose, the assets will be assigned useful lives equivalent to one-third of the normal, eliminating fractions of months. Taxpayers may discontinue the use of the accelerated method at any time but may not return again to the accelerated method.

The IRS has issued general guidelines on the useful lives of fixed assets for different activities, such as industry, mining or fishing. However, the Regional Tax Director may, at the request of the taxpayer or of the Foreign Investment Committee, modify the applicable depreciation if deemed advisable.

No allowance is made for amortization of intangible assets, such as goodwill, patents, trademarks, etc. Depletion is not tax deductible.

(6) Branch of foreign corporation

Branches of foreign entities are taxed only on Chilean source income. The Income Tax Law empowers the IRS to assess the taxable income of a branch should the accounting records not be adequate for assessing it. In such a case, the IRS may assess taxable income on the basis of gross receipts, assets, capital invested, sales, or percentage of exports and imports.

(7) No income tax on importations.

The 35% Additional tax levied on certain payments to persons or entities not domiciled in Chile is not applicable to imports, provided the import prices are reasonable in terms of market values. Amounts paid in excess of reasonable prices are taxable. Nevertheless, since imports must be approved by the Central Bank, in practice prices approved by the bank are considered reasonable by the IRS.

(8) Interest payments.

Generally, interest paid by a limited liability company to its partners or by a branch to its head office is not tax deductible. This limitation is not applicable to interest paid by a corporation to its shareholders.

Interest on loans obtained abroad is normally subject to a 35% Additional withholding tax; nevertheless, interest paid to non-Chilean banks is taxed at a 4% rate under certain conditions.

(9) Royalties, patents and technical assistance.

In general, the payment to entities not domiciled in Chile of royalties, patents and fees for technical assistance is subject to a 30% Additional tax to be withheld by payor. In the case of technical assistance or engineering services, the rate is 20%.

All these payments are normally deductible as expenses for tax purposes.

(10) Related party transactions.

In the case of transactions between related parties, the tax deductibility of certain charges may be objected to by the IRS. Such is the case of the transfer of assets at prices below cost, waiving of debt, excessively high interest rates and other similar transactions.

(11) <u>Income Taxes on Payments made to Individuals or Entities not domiciled in Chile</u>.

In accordance with the general rules indicated below, payments made to a non domiciled individual or entity are subject to additional tax to be withheld by payor.

This tax is levied at a 35% rate on the following payments made to individuals or entities not domiciled in Chile:

- Fees for the use of trademarks, patents, formulae, and other similar services.

- Interest on loans, except (under certain conditions) when paid to international foreign banks or financial institutions in which case the rate is 4%.

- Fees for services rendered abroad, with the exception of payments for freight, shipping and clearance expenses, weighing, sampling and analysis of products, insurance payments (other than those mentioned below), international telecommunications, smelting, refining and processing of Chilean products.

The rate is lower in the following cases:

- Payments made to insurance companies not established in Chile for insuring equipment or other goods located in Chile and for life or medical insurance of individuals who are resident or domiciled in Chile, 22%. In these cases, reinsurance is taxed at a 2% rate.

- Payments for engineering services or technical assistance, 20%.

- Remunerations paid to individuals or entities not domiciled in Chile for maritime transportations to and from Chilean ports and commissions thereon, as well as remunerations originating from services to vessels and freight in Chilean or foreign ports, 5%. This tax is not applied, on the basis of reciprocity when, in the country where the vessel is registered or in the country of the operator a similar charge does not exist or is not applied to Chilean vessels.

- Payments for the rental, lease, charter or any other contract which provides the use of foreign vessels for coastal trade, 20%. The same is applied when the corresponding contract allows or does not prohibit coastal trade.

- Payments for the rental of imported capital goods elegible for the system of deferral of custom duties, 2%.

C) VALUE ADDED TAX.

(1) Tax Rate and Transactions Subject to VAT.

The tax rate is 18% assessed on the price of the transaction. When the price is manifestly below the normal level, the IRS is empowered to assess it.

In general terms, the following transactions are subject to VAT:

- Sales and other contracts whereby the title to movable goods is transferred, provided that they are executed on a recurrent basis;
- Services corresponding to commercial, industrial, financial, mining, construction, insurance, advertising, data processing and other business activities;
- Rental of movable goods, as well as the rental of real estate furnished or equipped to carry out industrial or commercial activities;
- Leasing of said goods
- Insurance premiums, with some exceptions; and,
- In certain cases, construction activities (analyzed later in more detail).

(2) Tax Liability.

As a general rule, the seller of goods or services is responsible for the payment of the tax. The amount of the VAT, however, is added to the price of the goods or services. As a consequence, it is actually the buyer who bears the economic impact of the tax.

Exceptionally, when the seller is not domiciled in Chile or for other reasons is difficult to control by the IRS, the buyer has to withhold and pay VAT.

The tax is payable monthly, except for special situations such as importations.

(3) Credit and Debit System.

VAT charged by a company on sales or services is called "VAT debit". VAT borne by a company on purchases of goods or services is called "VAT credit". The tax borne on the acquisition of related physical assets, including buildings and constructions, may also be credited.

VAT credits are deducted from VAT debits and the difference has to be paid to the Chilean Treasury.

If in a given month credits exceed debits, the difference may be carried forward and added to the credits of the following month.

VAT credits incurred in the purchase of fixed assets that remain outstanding for more than six months will be refunded in cash by the Treasury.

(4) Exemptions.

There are not many exemptions in the Chilean VAT law. The main ones are the following:

(a) Exports;

(b) nterest on loans and other financial operations. In the case of deferred payment of a sales price, interest charged is subject to VAT;

(c) International freight, both by air and sea; and

(d) Personal services.

(5) Construction.

New houses, buildings and constructions of any kind sold by construction companies are charged with VAT.

Provisions have been established in the law allowing the deduction of the cost of the land from the taxable basis. Revenues originating from construction contracts are also subject to VAT.

(6) Exports.

As indicated previously, exports are exempt from VAT. However, exporters may recover VAT charged on purchases or services necessary for their exporting activities as a credit against the debit originated in their local sales. Additionally, they may recover the said credit in cash as a refund.

D) STAMP TAX.

Bills of exchange, promissory notes, letters of credit and, in general, any kind of documentation referring to a loan or a credit transaction for money borrowed are subject to stamp tax.

The rate is 0,1% on the face value of the document for each month, with a maximum of 1.2%. Should the document be payable at sight, the rate is 0.5%.

E) REAL ESTATE TAXES.

Real estate is annually taxed at a rate of 2%. The tax is assessed on the fiscal valuation of the property.

In the case of business entities, this tax may be credited against the First Category tax.

IV. LABOR AND SOCIAL SECURITY SYSTEM

A) THE LABOR CONTRACTS

Our legislation recognizes three types of labor contracts: individual labor contract, collective labor contracts and agreements, and special contracts.

(1) The Individual Labor Contract

This is the contract agreed upon in writing between an employer and an employee by which they are bound, the latter to render personal services under the dependence and subordination (*"vínculo de subordinación y dependencia"*) of the former and the former to pay a compensation for those services.

Article 10 of the Labor Code states the minimum provisions that must be included in the individual labor contract, namely the date of the contract, the specification of the parties, the position of the employee and description of the work to be rendered, the place of work, the remuneration to be paid by the employer, the terms of payment of the compensation (which term cannot exceed monthly periods), the daily and weekly work shift, the duration of the employment and the benefits in cash or in kind to be provided by the employer.

(2) The Collective Labor Agreements

Our Law recognizes two different collective labor agreements namely the *Contrato Colectivo* and the *Convenio Colectivo.*

(2.1) *Contrato Colectivo* (Collective Labor Contract): The Labor Code defines this contract as that which is agreed upon by one or more employers with one or more unions or with employees not organized through unions but who come together to negotiate collectively for the purpose of establishing common working conditions and remunerations for a fixed period of time. The collective contract must be agreed upon in writing and cannot have a term of less than two years. Also the law stipulates the minimum clauses to be included in the these contracts.

The provisions agreed upon in collective agreements are the result of a collective bargaining process, whose operation is regulated in the Labor

Code regarding Union and Collective Bargaining.

(2.2) *Convenio Colectivo* (Collective Labor Agreement): In addition to the collective contracts, the law allows the employer and the employees (either with a union or with a group of employees) to enter into collective labor agreement. These agreements also establish common working conditions and remunerations for a fixed period of time

The only difference between the *Contrato Colectivo* and the *Convenio Colectivo* is that the latter, unlike the former, does not require a process of regulated collective bargaining, and is thus neither subject to regulated procedures nor accorded privileges granted by formal collective bargaining. Therefore the *Convenio Colectivo* is an agreement that may be agreed upon at any moment since it depends solely on the discretion and will of the parties.

Once they are duly executed, both agreements have the same effects and bind both parties.

(3) <u>Special Contracts</u>

The law considers the existence of special work contracts and each of these contracts has its own characteristics and specifications, e.g. the apprenticeship contract which is restricted to individuals under 21 years of age; farm workers contracts; contracts for workers on ships or at sea and temporary dock workers and contracts for domestic help.

(4) <u>The Duration of the Labor Contract</u>

The parties may agree on an indefinite period of time or limit the duration of the contract to the completion of a particular job to be performed by the employee or agree on a fixed period of time. In this last case the duration of the contract cannot be agreed for periods exceeding one year, or two years in the case of managers, proffessionals and technic employees. At the expiry of the original fixed period or upon expiry of the extended period, the contract terminates ipso facto but if the employee continues rendering services for the same employer, by virtue of law the term of the contract becomes indefinite.

(5) <u>The Worker's Age</u>

For purposes of labor and social security legislation, work may begin at age 18 and retirement at age 65 for men and age 60 for women. Nevertheless, the Social Security System contain provisions which allow early retirement in certain cases.

(6) The Worker's Nationality

The law states that at least 85% of the employees working for an employer who employs more than 25 workers must be of Chilean nationality. For determining this ratio the law excludes the technicians who cannot be replaced by Chilean nationals.

(7) Work Shift

The normal working week is limited to a maximum of 48 hours, which may be divided up into a maximum of 8 hours daily from Monday through Saturday or up to 9 hours and 36 minutes daily from Monday through Friday. The maximum weekly working hours cannot be distributed in more than 6 days nor less than 5 days. If overtime is needed the ordinary daily working limit may go up to 10 hours.

If the employer's business requires continuos labor, a special shift system may be established with the approval of the labor authorities. Further, normal working periods may be extended by mutual written agreement by a maximum of two hours each day in addition to the 8 or 9.36 hours indicated above, provided that such an extension is exceptional and not detrimental to the health of the employee. Overtime which is defined as the time worked by the employee in excess of the agreed work shift must be paid at 50% above the agreed hourly rate.
Working hour limits do not apply to personnel entrusted with certain supervisory, administrative or confidential matters or to employees such as overseers or to employees whose activities are of a non continuous nature or require only their presence. However, these persons may not remain in the working place for more than 12 hours daily without a break of at least one hour. There is no time limit in the work shift established for managers or administrators, or for any employees who work without immediate senior supervision or outside of the working premises, factory, etc.

There is also an exception regarding stores or commercial establishments e.g. department stores, which may extend the duration of the working hours by two additional hours in the days immediately prior to Christmas or National Holidays. In these cases the hours in excess of the maximum of 48 hours shall be paid as overtime.

(8) Part Time Jobs

According to Chilean law, part time jobs are allowed and subject to the same provisions as those for regular jobs. In the case of workers rendering services upon a part time basis the employer must pay at least the corresponding part of the minimum wage.

(9) Daily and Weekly Rest and Yearly Vacations

(9.1) Daily Rest Period

The daily work shift is divided into two periods and between each period there should be at least a half hour break for lunch and this break is not counted for the purposes of determining the daily work shift. Also the law indicates that work that entails a continuous process of manufacturing or service is free from this rest period and the law further indicates some cases in which the rest period is greater i.e restaurant, hotels and club employees.

(9.2) Weekly Rest Period

The weekly work shift is six days. Sundays and days declared as holidays by law are for rest. However, the parties may agree to shorten the working week to five days making Saturday also a day of rest.

The law indicates that some companies are exempted from this rest period but the employer must compensate the employee with a day off in exchange for Sundays or national holidays. However at least one Sunday every month must be granted as a free day to the employees.

(9.3) Vacations

Employees who have worked for more than one year have the right to an annual paid vacation of 15 working days. After working ten years continuously or not for the same or different employers, vacations are extended by one working day for every three years of service.

Female employees are entitled to six weeks leave before and twelve weeks after the birth of a child, on full pay; this payment is made by and for the account of the Social Security system and not by the employer. In addition, women cannot be dismissed for a period of one year counted from the end of the maternity leave.

Establishments with more than 20 female workers must provide a nursery school for children under 2 years old. Employers may contribute to an external nursery school to provide such service. While the women are nourishing their babies they shall be granted one hour a day for this purpose.

(10) Remunerations

The law considers as remunerations the monetary payments and the benefits in kind valuable in money that the worker receives from the employer on account of the work contract.

The remuneration includes the salary, overtime payment, commissions, profit sharing and bonuses. The law further indicates that certain payments or allowances do not constitute remuneration, such as lunch, family allowance for each dependent of the employee, transportation allowance provided by virtue of law, etc.

As indicated before, the remuneration consisting in salary must be paid in the agreed fixed periods which in the case of workers usually consists in weekly payments and in the case of employees monthly payments. In the case of variable remunerations, it is usual that such commissions or variable remunerating are usually paid monthly, bimonthly or quarterly. Other payments which depend on the quarterly or yearly results of the company, i.e. bonuses and profit sharing are paid at the end of the quarter or business year respectively.

The amount of the compensation can be freely agreed between the employer and the employee. However, the law fixes a minimum level which in the case of the monthly remuneration cannot be lower than one legal monthly minimum wage (US$ 166 approximately).

(10.1) Profit Sharing

Under the provisions of the Chilean Labor Code, if a company earns profits it must share part of that profit with its personnel. The law stipulates that companies must distribute 30% of profit to the employees, calculated prorrata on the employee's salary and the number of years worked for the company. The basis used to determine profits is the corporate taxable income (subject to certain adjustments) less 10% of net equity. However and in lieu of the above liability, the employer may pay a bonus of 25% of the yearly salary, but the bonus in this case, regardless of the level of salary of the employee, cannot exceed a maximum of the 4.75 monthly minimum wages (at present app. US$ 790).

The company and the employees may agree on a profit-sharing system different from those described above, provided the payment to the employee is not lower than one of the two alternatives above mentioned.

(10.2) Remunerations in Foreign Currency

Law 18.156 and Chapter XVII of the Compendium of Foreign Exchange Regulations of the Chilean Central Bank, allows payments of remunerations in foreign currency to foreigners subject to the following conditions:

(a) The employee must declare his decision to maintain his subscription to a foreign social security system; and

(b) Prior approval from the Central Bank must be obtained.

(10.3) Additional Benefits

Employers have no legal obligation to provide fringe benefits, other than benefits which may be voluntarily agreed upon in individual or collective contracts or agreements. Pension and sickness benefits are covered by the Social Security system described later in this report. There is no legal obligation to provide canteen facilities and meals.

(11) Health and Safety

(a) Chile provides for a public and private medical system for employees including preventive and curative health aid. The preventive medical service provides for periodic health examinations. When employees are found to suffer a specific illness, they are granted sick leave. During periods of sick leave the employer cannot terminate the work contract because of illness of the employee, but the medical system pays the salary as from the fourth day of illness.

The Labor Accident and Occupational Disease Fund provides for medical and dental attention, hospitalization and medicine as well as indemnities (depending on the type of disabilities suffered) and related expenses.

Indemnities are granted in the form of a pension to the injured employee or to his spouse and dependent children in the case of death of the employee. The Labor Accident and Occupational Disease Fund is funded through a base contribution of 0,9% of the worker's salary plus an additional payment which must be borne by the employer exclusively depending on the activity and level of risk of the company.

(b) The Labor Accident and Occupational Disease Fund Law established under Law Nº 16.744 states the obligation for companies or establishments with more than 25 employees to create a permanent committee *(Comité Paritario)*, formed by representatives of the employers and employees. This committee is responsible for the adoption of all the measures needed to avoid labor accidents and for recommending the proper use of the safety implements existing within the company. The employees' representative in this committee cannot be dismissed while he is a member of it without prior authorization of the labor Courts.

(12) Termination of the Work Contract

The Labor Code establishes provisions regarding the termination of the work contract and employment stability. Under this statute the work contract may only be terminated by agreement of both employer and employee, by the employee's resignation, by the death of the employee, by the expiry of the fixed term agreed upon in the contract, by the conclusion of the work for which the employee was contracted, by an act of God or circumstances beyond the control of the parties (force majeure) and by dismissal by the employer.

If the employer dismisses the employee on the general ground of the needs of the company, such as rationalization of the company, the lack of skills of the employee, etc., a severance compensation is awarded to the employee, amounting to one month's salary for each year or fraction of year over six months spent in the service of the same employer, with an upper ceiling of 330 days' worth of compensation. However, for the purposes of calculating this severance compensation, the law stipulates that the monthly salary in question cannot exceed a maximum of 90 "*Unidades de Fomento*" (approximately of US$ 2700.-), which may be waived by the parties. If the employer fails to prove the actual need of the company to dismiss the employee, the company must pay the employee an additional 20% on the above-calculated severance compensation.

Nevertheless, if the employee is dismissed with due cause, i.e. serious breach of contract by the employee, grave misbehavior, etc., no right to severance compensation arises for the employee. However, the employee may contest the dismissal in the Courts and if the Courts rule in favor of the employee, the company must pay the severance indicated above plus a penalty of up to 50%.

(13) Independent Contractor's Workers

In Chile it is common that large companies subcontract independent contractors to perform specific tasks or render special services such as cleaning services, canteen, etc.

According to Chilean law, the principal is responsible to the workers of the independent contractor in case of breach of legal or contractual obligations of the latter. This responsibility is extended to labor and social security obligations, therefore during the life of these contracts it is important to permanently survey the compliance by the independent contractors of their obligations with their employees.

B) UNIONS

Unions are regulated by the Labor Code. The purpose of a union as stated in the law is to represent the worker in the exercise of the rights arising from labor contract, to integrate employer and workers, to check compliance with social security and labor legislation, to help their associates, to promote education and improvement of safety in the work place and provide non profit services for the members. Employees are free to become members of the union or stay out of these organizations. Employees may be a member of only one union.

The law authorizes the existence of more than one union in each company.

C) SOCIAL SECURITY

(1) Overview

In 1980 the Government introduced a major change in the Chilean Social Security system, from Government administrated pension and medical funds, to contributions made to funds administrated by private entities subject to overall Government control. This new system is regulated under Decree Law Nº 3500 of 1981.

Under this statute, old age pensions are financed exclusively by the employees (no company contribution) through contributions which are accumulated in individual accounts at entities known as *Administradoras de Fondos de Pensiones AFP*. For these purposes, workers must contribute 10% of their monthly remuneration up to a maximum remuneration of 60 *Unidades de Fomento* (currently app. US$ 1800). The remuneration in excess of 60 *Unidades de Fomento* is not subject to the 10% contribution. The *Unidad de Fomento* is a monetary unit created by law back in 1975 which is adjusted daily in accordance with the variation of the CPI and which is used for tax, labor and other cases in which adjustments for inflation are provided by law or by agreement of the parties e.g. medium and long term financing, lease agreements, etc.

In addition, workers must contribute 7% of their remuneration also up to 60 UF for medical care and 3,3% for death or disability coverage. Employers do not make contribution to any of these funds but they must contribute a percentage ranging between 0.9% to 3.4% for labor accidents.

(2) Coverage

The Social Security system covers all workers, including independent workers. In the case of employees affiliation to the system is mandatory; in the case of independent workers affiliation is voluntary.
In the case of foreign employees, as a general rule these employees must also pay social security contributions as indicated above. However Law Nº 18156 grants exemption from social security contributions to foreign personnel and the company that contracts them provided the following conditions are complied with:

1. The expatriate subscribes to a social security system outside Chile covering at least illness, pension, disability and death.

2. The employee expressly declares in his work contract that he will remain a subscriber to the foreign social security system.

This exemption includes the contribution of the employee to the pension and medical fund but does not include the employer contributions to the labor accident fund discussed above.

D) TAXES

(1) National Employees

The remunerations of employees, including foreign employees, are subject to a monthly Second Category Income tax under a progressive tax scale to be deducted at source by the employer and the tax is payable by the company to Treasury within the first 12 days of the month following that of the deduction.

As from 1996 the tax brackets will range from 5% to a tax rate of 45%.

If the employee only earns income arising from his employment contract this tax is deducted by the employer as discussed above and the employee is not required to file monthly or yearly tax returns. On the other hand if the employee earns other Chilean or foreign source income asides from his employment income, e.g. rentals or portfolio income, the employee must nonetheless file a yearly tax return despite the deduction of the Second Category tax by the employer

(2) Foreign Employees

In the case of foreigners domiciled or resident in Chile and working as employees in Chile they are subject also to the Second Category tax as explained above. Foreigners neither domiciled nor resident in Chile working as employees or consultants in Chile are subject to a flat 20% Additional Income tax to be deducted by the company that employs them in Chile upon payment of the salary or fee and the tax is payable to Treasury within the first 12 days of the month following the month the tax was deducted.

The tax law does not contain a definition of domicile and in the absence of such definition the general provisions of the Civil Code apply. Under these provisions domicile is acquired whenever sufficient evidence exists that the foreigner is coming to live in Chile for a reasonable period of time, i.e. if he engages in a work contract for one year or more, if he assumes an executive position in the company, if he brings family with him, etc.

In the case of residence the Tax Code does provide for a definition indicating that residence is acquired when the foreigner stays in Chile for more than six continuous months in one year or more than six months continuous or not in two consecutive tax years.

In the case of foreigners, during their first three years of residence in Chile they must pay taxes as indicated above only on their Chilean source income and this three year term may be extended by the tax authorities. After the three year term or its extension has elapsed, the foreigner must pay taxes on his worldwide income.

V. ENVIRONMENTAL REGULATIONS

During the last years the Chilean environmental law has seen a great improvement in its importance, consistency and standards. From the judicial enforcement of the constitutional right to live in an environment free of pollution to the enactment of the Environmental Framework Law Nº19.300 (EFL), the environmental regulations have begun to form a legal body which must be kept in mind when considering any new investment project with environmental consequences.

The EFL is considered a key development from an environmental regime characterized by the lack of coordination, insufficient regulation and overlap of jurisdiction, to a new regime which intends to overcome said situation creating a consistent and well organized system of environmental regulations.

In addition to the above general purpose the EFL also has two main specific objectives. The first one was to create a national agency called *Comision Nacional del Medio Ambiente* (Conama)in charge of the implementation and enforcement of the environmental regulations, as well as regional agencies called *Comisiones Regionales de Medio Ambiente* (Coremas) which act under the authority of Conama.

The second objective was to establish methods for the efficient management of the environmental problems. Among these methods, the most important are: a mandatory system of environmental impact assessment, plans of management of natural resources, prevention plans and plans of decontamination.

The purpose of the environmental impact assessment is to submit to the evaluation system all projects that could eventually affect the environment. The law listed all the categories of projects that will be subject to the process, distinguishing between those which would cause a significant impact and those which would not. The former will be subject to a procedure called Environmental Impact Study (EIS) and the latter will be subject to a procedure called Environmental Impact Declaration (EID). Obviously the requirements and conditions applicable to the EIS are higher and more strict than those for the EID.

Finally, it should be noted that the EFL was drafted based on the following principles: "prevention" of pollution, polluter pays, environmental liability, citizen participation and efficiency.

VI. INTELLECTUAL PROPERTY

A) TRADEMARKS

A trademark registration in Chile has a duration of 10 years. The term required to obtain a trademark registration is about 1 year if no oppositions have been filed and around 2 years in case of having entered any.

After the application is filed, the Examiner of the Chilean Trademark Department conducts a search to determine the existence of identical trademarks and can reject an application if an identical or very similar trademark is found. This process usually takes about two weeks. However, if no conflicting trademarks are found the Examiner will allow the trademark for publication in the Chilean Official Gazette.

Please note that in our country there are no official searches. Additionally, there is no trade names registrations in Chile, but for its registration as trademarks in the national class for commercial or industrial establishments or as company names in the Registry of Commerce.

According to our current Trademark Regulations the agent must file a trademark application together with a Power of Attorney, duly executed before a Notary Public and legalized by the competent Chilean Consul in the country of its execution. One Power of Attorney form is sufficient to file any number of applications in the name of the same owner.

The aforementioned Power of Attorney may enable the trademark agent to represent the applicant on the filing and/or renewal of his trademarks, as well as to act on his behalf to defend his marks by lodging oppositions against other similar applied for trademarks by third parties.

B) PATENTS & DESIGNS

In order to file a patent application in Chile, the applicant must submit the complete text of the patent application in Spanish.

With regard to design applications, the applicant needs to file a complete set of drawings including side, front, plan, rear and underside views, showing the shape and configuration of the article in order to prepare the description.

At the time of filing the agent also need a Power of Attorney along the lines explained before for filing trademarks.

Within three months the agent needs to file, if necessary, a certificate of the priority document and an assignment document, if the applicant were not to be the inventor himself.

As far as the procedure is concerned, patent applications undergo a preliminary examination, of a formal nature, which takes about twelve months. After this period has elapsed and provided there are no observations resulting from such examination, an abstract of the application is published in the Official Gazette. As of that time, the whole application and all documents pertaining to it, are open for public inspection and a 60 working-days period starts for possible oppositions by third parties.

Regardless whether oppositions are filed or not, an examiner is appointed to conduct a substantial examination of the application.

The whole procedure for obtaining a patent lasts roughly 2 years. However, if the matter is complex and subject to oppositions by third parties, this term may be a year longer.

VII. VISAS FOR FOREIGNERS

Chilean law provides for three kinds of visas for foreigners who wish to work in Chile, as follows:

A) TOURIST VISA

Tourist visa is granted at Customs upon entrance to Chile and for a maximum period of time of 90 days. The authority however is empowered under exceptional circumstances to limit the stay of the visitor to shorter periods. The Tourist visa may be extended in Chile only once, for a maximum period of 90 days counted as of the expiry of the first period. For the purposes of obtaining a Tourist visa one must be a passport holder.

The Tourist visa is granted to all foreigners coming to Chile, in the absence of a special visa, i.e. work or immigrants visa, and is also extended to foreigners who enter the country for businesses purposes.

Eventhough as a general rule tourists cannot engage in paid activities in Chile, in certain special cases duly considered by the Foreigners Department of the Ministry of Interior, the authority may grant special Work Permits to a tourist to carry out remunerated services in Chile for periods not longer than 30 days. This Work Permit may be extended for additional periods of 30 days until the expiry of the original or extended period of the Tourist visa.

B) VISA SUBJECT TO A WORK CONTRACT (*WORK VISA*)

This visa is granted to foreigners who are living in Chile so as to comply with a work contract. This visa is also extended to cover the spouse, parents and children living with the foreign employee in Chile. These beneficiaries however are not allowed to engage in business activities in the country unless they obtain their own visa. The Work Visa is granted subject to the following requirements:

(a) The employer must have legal domicile in Chile;

(b) The work contract must be signed in Chile before a Public Notary or outside Chile before a Chilean Consul;

(c) In the case of professionals or technicians they must demonstrate they hold the corresponding professional agree through duly certified documents;

(d) The profession, activity or work to be carried out by the employee is necessary for the country;

(e) The activities that the employee will carry out in Chile are not considered to be dangerous for national security;

(f) The work contract must contain special provisions on the obligation of the employer to withhold and pay the income tax affecting the salary of the employee and the obligation of the employer to pay the travel expenses of the employee and his family to return to his country of origin or to any other country that may be agreed upon termination of the work contract; and

(g) The foreigner can only engage in the activities agreed upon in the work contract and cannot accept other remunerated positions without prior approval of the authorities.

The visa is granted for up to two years and may be extended for two additional years at the end of which the employee may apply for a visa for permanent residence in Chile. This visa expires upon termination of the work contract.

C) TEMPORARY RESIDENCE VISA

This visa is granted, amongst others, to professionals, technicians and experts who do not come to Chile under a work contract with a company or branch office in Chile, but as independent consultants and whose services in Chile are considered useful or convenient for the country. This visa also covers the spouse, parents and children and again these beneficiaries are not allowed to carry out business activities in Chile unless they obtain their own visas.

To obtain this visa, it is necessary to file documents proving the applicant's professional degree as well as other documents that may be requested by the authority. This visa is granted for up to one year and may be extended once for up to one year, after which the foreigner may apply for a visa of permanent residence.

VIII. SOME HOT ECONOMIC AREAS

A) OVERVIEW OF THE MINING LEGAL FRAMEWORK.

(1) The legal framework

Chilean law stimulates the development of mining activities and guarantees the ownership rights of both local and foreign investors.

The Constitution provides that the State has absolute, exclusive, inalienable and imprescriptible ownership of all mines and mineral substances, with the exception of surface clays, notwithstanding the ownership by individuals or corporations of the lands in which they may be located. The Constitution also provides that every person has the right to explore and excavate to look for mining substances, and also to set up mining concessions for the exploration or exploitation. Such concessions must be established by judicial resolution. The ownership right over the concession is protected by the constitutional guaranty of private property.

For those minerals that are excluded from mining concessions, like liquid and gaseous hydrocarbons, lithium, ores located offshore or in areas deemed important because of national security concerns, the Constitution provides that exploration and exploitation can be carried out directly by the State, by administrative concessions, or by operating contracts.

The Mining Constitutional Organic Law establishes the legal framework for the exploration and exploitation of mining concessions. The concessions are deemed as an ownership right over land, granted by the Courts, and they can be encumbered, mortgaged and transferred. A concession owner has full ownership rights over the concession and the mining substances present within the bounds of the concession and is entitled to a legal right of way for exploration and exploitation purposes. The concession holder also has the right to defend his ownership against the State and third parties. The concession itself is maintained valid by the payment of an annual license fee.

The Mining Code provides systematic rules concerning the prospecting, claiming, developing and operation of mines. It deals with the procedures in Courts for the establishment of mining concessions, the rights and obligations of the mining concessionaire, the protection and termination of the mining concession, as well as the specific regulations about the mining contracts and quasi contracts which we discuss later in this report.

(2) The characteristics of a mining concession.

Mining concessions have the following common features:

(a) They are real rights. Such real rights are absolute because they may be enforced against anyone (including the State) and because the powers that they grant are exclusive for the benefit of the owner. They may have a broad scope including all claimable mineral substances present within the bounds of the concession.

(b) They are rights over property, independent from property rights over the land or any other right over surface tenements, even if they are owned by the same person.

(c) They are governed by the same civil laws as all other property, except to the exent that such laws may be in contradiction with the provisions of mining laws.

(d) They are divisible and as a general rule, not attachable. The exception to the non attachable feature has been contemplated in favor of mortgage creditors, or if the owner accepts in the judicial proceedings the attachment of the concession.

Also, if the owner is incorporated as a stock company (sociedad anónima) the concession is attachable by third parties.

(e) In general, they may be applied for and acquired in any capacity by any individual or juridical person, whether Chilean or foreign. They are transferable, transmissible, and may be subject to mortgage and other encumbrances or real rights. In general any agreements or contracts may deal with concessions, provided that they do not conflict with the legal nature of the mining concession.

(f) They are granted by resolution of the ordinary courts of justice under a judicial non litigious procedure. The application can be contested by a public authority or private person.

(g) They are conditional because they may be lost to the benefit of a third party if said party has preemtive mining rights over the same area, or they may terminate in the event of failure to pay the license fee required for their protection.

(h) The property right of the holder over the mining concession is protected by the constitutional guaranty of property rights.

The territory of a mining concession has the outer shape of a solid body whose upper surface on a horizontal plane is a rectangle, of indefinite depth within the vertical planes bounding it. The rectangle is identified by UTM coordinates (Mercator Universal Transversal plane coordinates).

(3) Additional provisions

The mining law contains many other provisions related with mining concessions and the exercise of the concessionaires rights. Some of them are:

(a) Surface tenements or property rights. They are independent and different from mining concessions. They may be subject to various easements (rights of way, occupation, water supply, power supply, etc) if required to carry out a proper and convenient exploration or exploitation of the mining concession. The same easements may be imposed for the benefit of processing plants. The encumbrances and easements may be established by an agreement or, in the absence thereof, by a court resolution which will include compensation for damages caused to the land or tenement owner.

(b) Special legal mining partnerships, to prevent the establishment of communities over mining concessions. Various forms of agreements for mining operations, including joint venture agreements, contractual mining partnerships, mortgage, and various agreements; i.e. bilateral promise to sell, unilateral promise to sell, and purchase options.

B) THE CHILEAN ELECTRICITY INDUSTRY AND THE SIC

(1) Introduction

The electricity industry in Chile is divided into three sectors: generation, transmission and distribution. The generation sector consists of companies that generate electricity with hydroelectric and thermoelectric plants and that sell their production to distribution companies at tariffs which are regulated by the Chilean Electricity Law, to other regulated customers, to unregulated customers and to other generation companies. Sales to non-regulated customers are made at prices which are freely negotiated with them and sales among generators are at prices equal to dispatch marginal cost of the last generation unit dispatched.

The transmission sector consists of companies that transmit at high voltage the electricity produced by generation companies. The third sector consists of distribution companies that purchase electricity from generation companies for sale to the public.

The largest generation companies in Chile, sell electricity through interconnected electricity systems. The two major interconnected systems are the Sistema Interconectado Central ("SIC") and the Sistema Interconectado del Norte Grande ("SING"). In addition, there are several other systems, including systems in the Aysen and Magallanes regions of southern Chile, that provide electricity in remote areas outside of the interconnected electricity systems. The SIC, with 4,072 NW of installed capacity, consists of 10,062 kilometers of transmission lines extending, north to south, 1,870 kilometers over Chile's central region. The SING consists of approximately 1,700 km of transmission lines extending over some 700 kilometers through northern Chile, with 1,119 MW of installed capacity.

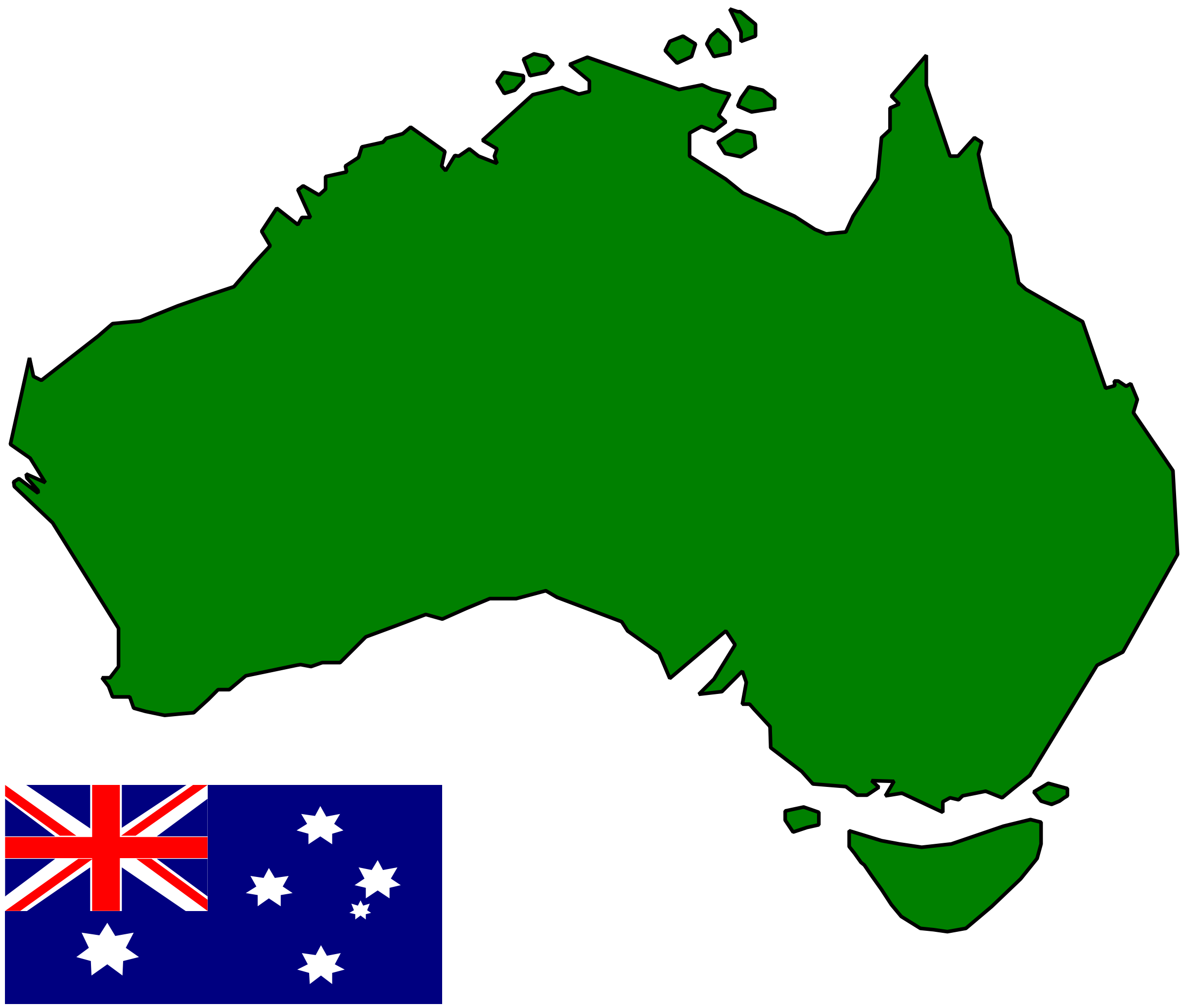
(2) Chilean Electricity Law

The generation, transmission and distribution of electricity in Chile is governed by the Chilean Electricity Law of 1982 ("D.F.L. Nº 1"). Three government entities have primary responsibility for the implementation and enforcement of the Chilean Electricity Law. The Comisión Nacional de Energía ("CNE" or "National Energy Commission") has authority to set tariffs, node prices and to produce an indicative plan for the construction of new capacity. The Superintendency of Electricity and Fuels ("SEF") sets and enforces the technical standards of the system. In addition, the Ministry of Economy grants final approval of tariffs and node prices set by the CNE and grants concessions to electricity generation, transmission and distribution companies.

Pursuant to D.F.L. Nº 1, companies engaged in the generation of electricity in Chile must co-ordinate their production to minimize the operating costs of the electric system. To achieve minimum operating costs, the dispatch of electricity production within an interconnected system is effected by operating costs, the dispatch of electricity production within an interconnected system is effected by the Centro Despacho Económico de Carga ("CDEC"). The CDEC dispatches generators without regard to contractual arrangements between generation companies and their customers. CDEC achieves the lowest marginal cost of the electric system by dispatching generation facilities in order of ascending marginal cost. Generation companies meet their contractual sales requirements with dispatched electricity, whether produced by them or purchased from other generation companies.

The CDEC also verifies every year in advance that every generation company has sufficient installed capacity and can produce enough electricity to meet the demand of its customers. Once a year, CDEC estimates aggregate peak demand in the interconnected system and calculates the firm capacity of each generating plant based on the capacity that each generator can guarantee at peak demand with a certain probability. This probability is set at a level such that the total sum of firm capacity of generating plants within the system equals the estimated aggregate peak demand in the interconnected system. If the firm capacity of any generation company exceeds its contractual sales requirements, such company will be reimbursed for its excess firm capacity by generation companies with contractual sales requirements in excess of their firm capacity. The reimbursement is made at marginal prices which equal the node price for capacity then in effect. The CDEC also calculates the firm energy for each generating company based on the energy that can be generated in a dry year, in the case of hydroelectric plants, or based on the average availability of thermoelectric units, in the case of thermoelectric plants and verifies that they each exceed their contracted energy demand. Any deficit in firm energy must be contracted in advance with other generation companies with surplus firm energy at prices negotiated between themselves.

Australia



AUSTRALIA

(Updated 25 August 2000)

OVERVIEW

This summary is designed to provide basic information about the visa and work permit application process in Australia. Please remember that, as with any nation, Australia's immigration laws may change without notice. The information in this report is of a general nature and does not constitute legal advice. For current and detailed information regarding the state of the Australia's immigration laws, as well as information pertaining to your specific needs, please contact your nearest Fragomen, Del Rey, Bernsen & Loewy office.

The Australian Immigration System is administered by the provisions and regulations of the Migration Act of 1958 (as amended) and the Australian Citizenship Act of 1948 (as amended). There are approximately 100 categories of visa and entry permits set out in the legislation.

The Australian government requires all foreign nationals entering the country to have the appropriate visa, except for nationals of New Zealand and some individuals in the armed forces. Visas may be obtained from the Australian Consulate office with jurisdiction over the individual's place of residence.

Electronic Travel Authority:

The Australian government has recently introduced a streamlined system, the Electronic Travel Authority ("ETA"), for citizens of the countries listed below. This process requires no application form and no requirement to send your passport to the Consulate. It is a replacement for a visa label or stamp in a passport. Travel agents and airlines are able to obtain the ETA through their computer reservations systems at the same time as they book travel to Australia.

In addition to US and Canadian citizens, the following countries are eligible for an ETA:
Andorra, Austria, Belgium, Denmark, Finland, Germany, Greece, Hong Kong*, Iceland, Republic of Ireland, Italy, Japan, Republic of Korea, Liechtenstein, Luxembourg, Malaysia, Monaco, Netherlands, Norway, Singapore, Spain, Switzerland, Sweden, Taiwan**, United Kingdom and the Vatican City.

**** Holders of UK passports which indicate their nationality to be British National (Overseas) can only be processed for an ETA if resident in and applying in Hong Kong.***
***** Holders of Taiwan passports can only be processed for an ETA if resident in and applying in Taiwan***.

BUSINESS VISITORS

PROCESS:

There is a free business Electronic Travel Authority ("ETA") available to citizens of the U.S., Canada, France, and Spain. For other ETA nationals, there is a business ETA which attracts a fee of AUD$60 (approx. US$40). Citizens of non-ETA eligible countries must apply for a Temporary Business Entry visa ("TBE" Short Stay) at the nearest Australian Embassy, High Commission or Consulate. (NOTE: the list of ETA countries is available in the Overview.)

REQUIREMENTS:
The Short-Term Business Visitor must:
1. Have a residence and an employer outside of Australia;
2. Travel for a limited and pre-set time period which must be consistent with the intended purpose of the trip;
3. Not receive compensation from sources within Australia (however, incidental expenses such as hotel room, cost of travel and meals may be paid by the host);
4. Have proof of adequate funds to defray expenses while on the business visit; and,
5. Have specific, realistic and articulable plans for his or her stay in Australia.

ALLOWABLE ACTIVITIES:
The business ETA and TBE Short Stay visa allows one to conduct business or work related activities in Australia for a period of up to 3 months, the only restriction being that the proposed activities not disadvantage an Australian citizen or Australian permanent resident. The TBE visa allows one to pursue recreational activities including tourism and non-formal studies while on a business trip or subsequent visit.

BUSINESS VISITOR VISA:
Applications for business visitor visas may be submitted to the Australian Consulate office nearest the applicant's current place of residence. For applicants residing in a country other than their country of birth, evidence of status will be required. Additionally, the applicant may be required to present evidence of any of the following:
1. Intention of a genuine visit.
2. Good health and character.
3. That there are no restrictions on his or her traveling to Australia.
4. Adequate funds for the duration of the intended visit.
5. No intention to permanently reside in Australia.

EXEMPTIONS:
New Zealand citizens are permitted to visit, study, work and reside in Australia without the need to obtain a visa.

MAXIMUM DURATION:
Business Visitor Visa: The maximum duration of a Business Visitor Visa is 3 months.

Electronic Travel Authority (ETA): The free business ETA available to citizens of some countries is valid for 12 months of receipt, and allows a single entry into Australia for a stay of up to 3 months. The multiple entry business ETA that attracts a fee of AUD$60 is valid for the life of the holder's passport, and allows a stay of up to 3 months on each entry.

PROCESSING TIME:
Business visitor visa**:** From 1 day to 2 weeks, depending on nationality.

Electronic Travel Authority (ETA): Several seconds to be electronically authorized after passport information has been entered into computer reservation system.

EXTENSIONS:
Non-ETA nationals who have entered Australia with a TBE Short Stay visa and ETA nationals in possession of a business ETA are not permitted to extend their stay in Australia. However, if their business activities require them to remain in Australia beyond three months, they should apply for a TBE Long Stay visa (employment authorization) on the basis of approved

sponsorship by an Australian employer at the nearest office of the Department of Immigration and Multicultural Affairs in Australia (DIMA) (see the Employment Authorization section). As of July 1, 2000, nationals working for overseas employers that do not have registered offices in Australia are required to return to their home countries to apply for a TBE Long Stay visa.

ETA nationals in possession of a tourist ETA are permitted to extend their stay by applying for a visitor visa at the nearest DIMA office.

EMPLOYMENT AUTHORIZATION

PROCESS:
A foreign national traveling to Australia for more than 3 months for business purposes must obtain employment authorization (TBE Long Stay visa).

Obtaining temporary work authorization for executives, managers and specialists involves a three-step process:
1. Business Sponsorship application.
2. Nomination Application on behalf of each sponsored employee.
3. TBE Long Stay Visa from the Australian Consulate in the employee's home country.

Sponsorship may be provided by an established Australian organization or by an organization outside of Australia (overseas sponsor).

REQUIREMENTS:
Step 1: Business Sponsorship Application
It must be established with DIMA that the sponsor is the direct employer of the foreign employee, and that the employer:
1. Has a satisfactory record or compliance with the immigration laws of Australia;
2. Has a reputable business background; and,
3. Is able to meet the sponsorship undertakings for financial responsibility and compliance with the laws of Australia.

In addition, the sponsor must demonstrate that the foreign employee's presence in Australia will contribute to one of the following:
1. Creation or maintenance of employment for Australian citizens or Australian permanent residents;
2. Expand Australia's trade in goods or services;
3. Improve Australia's business links with international markets (expand local business and export activity); or,
4. Increase competitiveness within Australia.

And that the sponsor will either:
1. Introduce, utilize, or create in Australia new or improved technology or business skills; or,
2. Train Australian citizens or permanent residents in the business operations of the sponsor.

The sponsorship application is filed with the DIMA office closest to the sponsor's place of business in Australia. Overseas business sponsors (companies without a registered presence in Australia) should file the application at the nearest Australian Embassy, High Commission or Consulate in the sponsor's home country.

Step 2: Nomination Application:
The Nomination Application identifies the position to be filled by a foreign national, and should be submitted either in conjunction with the Sponsorship Application or subsequent to its approval.

Step 3: Temporary Business Entry Long-Stay Visa
Once the nomination has been approved, and a letter issued, the foreign national may apply for a TBE Long Stay Visa. This application should be submitted at the Australian Embassy, High Commission or Consulate in the foreign national's home country.

MAXIMUM DURATION:
Temporary work authorization for executives, managers and specialists is available for up to four years.

PROCESSING TIME:
Estimated processing time for the Business Sponsorship/Nomination Application is approximately four weeks.

Long stay visa applications processed in about 1 week, depending on the location. Delays can occur if additional documentation is required or if there are any abnormalities on radiological or medical reports. Medical abnormalities are referred to Australia for assessment and can result in delays of at least 2-3 weeks

EXTENSIONS:
Extensions can be granted on the basis of new sponsorship, nomination and visa applications.

RESIDENCE PERMIT:
Australia does not have a residence permit requirement. Permission to remain in Australia is governed by valid visa status.

FAMILY AND DEPENDENTS

The applicant's dependents are permitted to accompany the applicant, provided certain conditions are met. Spouses and children are included in principal applicant's visa application along with evidence of the familial relationship to the principal applicant. Children are able to undertake studies in Australia subject to admission to a school and payment of overseas student's fees.

WORK AUTHORIZATION:
Spouses have an automatic right to work.

UNMARRIED PARTNERS:
No separate application is required. Common-law or 'defacto' spouses are included in principal applicant's visa application. Documentation attesting to the relationship is required. The documentation may include: evidence of common residence, evidence of common ownership of property, wills or insurance policies naming the other as a beneficiary, statements from friends and family attesting to the relationship, and so on.

ADDITIONAL INFORMATION

For additional information, please contact us at: info@fragomen.com.

STEVENSON, WONG & CO.

SOLICITORS AND NOTARIES, AGENTS FOR TRADE MARKS & PATENTS

史蒂文生黃律師事務所

14/6/01

THE NEW HONG KONG .hk DOMAIN NAME REGISTRATION REGIME

PAPER BY ANGUS FORSYTH

1. STRUCTURE MODEL BEFORE 1st JUNE 2001

The existing Hong Kong regional domain name registry, Hong Kong Network Information Centre ("HKNIC") has operated up to 1st June 2001 a somewhat arbitrary but generally neutral regime for the registration of Hong Kong domain names and on-line registration applications by the applicant or an agent setting out the purpose of the domain name, a description of the applicant and the name applied.

HKNIC has done this under licence from the Internet Corporation for Assigned Names and Numbers ("ICANN") as the **.**HK Country Code Top Level Domain ("HKCCTLD") registrar. HKNIC is a cooperative creature of the Joint Universities Computer Centre ("JUCC"), a consortium of the seven government funded tertiary institutions in Hong Kong. Actual allocation and distribution of Internet Protocol Addresses has been through the Asia Pacific Network Information Centre ("APNIC") under block allocation from ICANN. The Hong Kong ISP members of APNIC obtain the IP Addresses from APNIC and distribute them to the end user market in Hong Kong – a structure that is currently proposed to continue in the future.

2. ERSTWHILE HKNIC REGISTRATION REGIME, DISPUTE RESOLUTION AND CONTROL

Perhaps more out of resigned acknowledgement of the inevitable than anything else, the HKNIC regime has been generally accepted in default of any vigorously proposed alternative model. Applicants have been required to execute a standard form of registration agreement with HKNIC. Only one name per applicant has been permitted and only Hong Kong corporate entities or registered Hong Kong branches of overseas companies have been accepted as eligible to be registered HKCCTLD domain name proprietors. Unincorporated individuals are not eligible domain name registrants. HKNIC has implemented its own dispute resolution procedure – itself representing an advance away from although not excluding resort to, the previous exclusive remedy of court litigation with its attendant delays and high costs.

In this way, HKNIC has exercised a minimum control over the legal Hong Kong identity and the status of registered HKCCTLD domain name holders. JUCC administration through HKNIC has been effected through the domain name registration services database and server operated on behalf of JUCC by the Computer Services Centre of the Chinese University of Hong Kong.

3. PROPOSALS FOR CHANGE

In a major effort to bring about the greater possible impartiality, self funded commercial regularity and transparent administration under a due process of the domain name regime in Hong Kong, the high level Hong Kong Government policy committee, the Information Infrastructure Advisory Committee ("IIAC"), set up a task force in October 1999 to review the administration and assignment of Internet domain names and IP addresses in Hong Kong with a view to recommending a framework of arrangements which best suits Hong Kong's needs.

The Task Force drew up a list of proposals ("the Task Force Proposals") which were submitted to the IIAC for review acceptance in May 2000. IIAC, in turn, accepted and authorised the Task Force Proposals to be published over the period between June 2000 and the 16th July 2000 for public consultation and submission of comments to the Information Technology Services Department of the Information Technology and Broadcasting Bureau of the Hong Kong Government.

In reaction to the consultation responses, the Information Technology and Broadcasting Bureau consulted with JUCC. The setting up of a legislated statutory corporation was considered and dropped largely because of the needs of urgency and flexibility. This has accordingly led to the incorporation of the new Hong Kong Domain Name Registration Company Limited ("HKDNR") as a private company limited by shares on 23rd February 2001 with an authorised capital of HK$1,000.00 divided into 2 shares of HK$500.00 each.

The option of a statutory corporation has not been abandoned – just put into reserve as a future possibility in the light of experience with HKDNR. HKDNR put its basic programme and raison d'etre onto the Internet on 26th April 2001 at www.hkdnr.net.hk/reg.dn.html. On 1st June 2001, HKDNR published on the Internet an actual on line application form and related procedures. The following paragraphs summarize the brave new world now established pursuant to these pronouncements.

4. ESTABLISHMENT OF HKDNR

The Task Force Proposals envisaged that HKDNR would be a not for profit company and would have the exclusive administration of the HKCCTLD regime for Hong Kong. Its role would be to pay no dividends to its shareholders and to charge for domain name registrations in order to cover its operational costs. It is to register HKCCTLD domain name ownership on application and subsequent assignment or transfer of Internet domain names ending with com.hk (a commercial entity), org.hk (a non-profit organization), gov.hk (a bureau or department of the Hong Kong Government), edu.hk (an educational institution) and net.hk (an entity managing net work infrastructure and services).

As a side note, it is not clear why for this purpose the route of establishing a company limited by shares was taken over the normal not for profit corporate structure of a company limited by guarantee. This is perhaps even more legitimate a question in the light of the HKDNR website description of the company as "a not for profit company, which means that it pays no dividends to its shareholders". This is all very well as a policy statement but policies can change and the vehicle of HKDNR as incorporated is definitively a for profit vehicle. If the Hong Kong Inland Revenue Department will, quite rightly, not accept, for certification under S.88 of the Inland Revenue Ordinance of charitable exemption from profits tax, a company with anything less than stringent constitutional safeguards on profit distribution to members, what are we all to make of the incorporation of HKDNR with this full membership profit distribution capacity and potential? It is clear that the actual structure of HKDNR as incorporated is a corporate share held structure fully capable of declaration of dividends upon the two presently issued shares – or on any other shares issued in the future. It will be interesting to see how these dividends from what will clearly be a cash cow will be applied upon the level playing field that Hong Kong economic philosophy normally demands.

However, the HKDNR website also pronounces that HKDNR is assuming its .hk domain name stewardship functions before the future membership-based policy making and administrative body for Hong Kong Internet Domain Names is established. No more is said or promised about this phantom and obviously we shall all be watching this space. There may be those who comment in future on any such adventure being redundant and duplicative in both time and cost if a second vesting exercise is to be organized into a new registration body which at that time is still structured as a for profit organization.

The former HKCCTLD registration regime handled and operated by JUCC has been assigned to HKDNR with effect from the 1st June 2001 and the HKDNR operation is now stated to be effective on a fully neutral first come, first served basis subject only to the right during the "sunrise" period of 8 days following the 1st June 2001 for certain corporate applicants with a registered Hong Kong trademark or duly lodged application therefor to have priority for domain name registration of their trademark.

HKDNR has stated in its first announcement on 26th April 2001 that an important philosophy behind its domain name registration policies is the promotion of Internet use – especially with regard to e-commerce. The declared new policy at least for the immediate future – is that HKCCTLD domain names should be registered on a genuine commercial need basis and not form part of trading stock. HKDNR perceived that an element of corporate governance for the reassurance of the international community of Internet users in e-commerce is for them to know that they are dealing with HKCCTLD registered proprietors as being fully established registered entities under the Hong Kong Business Registration Ordinance with legitimate registered businesses and physical presence in geographical Hong Kong. The intention is to ensure elimination of a need to deal with virtual cyber squatters. Renewal of the domain name registration will accordingly be annually concurrent and co-terminous with the annual currency, expiry and mandatory renewal of business registration. The initial HKCCTLD domain name registration and each annual renewal fee is set at HK$200.00.

There is also a stated intent to bring in arrangements for allowing domain name registration by individuals – a new step for Hong Kong – after the full establishment of the operation of HKDNR. As envisaged by the Task Force Proposals, these will likely be derived directly from the names appearing on the identity card which the long standing Registration of Persons Ordinance requires to be held and to be carried at all times by all individual residents of Hong Kong.

It is interesting to note however that HKDNR on its website applies the term "customers" to applicants for Hong Kong domain name registration and to registrants although proposed transferees of Hong Kong domain names are referred to as "transferees". Somehow the terminology of purchase and sale where HKDNR purports to be the seller and a body corporate applicant for a registration is purported to be the buying customer does not entirely square with the authoritarian concept of validly instituted registrar status intended for, and adopted by, HKDNR in its entire operation of the new registration regime.

5. OLD OR NEW AGREEMENT ELECTION

All existing registered domain name holders registered before the 19th February 2001 will be entitled to elect for either continued registration under the pre 19th February 2001 HKNIC form of agreement or for registration pursuant to the HKDNR New Agreement valid under the new regime which is the only option for all registering a domain name on or after the 19th February 2001.

6. OLD AND NEW AGREEMENTS COMPARED

The following summarizes the basic difference between the Old Agreement and the New Agreement.

For an annual renewal fee, those electing to be governed under the New Agreement will have greater flexibility for registration of additional domain names, the new ability to transfer registered domain names and of changing updated information on the Register without charge:

Old Agreement	***New Agreement***
Fee is charged for name server information update. (Such update is usually necessary upon change of ISPs or web hosting service providers).	Annual renewal for HK$200.00 is required. This is seen as requiring registrants to maintain a current interest in their registered asset and to release it for others in the event of non-renewal when that interest ceases. Update of all information is free of charge.
An entity can register only one .hk domain name	An entity can register more than one domain name (with no upper limit on how many).
Domain name is not transferable.	Domain names are transferable between two

	consenting parties - provided the transferee establishes a presence in Hong Kong which HKDNR regards as valid.

During the "sunrise" period, a plurality of applicants for the same domain name will be postponed to the applicant holding, or already duly applying for, registration of a goods or service trademark in Hong Kong. In the event of more than one eligible applicant, HKDNR will decide by random selection.

All current holders of current **.**hk domain names registered with HKNIC will be required to re-register and update their registered information unless they registered before the 19th February 2001 and opt for continued registration under the Old Agreement. The re-registration application period opened on 14th May 2001 and closes on 31st May 2002. Failure to re-register will risk leading to termination of the existing domain name and revocation of its registration after a certain period. There is currently no charge for re-registration.

7. DISPUTE RESOLUTION

In the event of disputes between an existing registrant and an applicant for registration as to a particular domain name, the Registration Agreement provides for mandatory reference of the dispute under the new Dispute Resolution Policy to the Hong Kong Arbitration Centre.

The grounds of dispute submission by the Complainant are that:

(i) the registered domain name is identical or confusingly similar to a trademark or service mark in Hong Kong in which the Complainant has a right; and

(ii) the registrant has no right or legitimate interest in respect of the registered domain name; and

(iii) the registrant's domain name has been registered and is being used in bad faith.

It is necessary for the Complainant to prove the presence of **ALL** these three elements.

In what is evidently hoped to be a helpful framing exercise, any one or more of the following are provided to constitute evidence of bad faith-:

(i) clear primary intent of dealing in the domain name registration rather than in goods or services utilizing that name and for a value consideration in excess of the documented out-of-pocket costs directly related to the registration and maintenance of the domain names;

(ii) registration is clearly to prevent the owner of a trademark or service mark from reflecting that mark in a corresponding domain name;

(iii) registration is primarily for the purpose of disrupting the business of a competitor;

(iv) in use of the registered domain name the registrant intentionally attempts to attract for commercial gain Internet users to the registrant's website or other on-line location by virtue of a likelihood of confusion with the trademark of the Complainant as to the source, sponsorship, affiliation and endorsement of the registrant's website.

Detailed rules of procedure are to be introduced and the remedies available to the Complainant under order of the Arbitration Panel are limited to requiring the cancellation of the registrant's domain name or transfer of the registrant's domain name registration to the Complainant. All decisions of the Arbitration Panel pursuant to the dispute resolution policy shall be final and binding including, without limitation, publication in full on the Internet or other form of publication – except when an Arbitration Panel determines in an exceptional case, to redact portions of its own decision. Detailed provisions as to the exact mechanics of such processes are to be introduced.

On the whole, the principles encapsulated into the new regime as now published on the HKDNR website and to be refined in the detailed regulations now being finalised, seem fair and reasonable. They represent a creditable first run demonstrated by Hong Kong SAR to play its pro-active e-commerce role responsibly and sensibly on the World Internet Stage. Additionally, the adopted mechanism of HKDNR allows for amendment of any aspect of the regime which may be found prudent or necessary over time based upon experience in practice.

8. SOME PROBLEMS

However, there are clear flaws, fallacies and inequities inherent in the new regime in the HKDNR.

Among these particularly we should note:

(i) the erroneous concept that Business Registration under the Business Registration Ordinance is an exclusively equitable - and therefore justifiable - identifier of the legitimate, business "Hong Kongness" of a corporate legal entity. At the present stage where HKCCTLD registration is exclusively preserved for bodies corporate, it is a fact that every Hong Kong body corporate must apply for business registration whether it is carrying on business or not – and even if it never carries on business. The initial ratio behind the Business Registration Ordinance of the Government keeping a tab of minimum details upon business activity in Hong Kong was long ago subordinated to the much more important issue of cheaply collected revenue from bodies corporate of the business registration fees as an obligation simpliciter regardless of business and it is therefore true that there are many Hong Kong incorporated companies which do not in fact carry on business in Hong Kong and accordingly by the HKDNR declared yardstick do not in fact therefore have any prior or particular right to an HKCCTLD domain name over and above others who may carry on business here. All Hong Kong incorporated companies however are obliged to take out and therefore possess current business registration. Why the criterion of business registration alone was chosen for Hong Kong bodies corporate is a mystery. The Certificate of Incorporation issued by the Registrar of Companies in Hong Kong is the definitive evidence of existence of a Hong Kong corporation and a current Business Registration Certificate does not in many cases add any authentic evidence of active business to it.

By the same token, there are many corporations incorporated outside Hong Kong which effectively carry on business in Hong Kong. They can be divided into two categories:

(a) those who establish their own physical entity with dedicated employees in Hong Kong and an office here. Clearly such companies are obliged under the Companies Ordinance to take out registration as branch offices leading to the issue by the Registrar of Companies in Hong Kong of a Certificate of Registration of an Oversea Company ("Oversea Company Branch Certificate"). The legal obligation is to apply for registration within one month after having established the place of business and not before. Following the issue of the Oversea Company Branch Certificate, the branch office entity is obliged by law to apply for and take out business registration. There is however an often lengthy period between the application for registration at the Companies Registry of a branch office, which has already started business and therefore already exists as a Hong Kong fact, and the issue by the Registrar of Companies of the Oversea Company Branch Certificate. This lengthy period of processing by the Companies Registry renders the foreign corporate entity concerned vulnerable to a period which can be many months during which cyber squatters may apply to HKDNR under the new registration regime for registration of a HKCCTLD with the name – and even extending to the Hong Kong registered trademark - of the foreign company in circumstances where the foreign company – even though it has had an actual business for many months - is unable to take any action because of the wholly arbitrary HKDNR requirement that it should have the Oversea Company Branch Certificate which it is not able to get. The damages are magnified in that the new registration regime places no limit on the number of HKCCTLDs that a single qualified applicant can apply for.

(b) those overseas incorporated companies which are long time holders of fully valid currently registered Hong Kong trademarks. They have no place of business in Hong Kong and do not themselves intend to carry on business here. However, they do carry on substantial business in Hong

Kong exploiting their Hong Kong registered trademarks to the maximum but all this is done through Hong Kong agents and not by the oversea companies themselves. They therefore have no, and will never have any, Oversea Company Branch Certificate and Hong Kong Business Registration Certificate.

However, they have distinct, Hong Kong Government registered and commercially active performing assets in the form of the intellectual property in their Hong Kong registered trademark – a protective facility available to them under the Hong Kong Trade Mark Ordinance representing the legislated participation commitment of the Hong Kong Government in the International treaties calling for World Trade Organization membership equality of mutual trademark protection.

How HKDNR can arbitrarily intervene into the calm, traditional seas of Hong Kong legislated international responsiveness for trademark protection and enforce a system that permits cyber squatter registration of a HKCCTLD domain name only because the cyber squatter has a Hong Kong Business Registration Certificate and the legitimate registered trademark owner overseas body corporate who does not carry on business here does not have such certificate but is nonetheless the legitimate owner of the Hong Kong registered trademark is very hard to fathom – in fact is not fathomable and is likely to lead to substantive litigation. This is particularly the case in, for example, functions such as meta tagging of website addresses where the use of the domain name by a cyber squatter can bring him clearly illegitimate advantages.

Whether or not an oversea body corporate – for very good fiscal, liability or other reasons of its own – wishes to carry on direct business in Hong Kong using its registered trademark through a Hong Kong incorporated subsidiary or a Hong Kong registered branch of itself, or only through a local agent, is not the business or dictate of HKDNR.

If such body corporate wishes to carry on its legitimate business through Hong Kong as a worldwide component of a universal market, then that choice and its use of a Hong Kong registered trademark in such business carried on through agents alone must receive, and fully deserves, due respect and protection from cyber squatting by HKDNR – something that is not in fact available under the present HKCCTLD new domain name registration regime of HKDNR. Not only is it not available – it is expressly denied. In a printed answer on an Q & A sheet on the HKDNR website appears the statement *" ….. However, if your company has no registration in Hong Kong at all, but just wants to register a .hk domain name to "protect?* (sic) *your brand name, sorry, we cannot provide the service you want."* Apparently, however, the provision of the offered "service" to a Business Registration Certificate holder of a Hong Kong corporate cyber squatter is a function that HKDNR sees as legitimate – even if directly contrary to the commercial interest of a foreign owner of a validly registered Hong Kong trademark in actual use in Hong Kong through agents.

(ii) Practicing lawyers will be most interested to read the exemption of liability provision placed by HKDNR on its website. There is a statement that no warranty or guarantee is given to the accuracy or usefulness of the content hosted or referenced by the site. HKDNR accepts no liability for any loss and damages arising from or relating to the use of the contents of the site. No doubt the courts will be interested to be confronted with these words. However, these words must be read together with the additional words that *"no claims, actions or legal proceedings in connection with this website brought by any customers or other persons having reference to the material on this website will be entertained by HKDNR!!"* As the entire structure of HKDNR and its registration function is predicated upon policy utterances of JUCC at the instance of IIAC and the Information Technology and Broadcasting Bureau without any legislative authority or sanction, it is impossible to see how the curtain which such statements purport to drop may not be peered around by way of judicial review – if only to clarify that in Hong Kong society nobody – including HKDNR – is above the law. The HKDNR registration agreement itself is commendably proper in this respect by its express choice of Hong Kong law and submission to exclusive Hong Kong court jurisdiction.

Establishing Business Operations in Canada

A general overview of various matters of interest to foreign business persons contemplating establishing or acquiring a business in Canada

WINTER 2001 EDITION

For further information, please contact
Murray J. Perelman
Tel:(416) 5952345 Fax:(416) 5950567
Email: mperelman@goodmancarr.com

Goodman and Carr LLP. Hard Working Law.

Suite 2300, 200 King Street West, Toronto, Ontario Canada M5H 3W5 •Tel: (416) 595-2300
• Fax: (416) 595-0567 E-mail: mail@goodmancarr.com www.goodmancarr.com

ESTABLISHING BUSINESS OPERATIONS IN CANADA

The purpose of this booklet is to provide a general overview of matters of interest to a foreign businessperson contemplating establishing or acquiring a business in Canada.

The Canadian legal system consists of federal, provincial and municipal laws. These materials will focus on federal and Ontario legislation.

Any entity considering establishing or acquiring a business in Canada should consult with its professional advisers to address specific problems and requirements.

Additional information relating to the establishment or acquisition of a business in Canada can be obtained from, and any questions arising from this booklet may be addressed to,

Murray J. Perelman
Goodman and Carr LLP
Tel: (416) 595-2345
Fax: (416) 595-0567
E-mail:mperleman@goodmancarr.com

GOODMAN AND CARR LLP
BARRISTERS AND SOLICITORS
200 King St. West, Suite 2300
Toronto, Ontario
Canada M5H 3W5
Telephone: (416) 595-2300
Fax: (416) 595-0567
E-mail: mail@goodmancarr.com
www.goodmancarr.com

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I. Introduction

The purpose of this booklet is to provide a general overview of matters of interest to a foreign businessperson contemplating establishing or acquiring a business in Canada.

The Canadian legal system consists of federal, provincial and municipal laws. These materials will focus on federal and Ontario legislation.

Discussions with the principals and legal advisers of a non-resident businessperson considering Canadian operations usually involve the initial determination of whether to carry on business in Canada directly through a branch operation or by setting up a subsidiary corporation.

Factors to be considered in choosing between a branch operation and a subsidiary include the following:

1. *Tax Considerations*: Tax considerations are often the single most important factor in determining the structure of the proposed Canadian operations and are dealt with under the heading "Subsidiary or Branch: Tax Considerations".

2. *Marketing Considerations:* A foreign businessperson often considers it desirable to be able to project his or her business as being carried on by a Canadian corporation rather than as a branch of a foreign company.

3. *Compliance Costs:* The cost of maintaining a separate corporation will be somewhat greater than the cost of maintaining a Canadian branch operation.

4. *Government Assistance:* Certain government assistance programs may be available to a new business: for example, government assistance programs are available in connection with bank financing to acquire certain types of production machinery and equipment. Several programs would not be available if the applicant was a foreign entity carrying on business in Canada (i.e. a branch). Those programs might be available, however, where the applicant is a Canadian incorporated company, even though the company is a subsidiary of a foreign entity.

5. *Bank Requirements:* There are restrictions on the ability of Canadian banks to take certain types of security from foreign customers. This may cause difficulty in attempting to arrange lines of credit and the like with respect to the Canadian operations of a foreign company which will be avoided if the foreign entity incorporates a Canadian subsidiary to carry on the business and if the Canadian subsidiary grants the security to the Canadian bankers.

II. Subsidiary or Branch: Corporate Considerations

Canadian business operations can assume a variety of forms. The simplest is the sole proprietorship. An individual may carry on business directly using his or her own name or a trade name with a minimum of formalities. A sole proprietorship is only appropriate for simple business operations where limited liability is not important.

A business may also be carried on by a partnership. A partnership, consisting of individuals, corporations or both, may be appropriate in some circumstances, although the unlimited liability of each partner may not always be acceptable.

If limited liability is a concern, a limited partnership can be utilized. A limited partnership must have at least one general partner and may have any number of limited partners. Only the general partners are subject to unlimited liability. The liability of the limited partners is restricted to their investment in the partnership so long as they do not take part in the management of the partnership. If the limited partners take part in management, the partnership becomes a general partnership and unlimited liability ensues for all of the partners. Limited liability partnerships are also available to members of regulated professions.

The most common form of business organization used by non-Canadians establishing operations in Canada is the corporation. A businessperson may choose to carry on business in Canada through his or her existing corporate organization with no independent status in Canada (i.e. as a branch operation), or he or she may choose to incorporate a subsidiary in Canada.

If the decision is made to incorporate a subsidiary, it is necessary to determine whether to incorporate provincially (each province has its own corporate statute) or federally under the Canada Business Corporations Act. These materials will deal only with the incorporation of federal and Ontario companies.

A. Choosing a Jurisdiction of Incorporation

There are few significant differences between incorporating federally or provincially.

(1) Name

An important advantage in incorporating federally is that, once incorporated, a corporation has the right to carry on business in any province of Canada under its corporate name. While a federally incorporated corporation may be required to pay a license or registration fee to a province (other than Ontario and Quebec) in which it carries on business, that province cannot prohibit the corporation from carrying on business under its name. A provincially incorporated corporation, on the other hand, may be denied the right to use its name in another province if there is another corporation already in existence with a similar name.

(2) Financial Statements

Historically, the main disadvantage of incorporating under the federal statute was a requirement that a private corporation's financial statements be made public once a federally incorporated corporation had gross revenues or total assets in excess of a fairly low threshold. This meant that a federally incorporated corporation was required to file its financial statements in Ottawa and that such statements became a matter of public record even where the corporation was privately-held (i.e. not publicly traded). This was the main factor in causing foreign businesspeople to decide to incorporate provincially, but it is no longer a consideration. Currently, a privately-held corporation incorporated federally or in Ontario is not required to make any public filing of its financial statements no matter how large it becomes.

(3) Fees

The fees payable under the Ontario and federal statutes may sometimes be a relevant factor in determining jurisdiction. For example, the current government fee payable upon the incorporation of a federal corporation is $500, compared to the Ontario fee of $360.

(4) Convenience

Generally speaking, the Ontario Ministry of Consumer and Commercial Relations offers "over the counter service" in respect of corporate filings in its Toronto office. This allows for same day incorporations and convenient filings of other charter documents and provides the added assurance of being able to review or make further use of the documents immediately after their processing.

For federal corporations, all processing is handled in the central Ottawa office. Material filed in federal offices in cities other than Ottawa will generally bear the date of filing, although it may be some time before the actual documentation is returned.

B. General Corporate Provisions

The following is a list of some of the more relevant provisions which will affect the structuring of a subsidiary. Unless otherwise noted, the comments apply equally to Ontario or federally incorporated companies.

(1) Directors

Privately-held companies can have as few as one director provided that a majority of directors on the board are resident Canadians. There are two exceptions to the resident Canadian majority rule. In federally incorporated companies only, majority is reduced to one-third for holding corporations which earn less than 5% of their gross revenues in Canada. Ontario incorporated companies which have a board of directors of two only require one of the directors to be a resident Canadian (the federal Act would require both to be resident Canadians).

A resident Canadian is an individual who is a Canadian citizen or who has been lawfully admitted to Canada for permanent residence and who, in either case, is ordinarily resident in Canada. Under the federal statute only, a person who is not a citizen ceases to be a resident Canadian for these purposes when he or she has been in Canada for more than one year after first becoming eligible to apply for Canadian citizenship. In most cases, a permanent resident first becomes eligible to apply for citizenship after he or she has been in Canada for three years.

In March, 2000, the federal government introduced proposed changes to the Canada Business Corporations Act. If the proposed changes become law, only 25% of the Board of Directors of a federally incorporated business will be required to be resident Canadians and in a two-director company, only one director will be required to be a resident Canadian. The reduction in the residency requirement will not apply where federal legislation or policy imposes ownership restrictions such as book publishing, and film and video distribution.

A director need not be a shareholder but must be an individual at least 18 years of age, sane and not bankrupt. A director cannot appoint a substitute or delegate his or her duties. However, directors may delegate certain duties to a managing director or to a committee of directors, subject to residency requirements being met. The proposed federal changes will eliminate residency requirements for committees of the board of a federally incorporated company. A director may, by a majority vote of the shareholders who are entitled to vote, be removed before the expiry of the term for which he or she was elected.

The shareholders of a corporation (or the sole shareholder if there is only one shareholder) may enter into a unanimous shareholder agreement or unanimous shareholder declaration allowing the shareholders to restrict the powers of the directors to manage or supervise the business and affairs of the corporation. A shareholder who is a party to a unanimous shareholder agreement has all of the rights, powers, duties and liabilities of a director of the corporation to the extent that the agreement restricts the discretion or management of the business and affairs of the corporation and the directors are thereby relieved of those duties and liabilities to the same extent. Therefore, although the board of directors may have to include resident Canadians, a foreign shareholder may effectively control the corporation through the use of a unanimous shareholder agreement or unanimous shareholder declaration.

(2) Officers

There are no requirements as to the citizenship, nationality or residence of officers. Except for the Chairman of the Board (if there is one), officers of a corporation need not be directors of the corporation.

(3) Shareholders and Share Capital

There are no corporate requirements relating to the citizenship, nationality or residence of shareholders. Such requirements, however, may exist under other legislation applicable to the particular business, such as the Broadcasting Act for broadcasters.

Corporations may have unlimited authorized share capital and may issue various classes and/or series of shares. Shares must be fully paid upon issuance and only shares without par or nominal value can be created.

(4) Meetings

Resolutions of directors or shareholders may be passed at meetings or may be consented to in writing if signed by all directors or shareholders. Directors may meet by conference telephone if, subject to the by-laws, the appropriate consent of each director is obtained.

Meetings of shareholders or directors may be held outside Canada, but a majority of the directors' meetings of an Ontario incorporated corporation in any one year must be held in Canada unless the articles or by-laws of the corporation provide otherwise.

Directors may conduct business only at meetings at which at least 25% of those present are Canadian residents, unless the meeting is one resident Canadian director short of the 25% minimum requirement and a resident Canadian director who is absent later approves the business so conducted.

(5) Directors' Liabilities

Directors of a corporation have numerous statutory liabilities, including liabilities for the improper redemption or purchase of shares, the improper declaration of dividends, arrears of wages not exceeding six months and accrued vacation pay of not more than 12 months, or authorizing the issuance or allotment of shares for inadequate consideration.

Numerous statutes other than corporate statutes impose additional liability on the directors of a corporation in certain circumstances. These liabilities arise whether the corporation is federally incorporated or provincially incorporated. The following are some examples:

1. the Income Tax Act (Canada) requires every corporation to withhold and remit to the Receiver General of Canada specified amounts from the wages and other benefits payable to its employees and from certain types of payments to non-residents of Canada. If a corporation fails to withhold and remit these amounts and the corporation becomes insolvent, a director may be held liable for the amounts which should have been withheld and remitted unless he or she can demonstrate that he or she exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances;

2. a director may be liable under the Ontario Securities Act if he or she authorizes, permits or acquiesces in the failure of a corporation regulated by that legislation to comply with the ongoing disclosure requirements (which include the filing of financial statements and the making of timely disclosure of any material changes) or authorizes, permits or acquiesces in any material misrepresentation or omission in any documents or material submitted pursuant to the Ontario Securities Act; and

3. the Bankruptcy and Insolvency Act (Canada) provides that a director may be liable for any amount paid in respect of dividends or the redemption or purchase for cancellation of shares of a corporation, where such amount was paid when the corporation was insolvent or was rendered insolvent by one of these actions and bankruptcy occurred within 12 months thereafter.

Corporations may indemnify directors and officers against liabilities incurred by them in the performance of their duties. Corporations may also buy insurance to protect them against such liabilities. However, insurance cannot protect directors from costs and damages arising out of a failure to act honestly and in good faith and with a view to the best interests of the corporation.

(6) Auditors

Both federal and Ontario incorporated companies need not have an auditor (as opposed to accountants who prepare unaudited financial statements) so long as they are not offering their securities to the public and all of their shareholders consent in writing to the non-appointment.

(7) Maintaining Records

Accounting records must be maintained and be open for inspection by the directors. Unless a specific exempting order is obtained, an Ontario incorporated company must maintain the originals of such records at the corporation's registered office in Ontario. It may, however, at any place where it carries on business, keep the parts of its accounting records which relate to its operations, assets and liabilities at such place, as long as sufficient records are maintained at its registered office to enable its directors to reasonably ascertain the corporation's financial position on a quarterly basis.

Accounting records of a federally incorporated company may be kept outside Canada, so long as sufficient information is available at a Canadian office to allow the directors to reasonably ascertain the corporation's financial position on a quarterly basis.

The federal statute also contains provisions governing the maintenance of and access to corporate records, all of which must be maintained in Canada. Corporate records of an Ontario incorporated company must be maintained at its registered office unless an exempting order is obtained allowing them to be maintained elsewhere in Ontario.

C. Carrying on Business in Other Provinces

If a subsidiary is incorporated provincially, it may be required to obtain an extra-provincial license in other provinces to enable it to carry on business in those provinces. Ontario incorporated companies do not require licenses to enable them to carry on business in Quebec although they do have to make annual information filings.

Each provincial statute varies in its definition of what constitutes "carrying on business" in the province. Most of the provinces, however, have very expansive definitions which cover almost any activity carried on within the province. For example, the Ontario test provides that if a corporation has no resident agent, representative, warehouse, office or place of business in Ontario, has no interest (otherwise than by way of security) in real property situate in Ontario and does not otherwise carry on business in Ontario, an extra-provincial license will not be required. The taking of orders for goods, or the buying or selling of goods by travellers or through advertising or by correspondence, will not be considered carrying on business in Ontario.

The procedure to obtain an extra-provincial licence is not complicated provided that the name of the company is not similar to that of any other business operating in that province. The procedure involves a formal application accompanied by a certificate of status from the incorporating jurisdiction, the appointment of a local agent for service of statements of claim and other processes, and the payment of certain fees. In Quebec, the applicant must also meet the requirements of Quebec's language laws and adopt a French corporate name.

A company which carries on business without an extra-provincial licence may be fined. In addition, it will be unable to maintain any action in any court in the province in question with respect to any contract made by it until it has made the appropriate filings.

If a subsidiary is incorporated federally, it will be entitled to carry on business in any Canadian province without obtaining an extra-provincial license. However, it will still have to file certain forms and pay certain registration fees in each province in which it carries on business.

Every corporation carrying on business in the various provinces of Canada is required, under various statutes, to file information returns on specified annual dates and/or on the occasion of certain changes to its structure.

D. Branch Operations

If it is decided that the business should be carried on as a branch operation without a Canadian corporate entity, the foreign corporation may have to obtain a provincial license in each province in which it intends to carry on business. As described above, obtaining an extra-provincial licence is usually not complicated, provided that the name of the foreign company is not similar to that of any other business operating in the relevant province.

III. Subsidiary or Branch: Tax Considerations

A new business will be affected by a number of federal taxes, as well as taxes levied by each province in which the business is carried on. This booklet highlights certain federal and provincial tax considerations relevant in determining the appropriate structure to be utilized in establishing business operations in Ontario. It should be emphasized that tax consequences may vary depending on the nature of the business, the structure chosen and the places where it is carried on.

A. Corporate Tax on Earnings

The Income Tax Act (Canada) (the "Tax Act") subjects a non-resident to Canadian tax if it carried on business in Canada at any time in a taxation year or in a previous year. The concept of carrying on business is expanded by the Tax Act to include manufacturing, packaging or constructing anything for exportation or soliciting orders or offering anything for sale in Canada, either directly or through an agent; a non-resident will therefore be taxable in Canada on income from such activities in the same manner as a resident of Canada.

The provisions of the Tax Act may be overridden by any bilateral income tax agreements, treaties or conventions that Canada enters into with the non-resident's home country. For example, in the case of a resident of the United States, the Canada - United States Tax Convention 1980 (the "Canada-U.S. Treaty") exempts a U.S. resident from Canadian tax in respect of its "business profits" other than those which are allocable to a "permanent establishment" in Canada. "Permanent establishment" is broadly defined in the Canada-U.S. Treaty to mean a fixed place of business in Canada through which the U.S. resident carries on business in whole or in part. It includes especially:

1. a place of management, a branch, an office, a factory and a workshop;
2. a building site or construction or installation project if it lasts more than 12 months; and
3. a person who has and habitually exercises in Canada the authority to conclude contracts in the name of the U.S. resident, other than an agent of independent status.

If a U.S. resident carries on business in Canada directly through a branch operation, it will have a permanent establishment in Canada. The non-resident will then be subject to tax in Canada in much the same manner as a Canadian resident, but only in respect of profits derived from the activities of the branch operation, as well as certain additional taxes referred to below.

Having a Canadian incorporated subsidiary which is carrying on business in Canada will not, itself, cause the U.S. resident parent corporation to be regarded as having a permanent establishment in Canada. However, the subsidiary being resident in Canada would be subject to tax in Canada on its worldwide income.

Income earned from carrying on business in the Province of Ontario through a permanent establishment as defined in the Ontario Corporations Tax Act is subject to combined federal and provincial tax at the rate of approximately 42.1%. Since provincial rates of tax differ, the combined rate will vary in respect of income earned in other provinces.

Canadian controlled private corporations ("CCPCs") are subject to a lower rate of tax (approximately 19.6% in Ontario and expected to decrease by 0.5% per annum over the next five years) on the first $200,000 of business income. A corporation which is actually controlled by Canadian residents will, of course, qualify as a CCPC so long as it is not controlled by a public corporation. In addition, a corporation which is owned equally by Canadian residents and non-residents and which is not controlled directly or indirectly by non-residents will also qualify as a CCPC. The availability of this reduced rate should be considered in structuring a non-resident's Canadian entity if it is intended that Canadians participate in the ownership of that entity.

The federal government levies a capital tax equal to 0.225% of a corporation's taxable capital employed in Canada in excess of $10 million. The capital tax can be applied to reduce the amount of corporate income tax surtax (which is levied at the rate of 4% of taxable income) payable by the corporation.

If the non-resident chooses not to establish a Canadian corporation in Canada but, instead, operates through a branch, then, in addition to the normal corporate taxes applicable to the income of the branch, it must pay a tax of 25% of the after-tax earnings of the branch (this is reduced to 5% for U.S. residents by the Canada-U.S. Treaty). This branch tax is the equivalent of withholding tax on dividends and is levied whether or not the earnings of the branch are in fact remitted to the branch's home country. The branch tax is based upon the net profits of the branch remaining after deducting all taxes, other than the branch tax, and all profits reinvested in the branch's business operations. Under the Canada-U.S. Treaty, a Canadian branch of a U.S. corporation is exempt from branch profits tax on the first $500,000 of its earnings in excess of all taxes and reinvested profits.

The tax consequences of using a branch operation are, therefore, relatively straightforward. Branch income will be subject to full Canadian corporate tax rates plus a branch tax.

An issue which may arise in using a branch operation is determining the amount of profit allocable to the Canadian branch, as opposed to the non-Canadian operations of the non-resident entity. Disagreement may arise on this issue between the Canadian and home country tax authorities, especially with respect to the allocation of operating costs. Subject to the ever present question of whether fair market value has been received/paid for goods and services, there would be greater certainty if a Canadian subsidiary is used, because the profits of a subsidiary can be more easily segregated from the profits of the non-resident parent.

As an administrative matter, using a Canadian branch results in the foreign entity's books and accounting records, both in Canada and elsewhere, being open to audit by Canadian tax authorities. Where a subsidiary is used, only the books and records of the Canadian subsidiary must ordinarily be made available for audit by the Canadian tax authorities; however, since 1988, the Canadian tax authorities can, in certain circumstances, require the production of certain foreign fiscal information.

Generally, the main advantage of using a branch operation is that branch losses will usually be deductible on home country tax returns in computing the non-resident entity's income. If the non-resident expects losses in the initial period of operation, it may be preferable initially to operate in Canada through a branch office, since no Canadian taxes would be payable during loss years and these losses could usually be utilized to reduce home country taxes. If a subsidiary is used instead of a branch, business losses will not be available to the non-resident and can only be used by the subsidiary to reduce Canadian taxes by setting them off against profits earned in Canada by the subsidiary in the three years preceding or seven years following the year in which the loss is suffered.

U.S. investors who anticipate start-up losses may consider forming an unlimited liability company under the laws of the Province of Nova Scotia instead of using a branch operation. An unlimited liability company, when properly structured, will qualify as a branch or partnership for U.S. Internal Revenue Service purposes (rather than a corporation). A Nova Scotia unlimited liability company is a corporation for Canadian tax purposes. This allows the income or loss from the unlimited liability company to be treated as income of the U.S. parent corporation for U.S. income tax purposes. We understand that losses incurred by the Nova Scotia unlimited liability company can thus be deducted by the U.S. parent in computing its U.S. income.

The shareholders of a Nova Scotia unlimited liability company are fully liable to the creditors of the company in a manner similar to partners being liable for the liabilities of a partnership. However, a Nova Scotia unlimited liability company will constitute a separate legal entity, whereas a partnership has no separate existence.

An unlimited liability company incorporated in Nova Scotia may own property and carry on business anywhere in Canada subject to compliance with local law.

U.S. investors considering the use of an unlimited liability company should consult with their American tax advisors.

The Tax Act permits a branch to be converted into a Canadian corporation on a tax-deferred basis. In broad terms, the tax cost of the shares in the corporation would be equal to the tax cost of the branch assets that were transferred to the corporation. The branch tax that was previously deferred by virtue of the investment of funds in the branch continues to be deferred; the investment in the branch can be repatriated only as a dividend subject to the prevailing rates of withholding tax.

B. Provincial Taxes

The Province of Ontario imposes a capital tax of 0.3% of the taxable paid-up capital employed in Ontario. Canadian controlled private corporations incorporated in Canada with total assets and gross revenues of $1 million or less and with no taxable income for the year are exempt from Ontario capital tax. Corporations with taxable capital of more than $1 million and less than $2 million pay a flat rate of capital tax of $100, $200 or $500, depending on taxable capital, total assets and gross revenues. The 0.3% rate applies to corporations with more than $2 million of taxable capital with a phase-in between $2 million and $2.3 million. This tax is payable by both a branch and a subsidiary. Paid-up capital is broadly defined to include corporate equity as well as certain liabilities such as bank loans and mortgages. The paid up capital of a branch is the greater of 121/2 times taxable income and the amount by which total assets in Canada exceed total current accounts payable relating to the permanent establishment and certain prescribed amounts. The capital tax generally bears no relationship to income or loss for a year.

C. Capitalization

Operations may be capitalized with debt and/or equity. As elaborated upon below, interest on monies borrowed for use in the business would be deductible in computing income subject to tax in Canada. The principal amount of a loan can be returned to the lender free of tax. On the other hand, "compensation" for equity is typically in the form of dividends. Dividends are paid from profit and are not deductible. Capital invested in shares may be returned to the shareholder by corporate resolution free of tax. Under the Tax Act, capital may be returned before distributing retained earnings of the corporation.

Borrowing by a branch operation or a Canadian subsidiary from Canadian arm's length Canadian sources will usually have no international tax ramifications. Canadian source income (and the resulting tax liability) will be reduced to the extent of the interest expense.

Borrowing from arm's length foreign sources (such as bank borrowings) will have few international tax ramifications. Canadian source income will be reduced by the amount of interest paid or payable. Such interest may be subject to a Canadian withholding tax of 25% of amounts paid or credited to the non-resident lender (reduced by most bilateral treaties to 15% and, as between Canada and the U.S., reduced to 10%). It is possible to eliminate withholding tax in certain circumstances. For example, the Tax Act provides that no withholding tax is payable if a subsidiary borrows from an arm's length non-Canadian lender, where the subsidiary corporation will not be obliged to repay more than 25% of the principal of the loan within the first five years other than in the event of default.

It may be desirable to capitalize the Canadian operations from non-arm's length foreign sources, such as a parent lending money to its subsidiary. To the extent that the income of the Canadian operations can be reduced by deducting interest expense on such loans, Canadian tax liability will be reduced. Although interest will be subject to Canadian withholding tax when paid or credited, maximization of the interest expense should be considered if the interest income receives more favourable tax treatment in the home country than dividends received (after receiving home country credit for Canadian withholding tax paid). However, such interest expense must be reasonable in the circumstances and it should be paid no later than the end of the second fiscal year of the Canadian subsidiary following the fiscal year in which the interest became payable to avoid an amount equal to the accrued interest being added back to the subsidiary's income for Canadian tax purposes as well as possible adverse tax consequences in the lender's home country. For example, we understand that if a U.S. non-arm's length lender does not charge a reasonable rate of interest, the U.S. Internal Revenue Code will impute to the lender an element of deemed interest. The Canadian authorities will not allow the deduction of such deemed interest unless there was a legal obligation in writing to pay it.

A further limitation on the deductibility for Canadian tax purposes of interest paid by a Canadian subsidiary to, inter alia, a foreign parent corporation or foreign affiliate is the "thin capitalization" rule. This rule is designed to prevent a subsidiary from claiming excessive interest expense in order to reduce its Canadian tax liability. If the amount of debt owed by the Canadian subsidiary to certain specified persons (including a foreign parent corporation and related persons) exceeds three times the total shareholders' "equity" in the subsidiary, a portion of the interest payable to specified non-resident lenders on the debt will not be deductible for Canadian tax purposes. Broadly, shareholders' equity is essentially the paid-up capital and retained earnings of the subsidiary. The debt owing to specified non-residents is defined to be the greatest amount outstanding at any time in the year. The unpaid portion of purchase price owing by a subsidiary to a parent corporation on account of inventory purchases must also be taken into account in making this calculation.

An amount advanced by a specified non-resident to an arm's length person on condition that the person make a loan to the subsidiary is deemed to be a loan directly from the specified non-resident. However, a loan guaranteed by a specified non-resident is not included in the calculation.

In order to avoid the impact of the "thin capitalization" rule, it is usually preferable for the Canadian subsidiary to borrow any amount in excess of three times equity directly from arm's length sources such as a bank.

The "thin capitalization" rules do not apply to funds advanced by a parent corporation to a Canadian branch operation.

During 2000, four changes to the thin capitalization rules, to take effect for taxation years that start after 2000, were proposed. The ratio is to be reduced to 2:1 from 3:1. The ratio of debt to equity is to be calculated as the average of the monthly balances during the year rather than on an annual basis. Debt guaranteed or secured by a specified non-resident will be deemed to be a debt owing to the specified non-resident (this proposal has since been deferred for further study). Finally, an exemption for manufacturers of aircraft and aircraft components is to be eliminated.

D. Withholding Tax

The Tax Act requires Canadian entities to withhold 25% of certain payments made to non-residents. If a Canadian subsidiary is established, Canadian customers dealing with it need not withhold tax on payments to it. However, if a branch operation is established, Canadian customers may be required to withhold an amount (usually 15%) in respect of certain payments to the branch operation which for these purposes is a non-resident person. Whether customers will be required to withhold tax from their payments will depend on whether these payments are in respect of rent, interest, dividends, royalties and other similar items. Any amounts withheld by customers will be credited against the Canadian tax liability of the branch on profits from the business earned in Canada. If no such Canadian tax liability exists in a year, the branch may claim a refund of the amounts withheld.

A subsidiary paying or crediting dividends to a foreign parent corporation is required to withhold tax in the amount of 25% (reduced by most bilateral treaties to 15% or 10% depending on the residence of the parent corporation and reduced to 5% pursuant to the Canada-U.S. Treaty). This withholding tax is in respect of the parent corporation's liability for Canadian tax on the dividend and is in addition to taxes paid by the subsidiary on its earnings. Withholding tax is payable only upon the payment or crediting of dividends; accordingly, this tax can be deferred until dividends are actually distributed by the Canadian corporation to its foreign shareholder. This withholding tax liability should be contrasted with the branch profits tax described earlier which is payable whether or not such income is remitted to the home country. However, this distinction may not be significant, since branch profits tax is reduced to the extent of new investment in Canadian business operations and since, for Canadian branches of U.S. corporations, the first $500,000 of earnings is exempt from branch profits tax, as described above.

Withholding tax also applies to amounts which a Canadian subsidiary pays or credits or is deemed to pay or credit to its foreign parent on account of interest, rents, royalties or similar payments. Pursuant to the Canada-U.S. Treaty, royalty payments "for the use of, or the right to use, computer software and for the use of or right to use any patent or information concerning industrial, commercial or scientific experience" are not subject to withholding tax.

Withholding tax applies to management or administration fees or charges, other than those which are simply a reimbursement of specific expenses incurred by a foreign parent on behalf of its Canadian subsidiary. If the foreign parent does not have a permanent establishment in Canada, the fees may not be subject to any tax in Canada. It should be noted that the Ontario Corporations Tax Act disallows 10/31st of such fees or charges, whether or not a federal withholding tax is exigible, effectively imposing the equivalent of a 5% withholding tax on the subsidiary in respect of such amounts.

E. Filing Requirements

The Tax Act requires a corporation that is either resident in Canada or that carries on business in Canada to file an annual information return disclosing information regarding transactions with non-arm's length residents. A separate annual information return is to be filed for each non-resident person with whom the corporation is dealing on a non-arm's length basis within six months of the end of the filing corporation's taxation year.

The information required relates to transactions between the filing corporation and the non-resident person such as sales, the performance of services, the payment of dividends and the payment of interest on loans.

For taxation years commencing after 1998, a Canadian taxpayer providing goods or services to a non-arm’s length non-resident must prepare and maintain (but not file) documentation to establish that such transactions took place at fair market value.

In addition, the Canadian tax authorities may serve a notice upon a person resident in Canada or a non-resident person carrying on business in Canada requiring that person to provide any foreign-based information or documents. It should be noted that this provision applies to both corporations and individuals. Foreign-based information or documents means any information or documents available or located outside Canada which may be relevant to the administration and enforcement of the Tax Act.

A judge may only set aside a requirement to file information if the requirement is unreasonable. The Tax Act provides that it is not unreasonable to request information in the possession of a non-resident person if the person served with the notice is related to the non-resident person. For example, a Canadian subsidiary of a U.S. corporation cannot claim that it is unreasonable to request it to provide information because the information is only available to, or in the possession of, its U.S. parent.

F. Customs Duties

A foreign business that exports goods to Canada, whether to its branch operation, to a subsidiary, or to an independent purchaser (including a distributor), should be aware of the added taxes and duties that may affect the price of the goods to Canadian customers. Most products are subject to three taxes which are imposed cumulatively: customs duty, federal goods and services tax and provincial sales tax. Certain products, such as tobacco and alcohol, also bear federal excise duty if they are produced in Canada. The rate of customs duty applicable to particular products is determined according to the federal Customs Tariff which classifies all imported goods into "tariff items" and sets out the rates applicable to each tariff item.

In the case of goods imported from the United States or Mexico, the provisions of the North American Free Trade Agreement ("NAFTA") (as well as the Canada-U.S. Free Trade Agreement (the "FTA")) determine the rate of duty applicable to each tariff item. NAFTA was implemented on January 1, 1994 and the FTA was implemented on January 1, 1989; both provided for the elimination of tariffs on North American goods over the following decade. As of January 1, 1998 most U.S. goods are duty-free. The gradual phase-out of duties on goods covered by NAFTA was to vary. The first five-year phase-out period ended as of 1998. There is a second phase-out period ending as of 2003 and a third, ending as of 2008. This declining tariff scheme only applies to goods that have sufficient North American content to satisfy the rules of origin tests set out in NAFTA. These rules are described below in Section XII of this booklet.

Where duties still apply, the rate of duty is applied to the "value for duty" of the imported goods. Value for duty is determined by the "transaction value", which is the actual charge made for the imported goods (if such value can be properly determined). Canadian law in this regard is in general conformity with the GATT Valuation Code. Generally speaking, the transaction value is the price paid or payable by the importer, adjusted to include certain factors such as commissions and brokerage fees, royalties and licence fees, and packing and packaging costs, or to exclude certain factors, such as transportation and insurance costs. If the transaction value cannot be used, either because the vendor and purchaser are related and such relationship has influenced the price, or because the importer is the same legal entity as the manufacturer and therefore has not purchased the goods, there are five alternative valuation methods. All of these methods are aimed at arriving at the amount that would have been the transaction value of the imported goods had such transaction value been available.

Where the buyer and the seller are related, such as where a Canadian subsidiary of a foreign corporation purchases products from its foreign home office, the transaction value will not be acceptable unless it can be shown that the buyer and seller deal with each other as if they were not related, or that the transaction value between the related parties closely approximates an amount which would be charged between independent parties for identical or similar goods, determined in accordance with a series of tests. The determination of whether the transaction value method is acceptable is made by the Customs Officer, on a case by case basis.

A Canadian branch of a foreign corporation is, for the purposes of the Customs Act, considered to be an importer, even though it is not a separate legal entity from the exporter corporation.

Where a classification or valuation problem is encountered, a formal ruling may be obtained from Canada Customs and Revenue Agency to enable the importer to establish the status of the goods and avoid the imposition of penalties as a result of improper valuation or classification.

G. *Goods and Services Tax*

The Goods and Services Tax ("GST") is a form of value-added tax imposed by the federal government. Generally speaking, GST is applied to all goods and services, with some limited exceptions. GST of 7% is collected and remitted at each level of sale. However, since the tax is intended to be borne by the ultimate consumer or end user, intermediate purchasers who use the good or service to provide another good or service will be entitled to a credit, known as an input tax credit, for the GST paid on the purchase by them.

Vendors are required to act as agents in collecting GST and remitting it to the government; the importer of record will be responsible for remitting the GST on imports. All persons engaged in commercial activity in Canada are required to register under the GST, other than businesses with less than $30,000 of annual sales or non-residents who are not carrying on business in Canada. Registrants may be entitled to receive a refund of all GST paid by them on all business purchases, including raw materials, inventories and capital assets. In each reporting period, registrants are required to remit (or entitled to receive) the difference between the GST charged on sales and the GST paid on purchases. Because of the input tax credit available to registrants, businesses which are not required to register may find registration beneficial where their customers will also be entitled to a GST input tax credit. Whether a non-resident carries on business in Canada through a branch or a subsidiary will have no impact on its GST liability.

The GST applies to almost all goods and services. Those items which are not subject to GST fall into two categories. "Zero-rated supplies", such as goods and services for export, professional services relating to establishing business operations in Canada, basic groceries and prescription drugs, are all technically subject to a 0% tax. Persons who manufacture or produce zero-rated supplies are entitled to claim input tax credits with respect to GST paid in connection with those supplies. Zero-rated supplies may also be imported free of GST. "Exempt supplies", such as financial services, residential rents and most health and dental care services, are not subject to tax. Persons who produce or provide exempt supplies are not entitled to input tax credits for GST incurred in producing or providing them. Other goods not subject to GST include commercial samples imported temporarily for display and warranty replacement parts imported and supplied for no consideration other than shipping and handling charges.

Small businesses are entitled to a fee for collecting GST, and very small businesses are exempt from any requirement to collect it. The filing and remittance requirements for a business will depend on the level of its annual sales.

Effective April 1, 1997, the Harmonizing Tax System ("HST") was implemented in Nova Scotia, New Brunswick and Newfoundland and Labrador. The single combined value-added tax replaced the federal and provincial sales tax systems and established a uniform sales tax rate of 15% in the participating provinces, resulting in a tax reduction of 3.77 percentage points in Nova Scotia and New Brunswick and a reduction of 4.84 percentage points in Newfoundland and Labrador. The HST introduced a mandatory tax-inclusive pricing system so that the price on the price tag is the final purchase price. The HST further added to the simplicity of the taxing system by not requiring separate registration for businesses already registered for the GST. Finally, the HST tax base is the same as the GST tax base so that basic essentials such as groceries and medical services continue to be tax exempt. The federal government would like to negotiate with other provinces to have them join this system.

H. Retail Sales Tax

All provinces except Alberta have retail sales tax systems. The rate of tax varies from province to province.

In Ontario, retail sales tax at the rate of 8% is payable on all tangible personal property purchased in Ontario or imported for consumption in Ontario. Tangible personal property is "personal property that can be seen, weighed, measured, felt or touched, or that is in any way perceptible to the senses," and includes certain computer programs, and natural and manufactured gas. The 8% rate is applied to the retail sale price, which includes customs duties as well as federal sales and excise taxes previously paid on the same goods. Ontario retail sales taxes are based on retail prices before the imposition of GST.

Where tangible personal property is purchased in Ontario or imported into Ontario for resale or lease, no retail sales tax is payable initially. Upon the subsequent sale or lease of such property to the consumer, an 8% retail sales tax is payable.

Although retail sales tax is imposed on the purchaser, the Ontario Retail Sales Tax Act requires the vendor to act as the province's agent for collection and remittance of the tax. Every vendor who sells or leases tangible personal property in Ontario is also required to obtain a vendor's permit under the Retail Sales Tax Act (a straightforward and inexpensive procedure).

I. Land Transfer Tax

In Ontario, a tax is generally imposed on transfers of land or on leases of land for a term (including renewals) longer than 50 years. The amount of the tax varies depending on the consideration paid, the type of land transferred and the residency status of the purchaser.

A purchaser pays transfer tax of 0.5% on the first $55,000 of consideration, 1% on consideration between $55,001 and $250,000, and 1.5% on the excess over $250,000. An additional tax of 0.5% is imposed on consideration over $400,000 for residential property with one or two single family units. In certain circumstances, full or partial refunds of land transfer tax, to a maximum of $2,000, are available to first time Ontario resident home buyers who purchase a newly constructed home.

Land transfer tax in Ontario is payable upon registration of a transfer of land or notice of lease in the appropriate Land Registry Office or 30 days after the disposition of a beneficial interest in land where the transferee has not registered a conveyance.

IV. Foreign Investment Review

The stated purpose of the Investment Canada Act (the "ICA") is:

> "To encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities and to provide for the review of significant investments in Canada by non-Canadians in order to ensure such benefit to Canada".

Parts III and IV of the ICA set out a notification and review procedure to be followed in connection with certain investments in Canada by non-Canadians.

A. "Non-Canadians"

The ICA distinguishes between "Canadians" and "non-Canadians". A Canadian is a Canadian citizen, a Canadian government, a Canadian controlled entity, or an individual who has been admitted to Canada as a permanent resident under the Immigration Act and who has been ordinarily resident in Canada for not more than one year after first becoming eligible to apply for Canadian citizenship. Since, in most cases, a permanent resident becomes eligible to apply for citizenship after having been in Canada for three years, the last category means that a permanent resident will revert to the status of a non-Canadian after having been in Canada for four years.

A Canadian entity is a corporation, partnership, trust or joint venture that is Canadian controlled. The rules relating to control are specific as shown in the following examples:

1. if a majority of the voting interests of an entity are owned by a Canadian or by two or more Canadians in a voting group, the entity is Canadian controlled;

2. if one Canadian, or two or more Canadian members of a voting

group, do not own a majority of the voting interests of an entity, but a majority of the voting interests are owned by Canadians, and it can be demonstrated that the entity is not controlled in fact through the ownership of voting interests by any one non-Canadian or by a voting group in which one or more non-Canadians own half of the voting interests, the entity is Canadian controlled; and

3. if a non-Canadian and a Canadian each own 50% of the voting shares of a corporation, the corporation is not a Canadian controlled entity.

The ICA contains specific sections intended to enable Canada to protect business activities related to "Canada's cultural heritage or national identity" ("cultural businesses"). One of those protections enables the Minister to deem an entity to be non-Canadian notwithstanding that the entity would not be determined to be non-Canadian on the basis of the specific technical rules in the ICA. This deeming ability only arises in connection with cultural businesses and only where the Minister is satisfied that the entity is controlled in fact (i.e. not necessarily legal control) by one or more non-Canadians.

To date, the government has identified publication, distribution, exhibition, production or sale of books, magazines, periodicals, newspapers, film or video products, print music and audio or video music recordings as cultural businesses.

B. Types of Transactions which are Caught

The notification and review provisions of the ICA are only relevant in acquisition transactions of the following types:

1. where the acquisition is the acquisition of a Canadian business carried on by a Canadian incorporated corporation, an acquisition of voting shares or an acquisition of all or substantially all of the assets used in carrying on the Canadian business;

2. where the corporation directly carrying on the business in Canada is not a Canadian incorporated corporation, the acquisition of all or substantially all of the assets used in carrying on the Canadian business. Thus, an acquisition of the shares of a foreign incorporated corporation directly carrying on business in Canada will not be notifiable or reviewable;

3. where an entity (other than a corporation) is directly carrying on a Canadian business or itself controls, directly or indirectly, another entity (other than a corporation) carrying on a Canadian business, an acquisition of voting interests in that entity. Thus, an acquisition of control of a Canadian business carried on by a foreign limited partnership by way acquisition of voting interests in that partnership will be notifiable or reviewable, whereas such would not be the case if

the business was carried on directly by a foreign corporation; and

4. where an entity (this time including corporations) directly or indirectly controls an entity in Canada carrying on a Canadian business, an acquisition of voting interests in that entity. Thus, although the acquisition of shares of a foreign incorporated corporation which directly carries on business in Canada would not be notifiable or reviewable, the acquisition of voting shares of a foreign corporation which owns shares of a Canadian incorporated corporation which carries on the business would be notifiable or reviewable.

Step transactions and acquisitions of control by more than one transaction or event are also caught.

C. *"Control"*

Once the type of acquisition is identified as one which may be reviewable or notifiable, the relevant questions then are whether control is being acquired and whether the relevant thresholds are met. The ICA contains a series of presumptions to assist in determining whether or not control is being acquired:

1. the acquisition of a majority of the voting interests of an entity is deemed to be an acquisition of control;

2. the acquisition of less than a majority of the voting interests of any non-corporate entity is deemed not to be an acquisition of control;

3. the acquisition of less than a majority but 33 1/3% or more of the voting shares of a corporation is presumed to be an acquisition of control, although that presumption can be rebutted if it can be shown that the corporation is not controlled in fact by the acquiror through the ownership of voting shares; and

4. the acquisition of less than 33 1/3% of the voting shares of a corporation is deemed not to be an acquisition of control.

The Minister's deeming ability in connection with cultural businesses also arises in determining whether control has been acquired. Once again, in considering whether control of a cultural business has been acquired, the Minister can deem control to have been acquired if it has been acquired in fact, notwithstanding that the technical rules contained in the ICA would not lead to such a finding.

D. *"Canadian Business"*

The notification and review rules only apply where the non-Canadian is establishing or acquiring control of a Canadian business. A Canadian business is a business carried on in Canada that has a place of business in Canada, one or more individuals in Canada who are employed or self-employed in connection with that business, and assets in Canada that are used in carrying on the business. A business carried on partly in Canada and partly in some other place is deemed to be carried on in Canada. Finally, a part of a business that is capable of being carried on as a separate business is a Canadian business if the business of which it is a part is itself a Canadian business. Thus, a division may be a separate Canadian business.

E. Notification Requirements

Part III of the ICA provides that any new business proposal, and any acquisition of control of an existing Canadian business having less than $5 million of assets, is not reviewable (subject to an exception referred to below). However, any non-Canadian who proposes to acquire control of a Canadian business with less than $5 million of assets or proposes to establish a new business, or who has actually established or acquired such a business, is required to give notice of its making that investment. The notice must be filed before the investment is implemented or within 30 days thereafter. In determining whether the $5 million limit has been met, the value of the assets is determined based on the entity's audited financial statements for the last fiscal year preceding implementation of the transaction.

The North American Free Trade Agreement resulted in the $5 million threshold being increased in 1993 to $150 million (adjusted each year thereafter for inflation - the 2000 threshold was $192 million). These increased thresholds are only relevant to investors from World Trade Organization Agreement countries ("WTO Investors") (including Americans) who are proposing to acquire Canadian businesses, or to any non-Canadians proposing to acquire Canadian businesses from WTO Investors controlling such businesses. There are more than 80 World Trade Organization Agreement countries. The increased thresholds do not apply, however, to the following: businesses involved in the development or production of oil or natural gas; businesses engaged in the production of uranium; businesses providing any financial service; businesses providing any transportation service; businesses engaged in the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form (other than the sole activity of printing or typesetting); businesses engaged in the production, distribution, sale or exhibition of film or video recordings; businesses engaged in the production, distribution, sale or exhibition of audio or video music recordings; businesses engaged in the publication, distribution or sale of music in print or machine readable form; and business engaged in radio communication, in radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services. All of the foregoing remain subject to the $5 million threshold.

The notice itself is a short two page form which merely elicits some basic information about the investor and either the new business or the target business. Upon the filing of a notice, the Director of Investments is required to provide the non-Canadian in question with a receipt stating that the investment is not reviewable or that the Director of Investments reserves the right to send the non-Canadian a notice for review. However, the Director of Investments' right to reserve his or her option to review a new business establishment, or an acquisition of control of a business with less than $5 million of assets (or the higher levels where WTO Investors and non-excluded businesses are involved), only arises if the business is a cultural business.

If the transaction involves a cultural business, the Canadian government may issue an order for its review, but it must do so within 21 days after the certified date of receipt of the original notice.

As stated earlier, no notification is required if the acquisition is not of a type described above or if the acquisition does not amount to an acquisition of control. With respect to new business establishments, no notice is required if the new business is related to a business already carried on in Canada by the non-Canadian, unless the new business is within any of the sensitive areas outlined above.

F. Indirect Acquisitions

The ICA also applies to indirect acquisitions of control. Examples include acquisitions by one foreign corporation of the shares of another foreign corporation which owns a Canadian subsidiary, or mergers of two foreign corporations, one or both of which own or owns one or more Canadian subsidiaries.

Most indirect acquisitions will likely not be reviewable under the ICA. The $5 million threshold (or the higher levels where WTO Investors and non-excluded businesses are involved) applies where the value of the assets of a Canadian entity represents more than 50% of the value of the assets of all entities being acquired. However, where the value of the assets of the Canadian business represents 50% or less of the value of the assets of all entities being acquired, the threshold increases to $50 million (Canadian). Indeed, indirect acquisitions by WTO Investors or from WTO Investors in those circumstances are not reviewable at all. Since indirect acquisitions often involve Canadian businesses that represent 50% or less of the value of the assets of all entities being acquired, most indirect acquisitions are not reviewable.

With respect to those indirect acquisitions that are not subject to review, a notification must still be filed. The investment may become subject to review if it involves a business within any of the sensitive areas described above.

G. The Review Process

In those cases where there is a review required, the ICA specifically sets out the timing of the review process.

Once a complete application has been received by the Director of Investments, a receipt is issued. If the Director does not issue a deficiency notice within 15 days after an application has been received, the application is deemed to be complete. After the certified date of receipt of a completed application, the Minister has 45 days to make his or her determination. If he or she does nothing within the 45 day period, the application is deemed to be allowed. However, if the Minister is unable to complete his or her assessment of the application within that time frame, the Minister is entitled to notify the non-Canadian to that effect. The Minister then has an additional 30 days to make his or her determination or "such further period as may be agreed on by the applicant and the Minister". Once again, if he or she does not send notice of allowance or disallowance within the additional 30 day time period, or the longer period agreed to by the applicant and the Minister, the application is deemed to be allowed. Our experience is that most applications are dealt with within 45 days.

Upon the filing of an application for review pursuant to the ICA, the file is assigned to an assessor. The assessor conducts a detailed investigation of the application and prepares a report for the Minister. The Minister then makes the decision to either allow or disallow the proposal. There is no right of appeal from the decision of the Minister.

In conducting his or her review of the application, the Director of Investments will advise all Canadian provinces that will likely be affected by the proposed investment, and any other appropriate governmental departments. The assessor assigned to the file will discuss the application with the applicant and his or her representative and will attempt to elicit all relevant information relating to the proposal. The Director of Investments' guidelines indicate that he or she will keep an applicant advised of any matters which may delay an application or which may cause the Minister concern or difficulty in making his or her decision in order to enable the applicant to respond to those issues and to demonstrate the net benefit more clearly.

Where the Minister is not satisfied that the investment is likely to be of net benefit to Canada, he or she is required to notify the applicant to that effect. The applicant then has the right to make additional representations and to submit additional undertakings within 30 days from the date of that notice from the Minister (or within such longer period of time as may be agreed to by the applicant and the Minister). Once that period of time expires, the Minister is required to assess the application on the basis of the original information gathered by his or her staff, and in light of any additional representations and undertakings given, and then is required "forthwith" to notify the applicant of his or her decision. The total maximum elapsed time (subject to any agreement of the parties to alter the time limits) before the Minister is required to notify the applicant of his or her decision is therefore 45+30+30 days.

Applications with respect to reviewable acquisitions must be filed, and a decision rendered, before the acquisition may be implemented. However, the transaction can be implemented before a decision is made or an application is filed in any of the following situations:

1. if the transaction was originally only notifiable and became reviewable as a result of a Cabinet decision (that is, if it is a new business establishment or an acquisition under $5 million or the relevant higher threshold for WTO Investors, which, in either case, involves one of the sensitive areas);

2. if the transaction is an indirect acquisition of control of a corporation outside Canada; or

3. if the transaction is one in respect of which the Minister grants specific permission to implement an investment because he or she is satisfied that a delay would cause undue hardship to the non-Canadian or would jeopardize the operations of the Canadian business being acquired.

In the first case, the application for review is to be filed forthwith upon the non-Canadian being notified that the Cabinet has opted to have the new investment or acquisition reviewed. In the latter two cases, the application must be filed, at the latest, 30 days after implementation of the transaction.

If the Minister does not allow an application, the investment cannot be implemented, or, if the investment has already been implemented, the non-Canadian is required to divest itself of control of the Canadian business that is the subject matter of the application.

If an investment proposal is allowed, the ICA provides a mechanism to continue to monitor the investment. The applicant is required to submit information relating to the investment as required by the Director of Investments in order for the Minister to ensure that the investment is being carried out in accordance with the terms of the application originally filed by the non-Canadian, and any representations or undertakings given in connection with that investment. The Director of Investments' guidelines indicate that an evaluation will normally be made by 18 months after the implementation of the investment. The investment will be judged in the context of the overall results and will not be further monitored if the evaluation discloses implementation substantially consistent with the original expectations and subsequent economic circumstances, with no major commitments yet to be fulfilled. If the latter is not the case, the Director of Investments and the investor will together determine an appropriate time for future follow-up. The guidelines specifically recognize that plans and undertakings are based, to some extent, on projected circumstances and that, where inability to fulfill a commitment is the result of factors beyond the control of the investor, the investor will not be held accountable.

H. "Net Benefit" Test

A reviewable investment will not be allowed unless "net benefit" to Canada can be demonstrated. The ICA contains a section which describes in general terms the areas of possible benefit. The Director of Investments has indicated that both positive and negative factors will be considered, and net benefit will be shown "when the aggregate net effect is positive, regardless of its extent."

I. Exempt Transactions

The ICA contains a series of exemptions describing transactions which will not give rise to a review and which will also not require a notice to be filed. Such exemptions include: the acquisition of control of a Canadian business in connection with the realization of security granted for a loan and not for any purpose related to the provisions of the ICA; the acquisition of control of a Canadian business for the purpose of facilitating its financing and not for any purpose related to the provisions of the ICA; and any corporate reorganization where the ultimate direct or indirect control of the Canadian business remains unchanged.

J. Penalty and Enforcement Provisions

The Minister is entitled, in certain circumstances, to send a demand to a non- Canadian requiring the non-Canadian to cease contravening the ICA, to remedy a default under the ICA, to justify any non-compliance with undertakings given in connection with an investment proposal, or to explain why there is no contravention of the ICA. Those circumstances include: a failure to give a notice or file a review application in the appropriate circumstances; the implementation of an investment on terms and conditions that vary materially from those originally disclosed; the implementation of a reviewable transaction that either has not been reviewed or which has been reviewed and has been disallowed; the failure of a non-Canadian to divest itself of control of a Canadian business acquired under reviewable circumstances where the review has resulted in a negative decision; failure to comply with undertakings given or to comply with any provisions of the ICA or its regulations; or the entering into of a transaction or arrangement primarily for a purpose related to the ICA.

If the non-Canadian fails to comply with the Minister's demand, the Minister is entitled to apply to a court for such order as is required, in the court's opinion, in the circumstances. Such an order may involve any of the following: a direction to the non-Canadian to divest itself of control of the business on such terms as the court deems just and reasonable; a direction to comply with a written undertaking given; an injunction to prevent the non-Canadian from taking any actions that might prejudice the ability of a court on a subsequent application to order divestiture of the investment; the imposition of a penalty not exceeding $10,000 for each day the non-Canadian is in contravention of the ICA; the suspension or revocation of voting rights on any voting interests acquired by the non- Canadian; and the disposition of any voting interests or assets acquired.

K. Publicity

It should be noted that when notice is given of the establishment of a new business or acquisition of control of a Canadian business, the fact that such notice was given is made public. In addition, review decisions are made public. That is, the Minister will publicize the fact that a proposal by X Limited to acquire Y Limited was allowed or disallowed. The Minister is also entitled to disclose information contained in any written undertakings relating to an investment that is allowed.

V. Intellectual Property

Intellectual property law in Canada is governed by statutory provisions and the common law. It is usually divided into five distinct areas: trade marks, patents, copyright, industrial designs and trade secrets.

A. Trade Marks

The federal Trade Marks Act (the "TM Act") governs registration and many aspects of licensing of trade marks in Canada. Under Canadian law, registration is not absolutely required and trade mark rights can be acquired through use. However, unless a trade mark is registered, the owner has no right to prevent a third party from using a similar mark in a geographic area of Canada where the owner is not actually using, or has not established a reputation in, its trade mark.

Since the degree of protection afforded to unregistered trade marks is somewhat limited, many businesses will attempt to obtain registration of their trade marks under the TM Act. Registration under the TM Act provides cross-Canada protection (even in areas where the mark is not actually in use). The registration is valid for 15 years, and may be renewed for an unlimited number of successive 15 year terms. The TM Act also provides a statutory cause of action for infringement of a registered trade mark which is a procedural advantage granted to owners of registered trade marks in the event of trade mark litigation.

An application for registration of a trade mark may be based on one or more of the following grounds:

1. *Use in Canada:* Use in Canada occurs with respect to wares when they are sold in association with the trade mark in the ordinary course of trade. Use in Canada occurs with respect to services when the trade mark is used or displayed in the performance or advertising of the services.

2. *Making known in Canada:* A trade mark application may be filed on the basis that a mark used in a foreign "convention" country has become well known in Canada by reason of the distribution of wares in Canada or the advertising of wares or services in printed publications or by radio or television broadcasting. This basis for registration may be relied upon only by a foreign applicant, and it is a difficult basis to establish if challenged.

3. *Registration and use abroad:* An applicant who applied for or registered a trade mark in its country of origin, and has used the mark in any country, may be able to obtain registration of the trade mark in Canada if the Canadian application is filed within six months of the first application for registration in the foreign country.

4. *Proposed use in Canada:* An application based on proposed use in Canada must contain a statement that the applicant intends to use the trade mark in Canada in association with the wares and/or services described in the application. The application will be allowed without the necessity of commencing use of the trade mark although an affidavit or declaration must be submitted attesting to the commencement of use before a registration will be issued.

The Registrar of Trade Marks may refuse an application for registration of a trade mark on several grounds. These include the following:

1. the trade mark is confusing with a registered trade mark;

2. the trade mark is primarily the name or surname of an individual who is living or who has died within the preceding 30 years;

3. the trade mark is either clearly descriptive or deceptively misdescriptive in the English or French languages of, among other things, the character or quality of the wares or services in association with which it is used or proposed to be used; or

4. the trade mark consists of symbols such as royal or governmental arms, flags or crests, or scandalous, obscene or immoral words or devices.

As indicated above, registration under the TM Act will afford the owner of the trade mark a statutory cause of action for infringement of the trade mark. In addition, other statutory and civil causes of action exist for violation of trade mark rights. The Canadian Criminal Code also contains provisions prohibiting the copying or defacing of a trade mark. Owners of trade marks may enforce their rights in respect of a trade mark by criminal prosecution, or by bringing a civil action for damages and/or an injunction.

It often happens that the use of a trade mark is by a licensee and not by the owner of the trade mark. For example, a foreign trade mark owner might grant a license to its subsidiary to use its mark in Canada. Historically, the licensing of a trade mark was prohibited because it was thought to impair the distinctiveness of the character or quality of the wares or services which were no longer under the direct control of the owner. In order to reconcile the traditional view with business needs, the TM Act created a public registration system which allowed licensing of a trade mark but only if the mark was first registered and the fact that it was licensed to a third party was also registered. The mandatory registration requirements for trade mark users have since been repealed and replaced with provisions which allow third parties to make use of trade marks, provided that the third party gives public notice of the identity of the owner of the trade mark and the fact that the use of the trade mark is a licensed use.

B. *Patents*

The federal Patent Act establishes a non-renewable 20 year monopoly from the date that a patent is granted for an invention. An invention is defined as any new and useful art, process, machine, manufacture, or composition of matter, or any new and useful improvement thereof. A patent may not be issued for substances prepared by chemical processes and intended for food or medicine, unless the methods or processes of manufacture are disclosed. Further, a mere scientific principle or abstract theorem is not patentable.

A patent confers upon the inventor or his or her legal representative the exclusive right to make, use or sell the invention in Canada for 20 years. However, the Patent Act provides that any person may apply to the Commissioner of Patents, after three years from the date of grant of the patent, to obtain a compulsory licence if the patentee is abusing his or her exclusive rights. Under the Patent Act, abuse of the patent will be deemed to exist in a number of circumstances, such as failing to work the patent in Canada on a commercial scale without a satisfactory reason, or failing to meet the demand for the patented article in Canada to an adequate extent and on reasonable terms. As well, the Patent Act contains specific rules governing the granting of compulsory licences of patents which were granted before December 21, 1991, relating to food or medicine.

Generally, a patent will not be granted if public disclosure of the invention has been made at any time prior to the filing date. However, if such disclosure was made by the applicant, or by someone deriving the information from the applicant, during the one year period prior to the filing date, the patent may be granted.

A patentee may assign or license its rights in a patented invention. An assignment must be in writing and may be registered in the Canadian Patent Office. A subsequent assignee whose assignment is first recorded in the Patent Office will defeat the title of a prior assignee, except in the case of actual knowledge as to a previous assignment. A licence must be registered but need not be in writing.

C. *Copyright*

The federal Copyright Act defines copyright as, in part, the sole right to produce or reproduce a work, or any substantial part thereof, in any material form. In Canada, copyright protection arises automatically upon the creation of a work. There is no requirement to register the copyright or to mark a work.

Under the Copyright Act, there is copyright in Canada in every original literary, dramatic, musical and artistic work. Countries (including the U.S.) belonging to the Berne Convention, the Universal Copyright Convention or the World Treaty Organization are entitled to the benefits of the Copyright Act in Canada. In general, copyright protection subsists in a work for the life of the author plus 50 years after his or her death. If the author cannot be identified, the term is the lesser of 50 years from the first publication date and 75 years following the creation of the work. Certain shorter terms apply to particular works, including photographs, phonograph records, posthumous works, joint works and Crown works.

In order to qualify for copyright protection, the work must be original. The requirement for originality relates to the form of expression and not to the ideas expressed in the work. The work need not be of great literary merit.

Copyright protection gives the owner of the copyright the right to prevent publication or reproduction of works already published, or works already composed but not yet published. It does not protect against similar works which are developed wholly independently of the copyrighted work. It also does not protect ideas. Only the forms of expression or the actual materials which embody the ideas are protected.

The general rule as to ownership of copyright in a work is that the author of the work is the first owner of the copyright. However, if the work was created in the course of employment, and the author is not found to be an independent contractor, the employer will be deemed to be the copyright owner. In the case of an independent contractor, unless the contract expressly provides otherwise, the contractor will be the first owner. The provisions of the Copyright Act provide that the owner may assign his or her work, provided that the assignment is by instrument in writing and is signed by the owner.

Because the Copyright Act came into force in 1924, several difficulties have arisen in applying the concepts of that time to recent technological innovations. Of particular importance is the issue of whether computer programs are protected by copyright. According to the Copyright Act, a computer program constitutes a "literary work" which is expressly protected by copyright law. The Act defines a computer program as "a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result." Under this definition, the human readable portions of a computer program (known as "source code") whether expressed as a print-out on paper, in an external storage medium (such as a disk or tape) or in the main memory of a computer chip, have been held to qualify for copyright protection. In addition, the Supreme Court of Canada has stated that copyright subsists in computer programs embodied on a chip.

Before a computer program can qualify for copyright protection, it must meet two prerequisites: (i) it must be an expression of an idea; and (ii) the expression must be an original literary work. Copyright in computer programs only protects the expression of the ideas and not the underlying concepts themselves. Accordingly, there is nothing in Canadian copyright law to prevent anyone from using the original ideas in a computer program (i.e., the underlying algorithm) to create a new or improved work. One must therefore look to another form of protection, such as the laws protecting trade secrets, to guard ideas against imitation.

The Copyright Act also contains provisions for protecting an author's moral rights in copyrightable works by providing the author with the right to the integrity of the work and, where reasonable in the circumstances, the right to be associated with the work as its author by name or under a pseudonym, as well as the right to remain anonymous.

While there is no statutory requirement in Canada to place a copyright notice in the form of the letter "c" in a circle, along with the year of publication of the work and the name of the owner of the copyright, it may be prudent practice, if only because it gives notice to third parties of the owner's copyright.

The Copyright Act provides that someone who knowingly infringes a copyrighted work may, on summary conviction, be liable to a fine of up to $25,000, or to imprisonment for a term of six months, or both. More serious, however, is the penalty on conviction on indictment of up to $1 million or to imprisonment for up to five years, or both. This provision is designed to discourage pirated works. It should also be noted that copyright infringements which cause economic loss or increase the risk of prejudice to the economic interests of the owner of a copyright may result in criminal sanctions under the fraud section of the Criminal Code.

D. Industrial Designs

Protection for industrial designs in Canada is available under the federal Industrial Design Act (the "Design Act"). Industrial design comprises features of shape, configuration, pattern or ornamentation applied to a manufactured article. However, it is only the aesthetic or ornamental aspects of the design that are registrable and protectable under the Design Act. Designs which pertain only to the utilitarian function of an article are not registrable.

The protection of industrial design rights under the Design Act only applies where the design has been registered. Registration gives the owner or his or her licensee the exclusive right to apply that design to an article for the purposes of sale, rent or importation. The registration subsists for a period of 10 years from the date of initial registration. After this 10 year period, the design falls into the public domain.

In order to be entitled to registration, the industrial design must be original and it must not have been in use by any other person at the time of its adoption by the designer or author. To be original, the design may be new or old, provided that no person prior to the designer had previously applied that design for the purpose of ornamenting the particular article in question. Originality also requires a certain degree of difference from old designs. Although a high degree of ingenuity in this regard is not required, a slight change or insubstantial variation will not be sufficient.

In order to be protected by registration, a design must be registered within one year from the date of its first publication in Canada. Publication means offering or making the design available to the public and includes, for example, selling the article, showing the article at a trade show or during a promotion, or disclosing the design for the purpose of soliciting orders. However, showing a design to a third party for the purpose of having prototypes made where the design and the prototype are treated and held as confidential would not constitute publication.

The application for registration of an industrial design can only be made by the owner of the design. The owner is defined as the author of the design, unless the author created the design for another person for consideration, in which case that other person is the owner. An assignee from an owner may apply for registration; however, registration will only be possible where the assignment is evidenced in writing and recorded in the Industrial Design Office.

In order to protect a design, the Design Act used to require that a marking appear on the article, or on a label attached to the article, indicating that the design had been registered. The Design Act no longer contains any marking requirements; however, it is beneficial to mark the article with a circled "D", together with the name of the registered party. This will help to ensure that the rights in the design will be properly protected, since a court cannot award any remedy, other than an injunction, if a defendant proves that it was not aware that the design in question was registered, and a defendant will have a more difficult time proving lack of awareness where the article was clearly marked.

E. Trade Secrets

There are two ways businesses can protect their trade secrets. First, they can develop internal policies and procedures for recording, storing and safeguarding their confidential information, and second, where appropriate, confidential information may be protected through the patent or copyright legislation discussed above.

Unlike the protection offered by patents or copyright, there is no statutory protection in Canada for trade secrets or confidential information. Rather, the Canadian law of confidential information has evolved through the courts. While "case-made" law is often more flexible and adaptable to change, it also carries with it a level of uncertainty that makes it difficult to predict any given outcome. Nevertheless, many of the fundamental principles of the law of trade secrets are fairly well established. For example, in order to be regarded as confidential, information must have a quality of confidence about it. Once the information loses this quality of confidence, it will no longer be considered confidential information and will no longer be subject to protection.

Factors which courts will examine in order to determine whether the information has the necessary quality of confidence include the extent to which the information is known outside the business, whether the information is known by the employees and others involved in the business, the value of the information and the extent to which measures were taken to guard the secrecy of the information. Confidential information may lose the necessary quality of confidence if it is publicly disclosed. This is true whether the information is disclosed by the confider, a confidant or a third party.

It is important to note that information need not be "secret" in order for it to be classified as "confidential". Several prominent Canadian cases have recognized the "springboard" theory of confidential information. The "springboard" theory dictates that information may be treated as confidential even though the sources of the information may be known to the public. The theory is predicated on the belief that anyone who expends time and resources analyzing or collecting publicly available information for the purpose of a commercial venture should be granted protection under the law. The recipient of any such information has a duty not to use or disclose it, as such disclosure would result in the confidant gaining an unfair advantage over the general public by using information which it could have obtained independently, but only if an equivalent amount of time and effort was invested.

The law of trade secrets is often resorted to in cases involving employer/employee relationships. Since all employees owe a duty of good faith to their employers, they cannot use or disclose confidential information, highly confidential information or trade secrets while employed. However, upon leaving the business, employees are only prohibited from using trade secrets and highly confidential information.

In contrast to the standard applied to employees, a higher standard has been held to apply to top management. Such individuals have been held to owe a continuing duty of good faith and loyalty to their employer even upon termination of their employment. This fiduciary duty prevents high ranking employees from obtaining corporate opportunities for themselves to the detriment of the employer.

Generally speaking, courts dislike having to determine the nature and extent of employer/employee confidentiality obligations in the post-employment phase. Canadian courts have indicated their preference that employers and employees express their agreement concerning post-employment use and disclosure of confidential information and trade secrets in a written contract.

The courts are then able to analyze the contract, compare it to other similar contracts, and assess the reasonableness of its terms.

If there are express contractual terms governing the use and disclosure of confidential information between the employer and employee, the courts will enforce the contract, provided that it does not constitute a restraint of trade. If the contract does not expressly provide for the treatment of confidential information and trade secrets, the courts may decide to imply terms into the contract in order to regulate the use and disclosure of confidential information and trade secrets between the parties.

VI. *Employment Legislation*

Canada has labour laws at both the federal and provincial levels. The federal government has jurisdiction over specifically designated federal works and undertakings including interprovincial transportation, banking, radio broadcasting. The provincial governments have jurisdiction over undertakings primarily within their boundaries. Most businesses are governed by provincial law except for federal employment insurance and Canada Pension Plan laws.

A. *Provincial Legislation*

The Ontario Employment Standards Act (the "Ontario Employment Act") is broad legislation which sets out standards respecting the minimum conditions of employment in most industries. Employees may have their entitlements increased by other legislation, by an agreement between an individual employee and employer, by a collective agreement or by the common law. Some of the more important provisions of the Ontario Employment Act are as follows:

1. *Statutory Holidays:* The Ontario Employment Act sets forth eight public holidays per year which employees are to have as vacation with pay. Most employees who work statutory holidays are entitled to be paid their regular wages plus a premium wage of time and one-half for each hour worked. Alternatively, the employee may agree to take another day in lieu of the public holiday in which case he or she will be entitled only to regular wages for the public holiday worked.

2. *Hours of Work:* Except for certain industries, a maximum work day is to be eight hours and a maximum work week 48 hours; a permit and the consent of the employee is required for excess hours beyond 48 hours. Any hours worked in excess of 44 hours per week are to be paid at time and one-half. There are specific provisions governing holiday and overtime pay for specific industries. The Ontario government has enacted legislation which will allow an employee to agree to work up to 60 hours a week without the necessity of a permit. It is anticipated that the change will come into effect in 2001.

3. *Vacation with Pay:* A vacation of at least two weeks with pay must be given to each employee including part-timers, for every 12 months worked.

4. *Equal Pay:* Equal pay must be given to men and women who perform equal work.

5. *Termination of Employment*: If the employment of an employee is terminated without just cause, that employee must receive at least the following minimum statutory notice periods or pay in lieu of notice:

   a. if he or she has worked from three months to less than one year - one week
   b. if he or she has worked from one year to less than three years - two weeks
   c. if he or she has worked from three years to less than four years - three weeks
   d. if he or she has worked from four years to less than five years - four weeks
   e. and so on until the employee has worked for eight years or more - eight weeks.

6. *Severance Pay:* In cases of termination of large groups of employees, the length of required notice is increased considerably. In addition to notice or pay in lieu of notice, a dismissed employee with five or more years of service may be entitled to severance pay of one week's pay per year of service to a maximum of 26 weeks. Severance pay is payable when an employee with five or more years of service is terminated and a) 50 or more employees are being terminated within a six month period due to a discontinuance of all or part of the business at a particular location; or b) the employer's annual payroll is $2.5 million or more. In certain cases of mass termination (50+ employees) the employer may also be required to give advance notice to the Ministry of Labour of the impending terminations.

7. *Common Law Requirements for Notice on Termination:* The notice requirements in the Ontario Employment Act are only minimum notice requirements. An employee can elect to proceed either under the Ontario Employment Act for the statutory minimums or sue under the common law for greater amounts. The common law requires that an employee be given "reasonable" notice of termination, unless he or she has been terminated for cause or has entered into an employment agreement which specifically deals with notice requirements on termination. What is "reasonable" according to Canadian courts is often significantly greater than what the Ontario Employment Act provides and depends on a number of factors. These factors include the seniority of the employee, the length of service with the employer, the type of work performed by the employee and the age of the employee. In order to avoid a costly problem, an employer would be wise to enter into a written agreement with each employee prior to hiring that employee

specifying the employee's rights on termination. Thus, an employer may be able to limit the employee's entitlement to the minimum provided in the Ontario Employment Act.

The entitlement of employees to notice on termination of employment, or pay in lieu thereof, is an issue which must always be addressed when an operating business is being purchased. The potential liability of the buyer to employees whose employment is continued after the sale may in part depend on the length of service of the employee with the seller.

8. *Pregnancy Leave:* A pregnant employee who has been employed by the same employer for a period of at least 13 weeks immediately preceding her estimated date of delivery is entitled to receive an unpaid leave of absence of at least 17 weeks following birth, miscarriage or still-birth.

9. *Parental Leave:* A parent may take up to 35 weeks of unpaid parental leave upon the birth or adoption of a child. A mother who has taken pregnancy leave may also take parental leave, for a combined leave of absence of 52 weeks.

10. *Minimum Wage:* The Ontario minimum wage (except in certain industries) is $6.85 per hour for employees 18 years of age and over.

Certain types of employees are specifically excluded from the operation of some of the provisions of the Ontario Employment Act (although not the maternity leave and termination of employment provisions). Those employees include most professionals and some commissioned salespeople.

The Canada Labour Code sets out standards respecting conditions of employment for federal works and undertakings. Since most businesses are governed by provincial law, the Code is not discussed here. Typical examples of federally-regulated companies include banks, inter-provincial trucking, airlines and telecommunications.

B. *Employer Health Levy*

All employees in the Province of Ontario are covered by the Ontario Health Insurance Plan. All Ontario employers are required to pay an employer health levy based on the total annual gross wages, salaries and other remuneration paid by the employer. The assessment formula is complex. The rates of taxation vary from a minimum of .98% of payroll to a maximum of 1.95% of payroll. There are no individual premiums payable by employees with respect to the plan.

C. *Employment Insurance*

The federal Employment Insurance Act requires all employers and employees to make contributions to the Employment Insurance Fund maintained by the federal government. As of January 1, 2001, the premium rate for employee contributions is 2.25% of insurable earnings to a maximum of $877.50 per year.

The employer pays its contribution at a rate of 1.4 times the employee's premium and remits the total to Canada Customs and Revenue Agency ("CCRA"). An employer's contributions to the Employment Insurance Fund are deductible for Canadian income tax purposes as a normal business expense. If an employer has a short-term disability or sick leave plan, it may be able to obtain a premium reduction.

Approximately 95% of employees are protected by employment insurance. In order to be eligible, an employee must be employed for a specified number of weeks in the preceding 52 week period, such number varying between regions. Employees are entitled to insurance benefits in the event of loss of employment due to termination without cause, layoff, maternity and parental leave, or illness, provided that they meet a number of eligibility criteria.

D. Canadian Pension Plan

The federal Canada Pension Plan (the "Plan") provides for retirement pensions for contributors, survivor benefits for widows and dependent children of contributors, and certain disability benefits. The Plan is compulsory for employees who are 18 years of age and have not reached 70 years of age, if they are employed in pensionable employment during the year and are not receiving a Canada (or Quebec) Pension Plan retirement or disability pension. With a few exceptions, all employers, employees and self-employed individuals are required to contribute.

Under the Plan, the employee's contribution is deducted at source. The employer is required to deduct 4.3% of the employee's earnings up to the maximum pensionable earning amount of $38,300, less an exemption of $3,500. The maximum pensionable earning amount and the exemption are set annually by the CCRA. Subject to a specified maximum payment set by the CCRA annually ($1,496.40 per employee in 2001), the employer makes a contribution that matches the employee's contribution and remits the total to the CCRA. The employer's contribution under the Plan is deductible for Canadian income tax purposes as a normal business expense.

E. Compensation to Injured Workers

The Workplace Safety and Insurance Act (the "WSIA") requires certain business to belong to a mandatory insurance plan administered by a Crown corporation, the Workplace Safety and Insurance Board. Other businesses may elect to obtain coverage through the Board. The WSIA provides that, workers who sustain personal injury by accidents arising out of and in the course of their employment or who are disabled by industrial disease are entitled to compensation out of a fund made up exclusively of employers' contributions. This does not apply where the injury is attributable solely to the serious and wilful misconduct of the employee and does not result in death or serious disability. No contributions from employees are permitted. Injured employees are given substantial rights of reinstatement and employers are obliged to cooperate in providing the injured employee modified work duties, where necessary.

The industries covered by the WSIA are divided into groups and classified according to their potential hazard. The amount to be contributed by an employer is dependent upon the particular type of operation, as well as the individual injury experience of the particular employer. The contribution rate is a percentage of payroll for the year. Payments out of the fund are made to an injured worker without determination of fault. Workers covered by the WSIA lose the right to sue their employer for damages in connection with the injury.

F. Human Rights Legislation

The Ontario Human Rights Code provides that no employer may discriminate in hiring, promoting, referring, recruiting, transferring, dismissing, or imposing probationary periods, based on race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, same-sex partnership status or handicap. The Ontario Human Rights Commission investigates complaints of discrimination and administers appropriate penalties. The Canadian Human Rights Act is similar federal legislation.

G. Legislated Holidays in the Retail Sector

The Ontario Retail Business Holidays Act provides that, subject to certain enumerated exemptions, every person carrying on a retail business in a retail business establishment in Ontario must ensure that his or her establishment is not open to the public on a holiday. "Holiday" for the purpose of this legislation means New Year's Day, Good Friday, Easter Sunday, Victoria Day (a Canadian holiday in May of each year), Canada Day (Canada's birthday - July 1st), Labour Day, Thanksgiving Day (in Canada this occurs in October), Christmas Day and any other public holiday declared by proclamation.

Although retail businesses are allowed to be open for business on Sundays, employees have an absolute right to refuse Sunday work.

H. Unions and Collective Bargaining

As in many other countries, employees in Canada are permitted to join together in unions for the purpose of bargaining collectively with employers. In Ontario, the Labour Relations Act governs the actions of employees (with certain exceptions) in selecting a union. If a majority of employees in an appropriate bargaining unit wish to be represented by a union, the Ontario Labour Relations Board will certify that unit and the employer is required to bargain in good faith with that union. Where a union and employer are negotiating a contract for the first time, the Labour Relations Board can force parties to submit to arbitration. The arbitrator can fix an agreement for a period of up to two years.

Employees without a valid collective bargaining agreement are entitled to strike and similarly, employers are entitled to lock out. This entitlement arises only after the collective agreement expires and certain prescribed conciliatory procedures fail.

When purchasing a business in Ontario, one must exercise caution. Generally, if the business has unionized workers, the buyer will have to deal with that union. Further, if a collective agreement is in force, the buyer will be bound by it.

I. Pay Equity Act

The Ontario Pay Equity Act intends to ensure that male and female employees receive equal pay for work of equal value. In general, the Pay Equity Act applies to all Ontario employers in the public sector, and to all Ontario employers in the private sector who employ 10 or more employees. Private sector employers with 100 or more employees have specific obligations to prepare and post a Pay Equity Plan. Smaller employers must review their compensation practices to ensure that there is compliance with the Act, but there is no duty to post a formal Plan.

The Pay Equity Act imposes a duty on employers to compare and value female and male job classes on the grounds of skill, effort, responsibility and working conditions. Pay equity is achieved when the job rate for the female job class that is the subject of the comparison is at least equal to the job rate for a male job class in the same establishment, where the work performed in the two job classes is of equal or comparable value, subject to several permissible differences in compensation.

J. Employment Equity Act

The federal Employment Equity Act is an affirmative action program which establishes numerical quotas in various job categories for the benefit of four target groups: women, aboriginal peoples, disabled people, and visible minorities. All businesses with 100 or more employees who do business worth $200,000 a year or more with the federal government are required, as a condition of doing business with the federal government, to provide the federal government with a Certificate of Commitment to implement employment equity. In addition, the Employment Equity Act applies to employers who employ 100 or more employees on or in connection with a federal work, undertaking or business, including such areas as transportation, broadcasting and banking.

K. The Charter of the French Language

In order to protect its linguistic and cultural heritage, the Province of Quebec has enacted specific legislation regarding the use of the French language that impacts on enterprises wishing to carry on business in Quebec. The legislation is not applicable to business operations outside Quebec. The Charter of the French Language, or Bill 101 as it is commonly referred to, provides that French is the official language in Quebec and includes provisions aimed at implementing French as the normal and everyday language of work, instruction, communication, commerce and business in the province. The Charter grants to all people in Quebec the right to work in French. Such a right may have to be claimed by an employee, especially if he or she works in a non-French environment.

Employment and promotion offers, as well as internal directives, policies and reprimands, must be written in French. However, they may be published in another language together with the French version. On the other hand, collective agreements must be drafted in French, although a translation of such agreements may be available.

All companies employing 50 persons or more must apply for a francisation certificate from the Office de la Langue Francaise (the "Office"), the body responsible for applying The Charter of the French Language. The Office will initially deliver a temporary certificate and determine a time period for the implementation of changes and measures aimed at increasing knowledge and usage of French in the internal procedures and communications, as well as the external relations, of the firm. The Office will technically support the company during the francisation process, the length of which will be adapted to the needs and the situation of the particular company. At the end of the process, the Office will grant a permanent certificate.

No employee in Quebec may be dismissed, demoted or transferred for the sole reason that he or she speaks French or does not master another language. An employer may not require knowledge of a language other than French, unless the performance of the particular duties requires a command of such other language. The employer must demonstrate that the knowledge of another language is necessary, and the Office may have to rule on the issue. The employees' rights may also be enforced by the Quebec Labour Commissioner as if it was a dismissal for union activities, or by way of grievance and arbitration.

VII. Immigration

The fundamental principles of Canadian immigration policy include the promotion of the economic, social, cultural and demographic policies of Canada; concern for refugees; the reunion of Canadian citizens and permanent residents with close relations from abroad; and non-discrimination. As well, the policy recognizes the need to attract business immigration to Canada and to facilitate the entry of visitors to Canada for the purpose of fostering trade, commerce, tourism, cultural and scientific activities and international understanding.

There are various procedures available for a person wishing to immigrate to Canada. Immigration authorities in Canada make decisions on a case by case basis. Quite often, the mechanics of making an application for a particular type of immigration status can be complex. Sufficient time allowance and preparation are important elements of a successful application.

An individual can immigrate to Canada as either a permanent or a temporary resident.

A. *Permanent Residents*

Persons seeking permanent residence in Canada must file an application and obtain a visa before entering Canada.

The process ordinarily takes 12 to 16 months to complete (18 to 24 months in the case of persons from Europe), although this time period will vary depending on the case load of the Consulate Office where the application is submitted. It is essential when applying to certain Consulate Offices, particularly in the United States, that all required supporting documentation and the prescribed fee be submitted with the application. Incomplete application packages will be returned and this will cause further delays in the process.

In all cases, the applicant must be medically admissible and must not be found to be within an inadmissable class (for example, an applicant who has been convicted of a criminal offence).

The federal Immigration Act prescribes the following classes of admissible immigrants:

1. *Family Class (Sponsorship Applications):* A Canadian citizen or permanent resident who is at least 18 years old may sponsor certain close relatives, such as a spouse, never married children, parents or grandparents 60 years old or older, or, in certain circumstances, parents or grandparents under 60 years old, and a fiancé(e). Family class applicants must meet the basic standards of good health and character and the sponsoring relative must sign an undertaking to make provision for his or her lodging, care and maintenance, and that of his or her accompanying dependants, for a period not exceeding 10 years. Immigrants in this class are not assessed under the points system described below.

2. *Convention Refugees:* A "Convention Refugee" is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his or her nationality or former habitual residence and is unable, or by reason of such fear is unwilling, to avail himself or herself of the protection of that country. Convention Refugees seeking immigration to Canada are assessed according to the same factors described below which are used to select independent applicants in order to evaluate the ability of such refugees to adapt to life in Canada. However, Convention Refugees are not assessed according to the points system described below. The amount of settlement assistance available to Convention Refugees from government or private organizations will also be a factor in determining whether or not a particular Convention Refugee should be admitted to Canada.

3. *Independent Immigrants:* Immigrants who do not qualify as members of the Family Class or as Convention Refugees are normally admitted to Canada on the basis of prescribed selection criteria using a points system. The system assesses one's ability to adapt to Canada considering such factors as: education, special vocational preparation, experience, age, occupational demand, personal suitability, arranged employment and knowledge of English and/or French. There is also a bonus for applicants who have specified close relatives in Canada. Additional points are awarded if the independent applicant can obtain a job offer validated by Human Resources Development Canada, confirming that there is no Canadian or permanent resident available for that job.

4. *Business Immigrants:* Canada also encourages the immigration of business people through the Business Immigrant Program. One of the stated purposes of the Business Immigrant Program is "to promote, encourage and facilitate the immigration of experienced business persons from abroad who will make a positive contribution to Canada's economic development by applying their risk capital and know-how to Canadian business ventures, which will create jobs for Canadians".

   The Business Immigration Program is very popular. The primary reason for its popularity is the priority given to the processing of business applicants, which is second only to Family Class members and Convention Refugees. Furthermore, the selection criteria and points system are weighted in favour of the business immigrant.

   The program consists of three basic types of applicants:

   a. *Self-Employed Applicants:* A self-employed applicant is a person who intends, and has the ability, to establish or purchase a business in Canada which will create an employment opportunity for himself or herself, and will make a significant contribution to the economic, cultural or artistic life of Canada. This is the category which is generally used by self-employed artists and musicians who will make a significant contribution to the cultural or artistic life of Canada.

      An applicant who demonstrates an ability and intention to make a significant contribution to the economic life of Canada may also apply under this category. Ideally, the applicant will show that the business he or she wishes to establish will provide an important and needed service to the area to be served by the business. The final decision whether the applicant will in fact make a significant contribution to the economic life of Canada rests with the visa officer. Given that there are no minimum investment requirements, visa officers often scrutinize more closely an applicant's ability to make a significant contribution and the officers will request evidence regarding the person's prior success in running his or her own business.

Self-employed applicants are individuals who intend to provide services or products to customers but do not plan to work as an employee for any company or for another individual. Ideally, a person applying under this category will have a history of self-employment and will be able to demonstrate that he or she is capable of being successfully self-employed in Canada. At a minimum, the applicant must be able to show that he or she has senior managerial experience in the field in question. Therefore, the applicant must have a "proven track record." Normally, documentation should be available to demonstrate that the person has been successful in the relevant area in the past, as selection is based on the qualitites of the applicant.

The applicant need not invest a significant amount of money in his or her business but must show that he or she has sufficient capital to commence the endeavour in Canada. In addition, the applicant must have a concrete plan of action and demonstrate a clear understanding of market and economic conditions in Canada. Although a business plan is not technically required, the existence of one would be helpful in establishing that the applicant has the capacity to run a business.

b. *Investor Applicants:* An "Investor" is a person who has accumulated, through his or her own endeavours, assets with a value of at least $800,000 and who is prepared to invest a minimum of $400,000 in a government approved investment fund. These funds will appeal to passive investors, as the funds are managed by others and cannot be withdrawn (no matter how much money is invested) for a period of five years.

The applicant must be capable of proving that he or she has the necessary net worth which was acquired through his or her own endeavours, such as having successfully operated, controlled or directed a business.

Investor applicants do not need to become actively involved in the management of the fund in which they invest. By investing in approved funds (which are currently only government funds), the Investor is issued an unconditional visa and avoids the problems which are associated with the "terms and conditions" with which Entrepreneurs must generally comply (see the discussion below). As well, investments are fully guaranteed by the provinces and territories that participate in the program. After five years, the investment is repaid in full without interest.

c. *Entrepreneurial Applicants:* An "Entrepreneur" is a person who has the intention and the ability to establish, purchase or make a substantial investment in a business venture in Canada which that person will manage on an active basis. The venture must result in the creation or maintenance of employment opportunities for at least one or more Canadian citizens or permanent residents, other than the Entrepreneur and his or her dependents. The applicant must be able to show that the business will make a significant contribution to the economy (which requirement is usually satisfied by the amount of money to be invested by the Entrepreneur).

This category is designed for experienced business people who are willing to participate actively in managing the Canadian business or commercial venture. An Entrepreneurial applicant will be required to provide a detailed description of his or her business background, highlighting relevant management experience, as well as details of his or her financial situation evidencing an ability to finance a business in Canada. An Entrepreneurial applicant must also be able to show that his or her net worth was obtained through his or her own endeavours.

A description of the applicant's Canadian business plan should be provided to the authorities to show that the applicant has considered the market, financing issues, licensing requirements, and other factors relevant to a new business venture in Canada. This aids in demonstrating to the immigration officer that the applicant has the intent and the ability to run the business.

Although there are no legislated requirements regarding net worth for an Entrepreneurial applicant, the investment is required to be "substantial" which varies depending on the type of business.

All Entrepreneurs will have "terms and conditions" placed on their permanent resident visas. These terms and conditions require the Entrepreneur to prove, within a two year period after arrival in Canada, that he or she has:

(i) made a significant investment in a business venture;

(ii) taken an active management role in the business venture; and

(iii) hired at least one Canadian, other than a member of his or her family.

In addition, the Entrepreneur is obligated to report to local Canada Immigration officials on an ongoing basis during those first two years.

Once the Entrepreneurial applicant has fulfilled these terms and conditions, he or she may then apply to have the terms and conditions removed. Failure to comply with the terms and conditions on the visa can lead to a loss of permanent resident status and removal of the applicant and his or her family from Canada.

As part of the Business Immigration Program, all "Business Applicants" must prove that they have enough money to support themselves and their dependents for at least six months after they arrive in Canada. As a guide, a Business Applicant is usually expected to have at least $10,000 plus $2,000 for each dependent.

B. Temporary Residents

Ordinarily, a non-resident wishing to enter Canada to work in Canada must obtain an employment authorization (a work permit) from the Canadian immigration authorities. To obtain the required employment authorization, the applicant must provide evidence that he or she has obtained employment in Canada and that he or she has an employment validation from Human Resources Development Canada. An employment validation can be obtained by the Canadian employer demonstrating that there is no Canadian citizen or permanent resident available to fill the position. An employment authorization is usually one year long although, in some cases, longer terms may be obtained.

The process is streamlined in the case of intra-company transfers of executive or managerial personnel. An employment authorization must still be obtained, but an employment validation is not required. Senior intra-corporate transferees need only obtain a letter from their employer identifying the individual as an employee of a branch, subsidiary or parent of a company which is located outside Canada who seeks to enter Canada to work at a senior executive or managerial level for a temporary period. The letter must be carefully drafted in order to specifically address the concerns of Canadian immigration officials with respect to who constitute "executive or managerial personnel".

An employer should allow sufficient time for the processing of temporary work permits. Therefore, if possible, applications should be submitted well in advance of the time that the employee is required to be in Canada. In certain circumstances, a work permit may be obtained at the Canadian port of entry.

Family members of the applicant may be admitted as visitors but they may not work unless they themselves can satisfy Employment and Immigration Canada's work criteria. Student authorizations are available fairly easily.

If, after coming to Canada, the non-resident decides that he or she wishes to remain in Canada on a permanent basis, Canadian permanent resident status must be obtained in accordance with the procedures outlined above.

In October, 1998 the federal government initiated a pilot project aimed at spouses accompanying temporary foreign workers coming to Canada for jobs in certain high-skill occupations in key high-growth sectors of the economy. Under the pilot project, such spouses are able to work in Canada through a facilitated validation process. The pilot project, which has been extended indefinitely, is open to spouses of highly skilled foreign workers who hold employment authorizations valid for at least six months.

In some circumstances, individuals who wish to enter Canada to work on a temporary basis may apply under the North American Free Trade Agreement ("NAFTA"). NAFTA applies only to citizens (not permanent residents) of Canada, the United States and Mexico and makes it significantly easier for certain types of business visitors to be admitted to Canada on a temporary basis. No Canadian employment validation is required.

NAFTA divides business persons into three categories:

1. Business Visitors;
2. Professionals; and
3. Intra-Company Transferees.

1. *Business Visitors:* Business Visitors who wish to enter Canada on a temporary basis to engage in certain designated activities may be admitted upon proof of citizenship and a description of the nature of their visit. An example of a designated activity is the taking of orders or the negotiation of contracts by a sales representative or agent for an enterprise located in Canada, but not the delivery of goods or the provision of services. Business Visitors do not require employment authorizations to enter Canada.

2. *Professionals:* Certain designated professionals wishing to enter Canada to carry on designated professional activities temporarily may be admitted if:

   a. they qualify for entry generally;

   b. they describe the purpose of their visit; and

c. they provide documentation to prove that they are engaged in one of the designated professions and have the proper qualifications to engage in that profession.

Professionals require employment authorizations. However, prior validation of employment offers is not required.

3. *Intra-Company Transferees:* An intra-corporate transferee may be admitted in the following circumstances:

a. the employee must have been employed by a particular employer on a continuous basis for at least one year within the three previous years;
b. the employee must continue to work for the same employer, or an affiliate or subsidiary thereof, in a managerial or executive capacity or in a position requiring specialized knowledge; and

c. the employee must satisfy normal entry requirements.

An employment authorization is required. However, no prior employment validation is necessary.

There are additional exemptions from the requirement to obtain an employment validation which are contained in the Immigration Regulations and the General Agreement on Trade and Services. Individuals seeking temporary employment in Canada should obtain legal advice to determine if any applicable exemptions exist in their particular case.

VIII. Anti-Trust Law: The Competition Act

This section highlights briefly Canadian anti-trust laws as contained in the federal Competition Act.

A. Scope of the Act

The Competition Act is administered by the Commissioner of Competition (the "Commissioner") in conjunction with the Competition Tribunal (the "Tribunal"), both of which are under the auspices of Industry Canada.

The Commissioner has the power to receive informal complaints and to conduct full investigative inquiries. The Tribunal, on the other hand, is an administrative agency that is empowered to review particular business practices and to issue orders concerning reviewable practices, following an investigation conducted by the Commissioner. The Tribunal can order a reviewable trade practice to be stopped if it is found to be anti-competitive in nature and effect. Although a reviewable trade practice may give rise to an administrative review, it is not a criminal offence per se. However, once the Tribunal makes an order with respect to a reviewable trade practice, failure to comply with that order will be a criminal offence.

The Competition Act also sets out various activities which do, in and of themselves, constitute criminal offences. The Commissioner is responsible for investigation and prosecution of these per se offences which, as in any criminal prosecution, must be proven beyond a reasonable doubt.

In addition to reviewable trade practices and criminal offences, the Competition Act establishes civil remedies. A consumer can bring an action for the recovery of damages suffered as a result of a person failing to abide by an order of the Tribunal, or as a result of a person's conduct where such conduct is contrary to the criminal provisions of the Competition Act. There is no parallel to the United States Sherman Act provision for treble damages.

Part IV of the Competition Act also enables the Governor-in-Council, where he or she is satisfied that competition in respect of any article has been prevented or lessened substantially, to reduce or eliminate customs duties on the article in question or on any like articles. In addition, where use has been made of the exclusive rights conferred by patents, trade marks or copyrights so as to have certain anti-competitive results, the Federal Court may regulate the use of such patents or trade marks.

B. The Competition Tribunal

The Competition Tribunal has a strictly adjudicative role. The Tribunal is composed of both judges and lay persons. This combination is intended to ensure the impartiality, due process, certainty and full rights of appeal associated with the courts, as well as the expertise in economics and business which experts from industry, commerce and public affairs can provide. The Tribunal has jurisdiction over all civil reviewable matters dealt with in the Competition Act.

C. Matters Reviewable by the Competition Tribunal

The Tribunal has the power to make orders with respect to a variety of trade practices including: abuse of dominant position, mergers, delivered pricing, refusal to deal, refusal to supply by foreigners, consignment selling, exclusive dealing, tied selling and market restriction. The Tribunal is also able to make orders concerning foreign judgments and foreign laws and directives. As previously mentioned, these practices are not criminal offences. However, if the Tribunal finds that these practices are anti-competitive and makes an order to that effect, failure to comply with such an order of the Tribunal will be a criminal offence. Most reviewable trade practices apply to "products", a defined term which includes both services and articles.

The Tribunal also has the authority to review marketing practices, including promotional contests, to ensure they are not deceptive. Deceptive marketing practices include misleading advertising, sale above advertised price and bait and switch selling.

Misleading advertising is both reviewable by the Tribunal and a criminal offence (see Subsection "Q"). The Commissioner may pursue either the criminal route or the administrative route. The Commissioner’s choice is final and is determined by a number of factors, such as the seriousness of the offence. Bait and switch selling can only be pursued by the administrative route. Bait and switch selling does not occur if a product advertised at a bargain price is available in reasonable quantities. Reasonable quantities are determined in accordance with the size of the market, the advertiser and the advertising campaign.

A person found to have committed a deceptive marketing practice may be ordered to cease such conduct, publish a notice and/or pay a fine of up to $200,000.

D. Abuse of Dominant Position

The intent of this provision is to ensure that dominant firms compete with other firms on merit, and not through the abuse of their market power, and to protect consumers, new entrants into the marketplace and, especially, the small business community. Abuse of dominant position is a civil matter which is reviewable by the Tribunal.

Abuse of dominant position consists of the following elements:

1. one or more persons must substantially or completely control a class or species of business in Canada or any area thereof;

2. the dominant firm must engage in a practice of anti-competitive acts with the object of lessening competition; and

3. the practice of anti-competitive acts must have had, be having, or be likely to have the effect of preventing or lessening competition substantially in a market.

The Competition Act does not define "anti-competitive acts". It does, however, provide a sample list of anti-competitive acts which is not exhaustive. These include:

1. a vertically integrated supplier squeezing the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

2. the acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or the acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, in either case for the purpose of impeding or preventing the competitor's entry into, or eliminating it from, a market;

3. the pre-emption of scarce facilities or resources which are required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

4. the use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

5. the buying-up of products to prevent the erosion of existing price levels;

6. the adoption of product specifications that are incompatible with products produced by any other person and designed to prevent his or her entry into, or to eliminate him or her from, a market; and

7. requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market.

An order may not be made by the Tribunal when the lessening of competition occurs as a result of superior competitive performance, even if by a dominant firm in a market. Thus, only abuses of market power will be subjected to the law, while aggressive competitive behaviour is allowed to continue.

The Tribunal's discretion is limited to remedies sufficient to overcome the effects of the anti-competitive practices and to restore competition in the marketplace. The Tribunal is entitled to prohibit the anti-competitive practice and, if necessary, to order partial divestiture or any other remedial measures necessary to restore competition.

E. Mergers

Merger is defined in the Competition Act as the acquisition or establishment, directly or indirectly, by one or more persons of control over, or a significant interest in, the whole or a part of a business of a competitor, supplier, customer or other person. This may occur by the purchase of shares, the purchase or lease of assets by amalgamation, combination or otherwise.

A merger or proposed merger that prevents or lessens, or is likely to prevent or lessen, competition substantially in a relevant market may be prohibited. In deciding whether competition will likely be lessened substantially, the Tribunal may have regard to a number of specified factors including the extent of foreign competition in the market, whether the acquired party was about to fail, whether there are barriers to entry into the market, whether acceptable product substitutes are available in the market, and any other factors relevant to competition in a market. The Tribunal will not be permitted to find that a merger substantially lessens competition solely on the basis of evidence of market share or concentration. The Tribunal will be required to make a qualitative analysis of the merger and weigh its impact upon competition.

A defence is provided in situations where gains in efficiency which would result from the merger can be shown to outweigh the costs resulting from a lessening of competition.

The Tribunal is given broad power to create remedies if it finds that a merger or proposed merger would likely lessen competition in a market. Such power includes the ability to prohibit or restrain a merger and, in the case of a completed merger, to order dissolution or partial divestiture.

Procedures are available to parties wishing to pre-clear a particular merger. Normally, professional advisers will assist in choosing the appropriate procedures to be followed and in making the necessary voluntary disclosure of all relevant facts relating to the merger.

Joint ventures which have potential for lessening competition are subject to the same law as other mergers. The Competition Act contains exempting provisions for joint ventures which are limited to a specific project or to research and development which meet defined criteria (including that the activities would not have been undertaken without the joint venture).

F. Pre-notification of Mergers

The Competition Act contains mandatory pre-notification requirements for certain proposed mergers. The purpose of the mandatory pre-notification provisions is to ensure that the Commissioner has a period of time to review certain more significant transactions before they are completed. Pre-notification is required if two thresholds are met. First, the parties to the merger, together with their affiliates, must have total assets or total revenues from sales in, from or into Canada of over $400 million. Second, the business being acquired must have assets or sales of more than $35 million. Should these two thresholds be met, the parties to the merger must notify the Commissioner of the proposed merger and disclose certain information relating to the parties and to the merger transaction itself. The Commissioner then has a limited period of time to decide whether or not to challenge the merger. Once the relevant time period has elapsed, the transaction can be completed, although it is still open to the Commissioner to challenge the merger. The pre-notification requirements only establish a period of time within which the transaction cannot be completed.

The Competition Act provides a list of exemptions to the pre-notification requirements. Such exemptions include acquisitions resulting from foreclosures, transactions between affiliates, the acquisition of Canadian resource properties for exploration or development and certain limited classes of joint ventures.

G. Delivered Pricing

Delivered pricing is the practice of refusing a customer delivery of an article at any location, where the supplier makes delivery of the same article to other customers on the same trade terms as would be available to the first customer if his or her place of business were located in that locality. When a major supplier of an article in the market engages in the practice of delivered pricing, or where the practice is widespread in the market, the Tribunal is empowered to prohibit the practice of delivered pricing where the customer is denied an advantage that otherwise would be available to him or her in the market.

The Tribunal cannot make an order that will force a person to undertake considerable investment in plant and equipment in order to comply with the order. An exemption is also provided for articles sold in association with a trade mark where it can be established that delivered pricing is necessary to maintain product quality.

H. Refusal to Deal

If a supplier is refusing to supply a product to a customer, the Tribunal may order that supplier to accept such customer as a customer, where the Tribunal is satisfied that:

1. the customer is substantially affected in his or her business due to his or her inability to obtain adequate supplies of the product anywhere in the market on usual trade terms;

2. the customer is unable to obtain adequate supplies of the product because there is insufficient competition among suppliers of the product in the market;

3. the customer is willing and able to meet the usual trade terms of the suppliers of the product; and

4. the product is in ample supply.

The Tribunal may also request that the Minister of Finance remove or reduce the customs duty which is payable on certain articles so that the customer in difficulty can obtain a supply of such articles in Canada.

A customer cannot demand that it be supplied with a particular brand of a product, unless that brand occupies such a dominant position in the market so as to substantially affect the ability of the customer to carry on business in that class of products unless it has access to that particular brand.

I. Refusal to Supply by Foreigners

The Tribunal may act where a supplier outside Canada refuses to supply a product to a person in Canada, at the instance of and as a result of the exertion of buying power outside Canada by another person. This provision would apply where a foreign parent might attempt to compel a foreign supplier to withhold a product from a Canadian buyer who is in competition with the subsidiary of the foreign parent.

J. Consignment Selling

Where a supplier who ordinarily sells a product for resale begins to sell by consignment in order to control the price at which a dealer in the product supplies the product, or to discriminate between dealers to whom he or she sells products and consignees, the Tribunal may order the supplier to cease selling on consignment.

K. Exclusive Dealing, Tied Selling and Market Restriction

Exclusive dealing is a practice whereby a supplier of a product, as a condition of supplying such product, requires a customer to deal only or primarily in products supplied or designated by the supplier, or to refrain from dealing in a specified product except as supplied by the supplier. Exclusive dealing includes a situation where the supplier induces the customer to accept exclusivity by offering to supply the product to the customer on more favourable terms than would otherwise be available to him or her.

Tied selling (which is common in most franchising arrangements) is any practice whereby a supplier, as a condition of supplying a product, requires the customer to acquire some other product from the supplier or to refrain from using or distributing another product that the supplier does not supply. Tied selling also includes any practice whereby a supplier of a product induces a customer to meet one of the conditions referred to above by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet such conditions.

Where exclusive dealing or tied selling, because it is widespread in a market or is engaged in by a major supplier of a product in the market, is likely to:

1. impede entry into a market;
2. impede the introduction of a product into or expansion of sales of a product in the market; or
3. have any other exclusionary effect in the market,

with the result that competition is or is likely to be substantially lessened, the Tribunal may prohibit the exclusive dealing or tied selling, or may make any other order to restore or stimulate competition in the market.

Market restriction is any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market or exacts a penalty of any kind from the customer if he or she supplies any product outside a defined market.

The Tribunal may prohibit market restriction if it finds that the market restriction is likely to substantially lessen competition in relation to a product because it is engaged in by a major supplier of that product or is widespread in relation to that product. The Tribunal can also make any other order that is necessary in its opinion to restore or stimulate competition in relation to such product.

The Tribunal will not make an order regarding exclusive dealing, tied selling or market restriction where:

1. the exclusive dealing or market restriction is in place for a reasonable period of time to help a new supplier or a new product into the market;
2. the tied selling is reasonable because of the technological relationship between the products in question; or
3. the tied selling is engaged in by a person in the money lending business in order to better secure loans and is reasonably necessary for such purpose.

L. Foreign Judgments, Laws and Directives

When the Tribunal finds that a foreign judgment, decree, order or other process would, if implemented in Canada, adversely affect trade and commerce or competition in Canada, the Tribunal may order that no steps be taken in Canada to implement the foreign judgment, decree, order or process.

The Tribunal may also intervene where it finds that a decision has been or is about to be made by a person in Canada either:

1. as a result of a foreign law, directive or communication to such person from a foreign government or a foreign person who is in a position to direct or influence the policies of the person in Canada, where the communication is to give effect to a foreign law and the decision, if implemented, would adversely affect trade and commerce or competition; or
2. as a result of a communication to such person in Canada from a foreign person who is in a position to influence such person, where the communication is to give effect to a conspiracy entered into outside Canada that, if entered into in Canada, would constitute a conspiracy under the Competition Act.

The Tribunal may order that no actions be taken in Canada to implement such foreign laws, directives or communications.

M. Criminal Offences

Part VI of the Competition Act sets out those offences which are criminal per se. These include: combinations or conspiracies to lessen competition unduly, bid rigging, conspiracies in relation to professional sports, price discrimination, predatory pricing, disproportionate allowances, misleading advertising, resale price maintenance, double ticketing and pyramid sales.

N. Conspiracy in Restraint of Trade

The section of the Competition Act which deals with conspiracies and combinations in restraint of trade is the Act's basic anti-trust section. Violation of this section (such as an agreement to fix prices or to divide markets) is generally considered to be the most serious crime under the Competition Act.

A conspiracy is an agreement or arrangement with another person to restrain or injure, unduly, competition in the production, manufacture, purchase, sale, storage, rental, transportation or supply of a product in a relevant market, or to otherwise restrain competition unduly in such market. A person who violates this section is liable to imprisonment for five years, or to a fine of $10 million, or to both.

To establish conspiracy, the prosecution must prove beyond a reasonable doubt that a conspiracy existed and that the parties intended to enter into the conspiracy. However, the prosecution does not have to prove that the arrangement, if carried into effect, would or would be likely to eliminate, virtually or completely, competition in the relevant market, nor does it have to prove that the parties intended that the agreement eliminate competition in such market. The Competition Act expressly provides that a court may infer the existence of an agreement by circumstantial evidence with or without direct evidence of communication. This recognizes that conspiracies, by their nature, are usually secretive and are typically not accompanied by documentary evidence of the agreement.

O. Price Discrimination and Predatory Pricing

Price discrimination occurs when a seller is party to, or assists in a practice of, discriminating among purchasers who are in competition with each other by giving one of the purchasers a price concession or other advantage that, at the time of the sale, is not available to other competing purchasers in respect of a sale of articles of like quality and quantity. The following points should be noted:

1. the offence only applies to the sale of articles and not to the sale of services;

2. there must be discrimination between at least two purchasers who compete with one another;

3. volume discounts which are equally available to all competing purchasers are allowed; and

4. the discrimination must form part of a practice of rebates, discounts or the like. Temporary discriminatory discounts are allowed.

It is also an offence for a business to engage in a policy of selling products in any area of Canada at prices lower than those charged by such business elsewhere in Canada, if such policy has the tendency or effect, or is designed to have the effect, of lessening competition substantially or eliminating a competitor in such part of Canada.

The predatory pricing section of the Competition Act makes it an offence for any business to engage in a policy of selling products at prices that are unreasonably low, having the tendency or effect, or designed to have the effect, of lessening competition substantially or eliminating a competitor. It is generally considered that for a selling price to be unreasonably low, it must be below the seller's cost.

A person convicted of one of the above offences is liable to imprisonment for two years.

P. Price Maintenance

Subject to certain exceptions under the Competition Act, it is a criminal offence for a producer or supplier of a product, or a person engaged in a business relating to credit cards, or a person who has exclusive rights conferred by a patent, trade mark, copyright or registered industrial design, to attempt directly or indirectly to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or advertises a product within Canada. It is also a criminal offence to refuse to supply a product to, or otherwise discriminate against, any other person engaged in business in Canada because of the low pricing policy of that person.

The suggestion by a producer or supplier of a product of a resale price or minimum resale price in respect of the product will constitute proof of an attempt to influence the price of a product, unless the party so suggesting the price can prove that he or she made it clear to the particular customer that such customer was under no obligation to accept the suggestion, and that his or her business relations would not suffer as a result of not accepting the suggestion. For this reason, a franchisor must be very careful in suggesting pricing policies to its franchisees.

The publication by a supplier (other than a retailer) of an advertisement that mentions a resale price for a product constitutes an attempt to influence upward the selling price to be charged by any person who may be offering the product for resale, unless the price is expressed so as to make it clear to any person that the product may be sold at a lower price. Advertisements placed by franchisors or by manufacturers usually contain words such as "dealer may sell for less" or words of similar effect.

The aforementioned presumptions of resale price maintenance do not apply to a price that is affixed or applied to a product, or to its package or container.

It is also an offence for a person to attempt to induce a supplier, as a condition of his or her doing business with that supplier, to refuse to supply a product to a person or class of persons because of the low pricing policy of that person or class of persons.

A person convicted of a price maintenance offence is liable to a fine in the discretion of the court, or imprisonment for five years, or both.

Q. Misleading Advertising

The most actively enforced criminal offences under the Competition Act are those which prohibit practices grouped under the generic heading of "Misleading Advertising". One of the major offences in this field is the use, in any form of media advertising, of misleading or unsubstantiated claims. For example, it is a criminal offence to make a false or misleading representation to the public regarding price, quality of goods, availability of products, profitability of dealerships, or any other matter which may mislead the public in a material respect. Similarly, misleading or inaccurate warranties or guarantees of a product, or the publication of inaccurate or deceptive test results, all constitute criminal offences.

To determine whether advertising is materially misleading, it is necessary to take into account both the strict, literal meaning of the words used and the "general impression" that is conveyed by the advertised message to the public at large. Special care must be taken in representing to the public the price at which goods are ordinarily sold, and representations of "special one-time sales" and "bargains" must be truthful and accurate in every respect, in order to avoid criminal liability.

It should be noted that a representation on a product, its wrapper or any other accompanying paraphernalia, an in-store decorative display, a door-to-door or telephone communication, or any similar manner of representation, are all deemed by the Competition Act to be made to the public, thus bringing the representation within the misleading advertising sections of the Competition Act. Advertising-related offences are not limited to traditional uses of mass media.

A person convicted of a misleading advertising offence is liable to a fine in the discretion of the court, or imprisonment for five years, or both.

Misleading advertising may also be caught by provincial legislation such as the Ontario Business Practices Act and the Ontario Consumer Protection Act.

The Competition Act also includes prohibitions against deceptive telemarketing, in which false or misleading representations are made in promoting the supply of a product or business. Telemarketers must adhere to strict rules when communicating with potential customers.

A person convicted of deceptive telemarketing is liable to a fine in the discretion of the court and imprisonment for five years.

IX. Financing Canadian Operations

Canada's well developed financial sector offers a full range of financing alternatives for Canadian businesses including public issues of debt or equity securities. Funds may be borrowed privately from a variety of lenders, including venture capitalists and more traditional sources. Whatever the source of funds, sufficient lead time must be allowed to process all necessary documentation.

A. *Equity Funding*

Each province in Canada has enacted securities legislation which governs the trading of securities within that province. As well, there is federal legislation which may be relevant to certain dealings in securities.

Securities legislation in Canada has developed, to a large degree, based on the U.S. experience. The intent of the legislation is to develop healthy securities markets that provide a high degree of protection to investors and an orderly trading market for issuers of securities. These goals are achieved through a relatively high degree of regulation of both the sale and resale of securities themselves and of persons responsible for trading in securities. As well, there is a requirement that there be continuous disclosure of material information relating to the business and affairs of certain issuing corporations.

The term "securities" is very broadly defined in most legislation and covers many investments which would not usually be expected to be caught by the legislation. For example, in certain circumstances, the acquisition of an interest in real property may be considered to be the acquisition of a "security".

As could be expected with a complex regulatory framework, there are numerous exemptions which allow specific types of investments to proceed without compliance with the more formal requirements, such as the preparation of a lengthy prospectus document containing full disclosure with respect to the securities being offered and related information.

The most common prospectus exemptions in Ontario include the following:

1. the private placement exemption. This exemption is available when a purchaser purchases, as principal, securities having an acquisition cost of $150,000 or more;

2. the seed capital exemption. This exemption is available where solicitations are made to not more than 50 prospective purchasers and sales are made to not more than 25 purchasers within a period of six months of the first purchase, provided that each purchaser purchases as principal and receives substantially the same information as he or she would receive if he or she had received a prospectus, and provided that there are no advertisements or selling or promotional expenses. The obligation to provide the purchaser with substantially the same information which he or she would receive if he or she had received a

prospectus does not apply with respect to the private placement exemption described above;

3. the private company exemption. This exemption is available where the securities being sold are securities of a "private company" and are not being sold to the "public". The requirements to make a company a "private company" are set out in the legislation. The determination of who is or is not a member of the "public" is a matter of fact to be determined in each situation.

It is not only the issuance of new securities that is subject to the securities legislation. Acquisitions of existing Canadian corporations may, for example, require the preparation of a takeover bid circular containing detailed information on the corporation making the bid.

Finally, when discussing the regulation of securities, it is important to be aware of the additional requirements imposed by the Canadian stock exchanges on corporations which choose to list their securities on such exchanges.

B. Debt Funding

Many domestic businesses in Canada are funded by third party lenders. Canada's chartered banks are the lenders in a substantial portion of Canadian business loans. Businesses may choose between the established domestic banks which are well-known internationally, or the foreign-owned banks which are usually subsidiaries of large international banks. Bank financing requires negotiation between the borrower and the lender as to the terms of the loan and its repayment, and the security that will be required. Depending upon the amount being borrowed, Canadian banks will usually require one or more of the following types of security: security over all of the assets of the Canadian operations, an assignment of accounts receivable, or a pledge of securities.

The factors considered in evaluating the quality of a loan are relatively similar throughout Canada. The banks generally look at ratios of debt to equity and the value of the hard assets in relation to the amount of the loan. Loans to finance acquisitions of assets will generally be at fixed rates. Lines of credit will generally be at variable rates which are usually tied to the bank rate set on a periodic basis by the Bank of Canada.

Canada's other financial institutions, including loan companies, trust companies and life insurance companies, are also permitted to engage in commercial lending, although to a much more limited extent because the lending activities of these institutions are more highly regulated than those of the chartered banks.

As with equity financing, the issuance of securities such as debt instruments is governed by the applicable securities legislation, although there are exemptions from prospectus and registration requirements for typical financings (such as loans from chartered banks).

Asset acquisition loans are often available through sale and lease-back programs offered by various financial institutions and equipment leasing companies. In addition, many companies specialize in equipment leasing, each leasing arrangement having its own distinct characteristics depending on the creditworthiness of the lessee, certain economic ratios, and the purchase price for the equipment and/or machinery in question. The Canadian chartered banks also offer different alternatives with respect to the financing of equipment and/or machinery acquisitions.

Each borrower must consider its own approach and strategy to the financing of its business. In particular, the borrower must determine whether it wishes to borrow from several different institutions, or whether it is better served by financing all aspects of its business from one source. The credit terms available, interest rates, ratios, and other terms of the agreement that are negotiated with respect to particular aspects of the businessperson's financing will assist the borrower in making its determination.

C. Government Assistance

Businesses operating in Canada should always consider government assistance as a potential source of funds. Separate programs are generally administered independently by the federal and provincial governments.

In addition to the incentives which are available under Canada's and Ontario's respective tax systems, there are a variety of incentive programs designed by government to advance particular policy objectives. For example, there are federal incentive programs to assist particular industries. There are also incentives available for certain qualifying export activities.

One such program is the Industrial Research Assistance Program. This program provides, among other things, financial support for certain types of research and development projects. There are, however, conditions governing eligibility for the program. Professional advisers in Canada are able to provide investors with up-to-date information on particular government incentives. Typically, significant lead time will be required in order to process any applications.

Most provinces have developed their own set of incentives which are available to businesses operating within its jurisdiction. Provincial programs may impose minimum residency requirements.

X. Franchising

Franchising as a technique of business expansion and organization represents one of the most dynamic commercial sectors in Canada. Its importance to the Canadian economy should not be underestimated. Not only does Canada offer a powerful economic environment, but the legal framework for franchising is encouraging. Other than in the Provinces of Alberta and Ontario, there is no specific registration or disclosure legislation in force anywhere in Canada dealing with franchising. While on the increase, the incidence of franchise litigation in Canada remains relatively low, and there is yet to emerge an identifiable Canadian judicial attitude towards the franchise relationship. Thus, franchisors enjoy substantial freedom in structuring their contractual agreements and selling their franchises. However, it should be pointed out that many business practices prevalent in franchising are subject to regulation by both federal and provincial laws of general application.

The following is a brief analysis of some of the more significant Canadian laws which impact generally on franchising.

A. Franchise Disclosure, Registration and Regulation

To date, Alberta and Ontario are the only provinces with legislation governing certain aspects of franchising. The franchise legislation in both provinces is a disclosure statute and does not directly regulate the substantive aspects of the franchise relationship. The Alberta Franchises Act (the "Alberta Act") is administered by the Alberta Department of Municipal Affairs, and The Arthur Wishart Act (Franchise Disclosure), 2000 (the "Ontario Act") is administered by the Ontario Ministry of Consumer and Commercial Relations.

In substance, the Alberta Act and the Ontario Act are very similar. They contain primarily disclosure requirements and a number of relationship provisions. Both Acts require fair dealing between parties to franchise agreements, require that franchisees have the right to associate, and impose disclosure obligations on franchisors.

Under both Acts, franchisors must provide a disclosure document to prospective franchisees. The disclosure document must contain copies of all franchise agreements and financial statements, and all material facts including specifically listed material facts. Franchisors are permitted to use disclosure documents acceptable under franchise legislation in jurisdictions outside Alberta or Ontario, as the case may be, provided that these disclosure documents include, by way of an addendum or "wrap around" document, any information necessary to meet the requirements of a disclosure document under the Alberta Act or the Ontario Act, as the case may be.

Financial statements must be prepared in accordance with generally accepted accounting principles. The minimum standards of review under both Acts are those of review engagement standard. Certain franchisors are exempt from the requirement to include financial statements in their disclosure documents. The disclosure document must include a certificate certifying that the disclosure document contains no misrepresentation.

The Alberta Act and the Ontario Act impose on the parties to a franchise agreement a duty of fair dealing in the performance and enforcement of that agreement. They also provide the franchisee with a private right of action for damages against the franchisor and every person who signed the disclosure document if the franchisee suffered a loss because of a misrepresentation contained in the disclosure document. As well, if the franchisee did not receive the franchise disclosure document within the time limits set out in the appropriate Act, the franchisee has the right to rescind all franchise agreements.

B. Anti-Trust Regulation

The Competition Act may potentially impact on an assortment of franchise practices as well as on the drafting of franchise agreements. The Competition Act, as previously summarized, identifies various reviewable trade practices which are subject to inquiry and a number of per se criminal offences.

The reviewable trade practices of primary concern to franchisors are those of refusal to supply a person, tied selling, market restriction and exclusive dealing. As described earlier in Section VIII above, the practice of tied selling consists of a supplier of a product requiring a purchaser to purchase another product from the supplier, as a condition of its purchase of the first product. The practice of exclusive dealing consists of a supplier requiring its distributors to deal exclusively in the supplier's products or products designated by it. The practice of market restriction consists of a supplier of a product requiring a purchaser, as a precondition of any sale, to limit its distribution to a defined market area.

The criminal offences of primary concern to franchisors are offences relating to price discrimination, resale price maintenance, pyramid and referral selling, and misleading advertising. A franchisor who engages in the practice of knowingly discriminating among franchisees, by granting any discount, rebate, allowance, price concession or other advantage to one franchisee which is not similarly granted to other competing franchisees in respect of the sale of articles of like quality and quantity, commits the offence of price discrimination under the Competition Act. However, a franchisor selling both to franchisees and directly to consumers through company-owned outlets may apply different pricing policies to the franchisees and to the consumers, since the franchisees and the consumers are not in competition with each other. A franchisor may also practise price discrimination among geographically separated franchisees who are not in competition with each other.

A franchisor commits the offence of resale price maintenance if it directly or indirectly attempts to achieve a price increase or to set minimum price levels for any product sold or advertised within Canada. Any influence exerted by a franchisor in suggesting minimum resale prices, other than a mere non-obligatory suggestion accompanied by a suitable disclaimer, constitutes price maintenance. Similarly, any advertising or promotion carried on by the franchisor in which reference is made to the price at which any product will be sold by a franchised outlet constitutes price maintenance, unless the advertisement or promotion makes it clear that the franchisee is free to sell at a lower price. The prohibition in the Competition Act against price maintenance does not, however, extend to setting price ceilings, although contractual clauses stipulating price ceilings must be carefully drafted to avoid offending the Competition Act.

An example of the offence of pyramid selling in the franchise context would be requiring the payment of a participation fee by a franchisee who would receive a fee for any franchisee subsequently recruited by the franchisee into the franchise system. The offence of referral selling is committed where the franchisee is induced to purchase goods on the promise that it will receive a fee or commission upon its subsequent referral to the franchisor of all other purchasers.

C. Trade Marks

Of major concern to franchisors in Canada is the appropriate procedure for licensing franchisees to use the system trade marks. A trade mark owner can license others to use the trade mark. The license agreement should contain sufficient provisions to ensure that the franchisor has the right to supervise the use of the trade mark in order to protect its distinctiveness. For more information on trade mark protection, see Section V, Part A of this booklet.

XI. Packaging and Labelling Legislation

Pre-packaged products sold in Canada are subject to statutory packaging and labelling requirements. These requirements are imposed at both the federal and provincial levels, although the majority are at the federal level. The relevant legislation protects the consumer by imposing certain uniform merchandising standards for products, articles, materials and substances.

A. The Consumer Packaging and Labelling Act

The federal Consumer Packaging and Labelling Act (the "Packaging Act") contains packaging, labelling, sale, importation and advertising requirements with respect to pre-packaged consumer products.

A pre-packaged product is any product that is packaged in a container in such a manner that it is ordinarily sold to consumers without being re-packaged. A container can be a receptacle, package, wrapper or confining band in which a product is offered for sale, but it does not include package liners or shipping containers or any outer wrapping or box that is not customarily displayed to the consumer.

The Packaging Act does not apply to a product that is a drug or device controlled by the federal Food and Drugs Act, goods produced by commercial or industrial enterprises or institutions for their own use, goods produced solely for export or for sale to a duty-free store, consumer textile goods subject to the Textile Labelling Act, replacement parts for durable consumer goods that are not intended for display to consumers, or pre-packaged artist supplies.

The legislation prohibits a dealer from selling, importing or advertising any pre-packaged product that does not comply with the requirements of the Packaging Act and the regulations thereunder. A dealer includes a retailer, manufacturer, processor or producer of a product, or any person who is engaged in the business of importing, packing or selling any product.

The legislation focuses on the label to be affixed to a product. A label includes any label, mark, sign, device, imprint, stamp, brand, ticket or tag. In order to comply with the legislation, the label must contain the following:

1. a declaration identifying the product's common or generic name or its function. The identification must be in both English and French and must appear on the principal display panel of the package. The information must be easily legible to the consumer, in distinct contrast to any other information or representation shown on the label, and the type must be of the height and kind prescribed by regulation;

2. the net quantity of the pre-packaged product (either a numerical count or a metric unit of measurement). Net quantity must be expressed in English and French and must be clearly and prominently displayed, easily legible and in distinct contrast to any other information or representation which is shown on the label. Net quantity may be expressed numerically if there is a trade practice to do so. Generally, net quantity must be declared by volume where the product is a liquid and by weight where the product is a solid; and

3. the identity and principal place of business of the person by or for whom the product was manufactured. The principal place of business may be identified by reference to the person's postal address. The required information may be shown in either English or French and must be easily legible to the consumer. If the product is manufactured outside Canada but the name and address shown on the product is a place within Canada, the address must be preceded by the words "imported by", "imported for", "importé par", "importé pour" or, alternatively, the geographic origin of the product may be stated.

Containers must be filled such that a consumer will not be misled as to the quantity of product in such container. In addition, the container must be manufactured, constructed or displayed in a manner that will not mislead a consumer as to the quality or quantity of product it contains. The container size of certain specified products (for example, wine, perfume and shampoo) is prescribed by regulation to prevent a proliferation of container sizes and shapes.

A label need not contain the mandatory French and English generic and product quantity labelling where the product in question is a local product (i.e. a product sold in an area in which either French or English is the mother tongue of less than 10% of the population), a test market product, a specialty product (which includes food or beverages that have special religious significance and imported products not widely used in Canada and for which there is no readily available Canadian substitute), a greeting card, a book, talking toy or a language game.

A dealer is prohibited from applying to a pre-packaged product, or from selling, importing or advertising a pre-packaged product that has attached to it, a label which contains any false or misleading representation relating to the product or that may reasonably be regarded as relating to it. A false or misleading representation includes any representation in which expressions, words, figures, depictions or symbols are used, and which are arranged or shown in such a manner that they might reasonably be regarded as qualifying the declared net quantity of the pre-packaged product, or are shown in such a manner as would be likely to deceive a consumer of the product. In addition, a representation is misleading if it includes any expression, word, figure, symbol or depiction that either implies, or might reasonably be regarded as implying, that a pre-packaged product contains matter that is not in it or that it does not contain any matter that is, in fact, contained in it.

A false or misleading representation also includes any description or illustration of the type, quality, performance, function, origin or method of manufacture or production of a pre-packaged product that might reasonably be regarded as likely to deceive a consumer.

Misleading representations may also be caught by the Competition Act (described earlier in this booklet) and by provincial legislation such as the Ontario Business Practices Act and the Ontario Consumer Protection Act.

A dealer is prohibited from applying to any edible or potable pre-packaged product a label that contains any representation with respect to the number of servings contained in the container unless the label contains a declaration of net quantity of each serving in the form prescribed by the legislation.

Manufacturers of refrigerators, ranges and dishwashers are required to affix to those appliances a label declaring the energy consumption of that appliance in terms of kilowatt hours per month.

B. Hazardous Products Act

The federal Hazardous Products Act regulates the advertising, sale and importation of hazardous or potentially dangerous products and substances. The legislation does not apply to explosives governed by the Explosives Act, cosmetics, devices, drugs or food governed by the Food and Drugs Act, pest control products governed by the Pest Control Products Act, or certain prescribed substances within the meaning of the Atomic Energy Control Act.

The legislation prohibits the advertisement, sale or importation into Canada of those hazardous products listed in Part I of Schedule I to the Hazardous Products Act. These items include, but are not limited to, furniture, toys and other articles that are intended for use by children and are painted with a lead based substance, and certain household glass products.

The advertising, sale or importation into Canada of a hazardous product included in Part II of such Schedule is prohibited, except as authorized by regulation. Items listed in Part II include, but are not limited to, certain bleaches, cleansers, sanitizers and glues. These regulated products may not be advertised, sold or imported into Canada unless they are labelled in both English and French. In addition, the regulations require such products to display clearly and prominently on their label certain prescribed wording together with a designated hazard symbol. The hazard symbol describes the nature of the hazard as being poisonous, inflammable, explosive or corrosive. International warning symbols are acceptable on the labels of products sold for consumer and household use. However, a second set of symbols different from those used everywhere else in the world are required on products sold in Canada for corporate, industrial or institutional use.

The container of a regulated product must also contain statements of precaution, directions for the proper and safe use and storage of the product, the nature of the primary and secondary hazard, and the first aid treatment and antidote for that product.

C. *Food and Drugs Act*

The federal Food and Drugs Act (the "Food Act") was enacted to protect consumers from injury, fraud and deceptive practices. The labelling requirements of the Food Act apply to food, cosmetics, medical devices and drugs. Under the legislation, food includes, but is not limited to, any article manufactured, sold or represented for use as food or drink for human consumption, chewing gum, and any ingredient that may be mixed with food for any purpose whatsoever. A drug includes, but is not limited to, any substance sold or represented for use in the diagnosis, treatment or prevention of a disease in humans or animals. A medical device means any item sold or represented for use in the diagnosis, treatment or prevention of disease and other related medical conditions in humans or animals.

The Food Act is intended to protect consumers from being misled as to a product's quantity, character, value, composition, merit or safety, and to prevent injury to the health of consumers. The Food Act requires that certain information be displayed clearly and prominently on the product label so as to be readily discernible to consumers under customary conditions of purchase and use of the product in question. The Food Act sets out the following basic labelling requirements with respect to food:

1. the common name of the food must be shown on the main label in both English and French;

2. the identity and place of business of the manufacturer must be shown on any part of the label (other than on the bottom of the package) in either English or French;

3. where the durable life of a product is 90 days or less, the label must include (anywhere except on the bottom of the package) the packaging date (if applicable) and the durable life date of the product, in both English and French;

4. if the durable life of the product is 90 days or less, and if the product cannot be stored at room temperature, the proper storage instructions must be shown on the label, in both English and French; and

5. if the pre-packaged product contains more than one ingredient, all the ingredients and their components must be shown and grouped together on the label, in English and French. The ingredients must be shown in descending order of their proportion of the product or as a percentage of the product.

The Food Act also provides that where the manufacturer makes a claim regarding the caloric, sugar, carbohydrate or sodium content of the product on the label or in an advertisement, the manufacturer must state the specific information in respect of the caloric, sugar, carbohydrate or sodium content of the food on such label. In addition, the Food Act contains specific rules relating to nutritional labelling, dietetic foods and infant foods. There are also special requirements for a variety of specific foods, including simulated meat and poultry products, dairy products and food additives.

There are five basic labelling requirements with respect to drugs:

1. the main inner and outer labels of a drug must show the proper name of the drug, immediately preceding or following the brand name;

2. the name and address of the manufacturer must be shown on the inner and outer labels of the drug;

3. the inner and outer labels of a drug must disclose the quantitative list of the medicinal ingredients of the drug by their proper names;

4. the outer label of a drug must indicate the net amount of the drug in the container in terms of weight, measure or number; and

5. the inner and outer labels of a drug must indicate the lot number of the drug and must provide adequate instructions for the proper use of the drug, as well as the expiration date of the drug.

It is an offence to label, package, sell or advertise food, drugs or medical devices in a manner that is false or misleading with respect to the character, value, quantity, composition, merit or safety of the product. A product that does not comply with the labelling requirements of the Food Act will be deemed false and misleading. Once again, the misleading advertising provisions of the Competition Act and provincial legislation may also apply.

D. Textile Labelling Act

The federal Textile Labelling Act assists consumers in identifying the many types of fibres used in fabric or clothing by requiring such fibres to be named by certain prescribed generic names and requiring the weight of each fibre in a fabric or product to be disclosed.

The Textile Labelling Act prohibits a dealer from selling, importing into Canada, or advertising a prescribed consumer textile article unless the article has a label containing a representation as to the textile fibre content of the article. A "dealer" is defined in the Textile Labelling Act as a person who is a manufacturer, processor or finisher of a textile fibre product, or a person who is engaged in the business of importing or selling any textile fibre product. Consumer textile products include products which are sold to any person for consumption and use but exclude products sold for consumption or use in the manufacturing, processing or finishing of any product for sale. Articles that are sold to a dealer outside Canada or to or by a duty-free store in Canada, or articles that are imported and then labelled in Canada before resale are exempt from the Textile Labelling Act.

A representation on a label relating to textile fibre content must include the generic name, in both English and French, of each textile fibre that comprises five percent or more of the article by weight, including the relative percentage of each such fibre, the identity of the person by or for whom the consumer textile article was manufactured, the name and address of the dealer by or for whom the article was made or by whom the article was imported and labelled, and such other information as may be required by regulation.

A dealer, in advertising a consumer textile article, is prohibited from making any representation as to the textile fibre content of the article, except in the manner provided for by regulation. A dealer is also prohibited from affixing a label to a consumer textile article and from selling, importing or advertising a consumer textile article with a label attached which contains any false or misleading representation that relates to or might reasonably be regarded as relating to the article.

E. Upholstered and Stuffed Articles

The Upholstered and Stuffed Articles Act (Ontario) (the "Upholstered Act") applies to all articles which contain stuffing. Stuffing means any material used for padding, filling or cushioning that is meant to be enclosed by a covering. The Upholstered Act prohibits any person from selling an upholstered or stuffed article that does not bear a label complying with the regulations. The label, which must be affixed to a conspicuous part of the main body of the article and must be of a prescribed size, must contain the following items in both English and French:

1. a statement advising that the label is not to be removed until delivered to the consumer;

2. a statement advising that the article contains new material only, or that the article is a renovated article or a second hand article, as the case may be;

3. a statement advising that the label is affixed to the article in compliance with the Upholstered Act;

4. the registration number of the manufacturer or renovator of the article and, if desired, the name and address of the manufacturer or renovator; and

5. a listing of the main stuffing materials of the article in the manner prescribed by regulation, up to the three main stuffing materials used as measured by weight.

F. Charter of the French Language

The Quebec Charter of the French Language includes provisions concerning business names, public signs and posters, commercial advertising, product labelling, menus, catalogues and brochures. Business names in Quebec must be in the French language. They may include elements written in another language, such as names of persons or places or foreign terms. No company may be incorporated, registered or licensed in Quebec without having adopted a French name.

Only the French business name may be employed in Quebec, unless the company markets its products both in Quebec and outside of Quebec, in which case a translation may also be used.

Letterheads and business cards may be in another language. However, if the company conducts its business only in Quebec, it will be required to use only its French name, with the exception of documents drafted both in French and in another language and those drafted only in such other language.

In order to maintain Quebec's distinct character, public signs and commercial advertising on billboards, signs or posters having an area of 16 square metres or more must be only in French, unless, except in certain specified cases, they are displayed on the actual premises of an establishment of the firm. For example, public signs and posters concerning public health and safety, and public signs and posters regarding cultural premises (such as a museum, a zoo or a botanical garden) may be both in French and another language, provided that French appears at least as prominently.

Public signs and commercial advertising in a place of business may be in another language, in addition to French, when they are aimed at the customers within such establishment, so long as French predominates.

Exceptions to the preceding rules are provided for in the Charter. The rules do not apply to advertising in newspapers or magazines published in languages other than French, nor in religious, political, ideological or humanitarian literature distributed by non-profit organizations. Bilingual signs are also allowed outside establishments which specialize in the sale of products typical of a foreign nation or ethnic group. Public signs and commercial advertising may be bilingual for cultural or educational products such as books, records, cassettes, films, and radio or television broadcasts. Companies involved in managing inter-provincial or international transportation systems may display signs in vehicles in other languages along with French.

The Charter contains its own provisions relating to the labelling of products. These provisions are more demanding than those of the federal Consumer Packaging and Labelling Act. Under the Charter, any inscription on a product, its container, or its packaging, or any document which accompanies the product, must be drafted in French; a translation is permitted provided that French predominates.

The preceding rule does not apply to products manufactured exclusively for export from Quebec nor to the following products or circumstances:

1. the products are from outside Quebec, are not marketed in Quebec and are simply displayed at a convention, conference or trade fair;

2. the products are from outside Quebec and are to be incorporated into another product and will not, in their current form, be offered in the retail market;

3. inscriptions on the products are permanently engraved, rivetted or inlaid;

4. the products are perishable food products from outside Quebec and are not offered for resale without being repackaged; or

5. the products are from outside Quebec, are in limited use in Quebec, and no equivalent substitute presented in French is available in Quebec.

Catalogues and brochures must be drafted in French; an English version may be distributed as well, as long as the French version is also available. The English version may also be sent to anyone who requests it.

Contracts entered into between a company and an individual must be in French. However, the parties may agree that such contracts be written in another language.

G. The North American Free Trade Agreement

Pursuant to the North American Free Trade Agreement ("NAFTA"), Canada is prevented from imposing internal restrictions that discriminate against products imported from the United States or Mexico. However, the Canadian packaging and labelling requirements set out above can continue to apply to products imported from the United States and Mexico as long as those requirements apply to Canadian domestic products as well. Pursuant to NAFTA, Canada, the United States and Mexico are working towards harmonizing their respective technical and regulatory requirements, including those relating to the packaging and labelling of products. In particular, with respect to the packaging and labelling of agricultural products, food, beverages and certain related goods for human consumption, Canada, the United States and Mexico have agreed to:

1. work toward the acceptance of dual declarations of content where the net quantity can be expressed in metric and U.S. units of measure, regardless of the order of the declaration;

2. work toward equivalent requirements for matters such as nutrition labelling, ingredient listing or declaration, labelling terminology and definitions, and grading declaration; and

3. review container sizes, including can sizes.

XII. The North American Free Trade Agreement

On January 1, 1994, the North American Free Trade Agreement ("NAFTA") among Canada, the United States and Mexico came into effect. NAFTA marked an important step in the development of trade relations among its signatories. Since 1947, Canada and the United States, as well as a number of other countries, have gradually reduced tariff and non-tariff barriers to trade in goods within the framework of the General Agreement on Tariffs and Trade (GATT). In 1989, Canada and the United States entered into a Free Trade Agreement (the "FTA"). The FTA represented a new stage in the liberalization of bilateral trade between Canada and the United States and NAFTA took this concept even further.

In addition to preventing the imposition of new protectionist measures by any of the three countries, NAFTA was designed to benefit industrial, financial and business enterprises established in Canada, the United States and Mexico. It provides for the eventual mutual elimination of barriers to trade in both goods and services, the promotion of fair competition, the harmonization of technical standards, greater access to government contracts, authorization of temporary entry for business persons, protection of intellectual property rights and the relaxation of rules governing investment and financial services.

A. The Elimination of Customs Duties

Pursuant to the FTA, all customs duties that were in effect between Canada and the United States as of December 31, 1988 were eliminated.

NAFTA provided for the immediate elimination of duty on over half of the FTA categories, effective January 1, 1994. For other items, there is a gradual phase-out which varies between five years (duty-free as of 1998), 10 years (duty-free as of 2003), and, for the most import-sensitive items, 15 years (duty-free as of 2008).

B. *Rules of Origin*

Only goods which originate in North America will be eligible for duty-free treatment and other benefits under NAFTA. "Rules of origin" have been established to determine which goods are eligible.

Where all of the components (raw materials and labour) are from North America, the item will be eligible under NAFTA provided that it meets specific NAFTA criteria of a technical nature. Where only some of the components come from North America, but the proportion of the value of such good (at the time of sale) which was sourced in North America is substantial, the good will still be eligible under NAFTA. For example, where raw materials from a non-NAFTA country are transformed into a different product through processing in a NAFTA country, the final product will likely be eligible under NAFTA. The test for "substantial" is generally met where more than 50 percent of the net cost or 60 percent of the net value of the finished product was generated in North America, or where the value of all non-NAFTA materials used in production represents no more than 7 percent of the value of a good.

For example, photographic film that has been exposed but not developed and that has been imported in this state into North America and developed in North America will be considered as coming from North America. Vegetable fat refined in Europe and transformed into margarine in North America will also be considered as coming from the free-trade area.

Where none of the components of a good come from North America, such good will not be eligible under NAFTA.

Since the elimination of customs duties on goods depends on the origin of the goods, enterprises whose production facilities are situated in North America will benefit from the elimination of customs duties whether they are controlled by Canadian, U.S., Mexican or foreign interests.

C. *Refunds of Customs Duties (Drawbacks)*

The drawbacks system provides for the reimbursement of duties paid by an enterprise on the import of components or raw materials required for the manufacture of a good, in cases where the good is to be exported later.

Manufacturers may collect a refund equal to the lesser of duties paid on imported components and duties paid on the export of finished products. Drawbacks on Canadian, Mexican and U.S. goods are no longer available, but have been replaced by refund procedures applicable to goods that remain dutiable in the free trade area.

D. National Treatment

In accordance with the provisions of GATT, the governments of Canada, the United States and Mexico already must treat goods originating in the other country no less favourably than that accorded their own goods. NAFTA stipulates that not only must the governments of Canada, the United States and Mexico accord such treatment to goods originating in the other countries, but that the same obligations extend to state and provincial governments. NAFTA also provides that many services ("covered services") will be treated equally, regardless of where they originate.

For example, a U.S. tax may not be directed specifically to goods imported from Canada or Mexico or services provided from Canada or Mexico if that tax does not apply to similar goods or services produced in the United States. Similarly, U.S. authorities must subject goods imported from Canada or Mexico, or services provided from Canada or Mexico, to the same safety standards that apply to goods manufactured domestically. Enterprises located in Canada and Mexico are therefore assured that the U.S. government and the governments of any of the 50 U.S. states may not discriminate against a good or any covered service in order to protect domestic industries against competition from enterprises located in Canada. Enterprises located in the United States are similarly protected from any such measure adopted by Canada or Mexico or any of their provinces or states. There is a major exception to this principle. Any discriminatory measure in effect between Canada and the United States as of December 31, 1988 can be maintained. In time, this exception will become less significant, and service industries will gradually be protected by the national treatment provision.

E. Technical Standards

NAFTA requires that the parties harmonize their technical standards as much as possible. However, any NAFTA country may adopt standards which provide a higher level of protection than the international standards provide.

F. Government Procurement

Manufacturers or suppliers of "eligible goods and services" in one country may submit bids in the other countries for most federal government contracts that have a value exceeding U.S. $50,000, or as between Canada and the United States, $25,000 U.S. The main "eligible goods" are raw materials extracted or produced in North America, and materials manufactured in North America for which the cost of components originating outside North America is less than 50 percent of the cost of the finished good.

Potential suppliers located in any NAFTA country will have access to the information necessary for the preparation of their bids, which they may submit in accordance with the procedure applying to domestic suppliers, and they will not be discriminated against when contracts are awarded. Consequently, manufacturers of goods similar to "eligible goods" manufactured elsewhere than in North America will in general be at a disadvantage compared to enterprises located in Canada, the United States and Mexico with respect to the awarding of contracts for "eligible goods" by the governments of those countries.

G. Temporary Entry for Business Persons

Citizens of any of the three countries who trade in goods or services or who are investors may be granted temporary entry to do business in the other country, provided that they otherwise qualify for entry under applicable law relating to public health and safety and national security. Temporary entry means entry without the intent to establish permanent residence. Although foreigners do not so qualify, any Canadian citizen employed by an enterprise located in Canada may take advantage of these special rules according to which, for example, the United States or Mexico may not require labour certification tests or other procedures of similar effect. U.S. or Mexican citizens seeking temporary entry into Canada for the purposes of trade benefit from the same favourable treatment. The NAFTA rules in respect of temporary entry are discussed in greater detail in Section VII, "Immigration".

H. Investment

In addition to amending the Investment Canada Act, discussed above in Section IV, "Foreign Investment Review", NAFTA also provides that, with the exception of certain specified types of investments in respect of "key" industries, Canada must afford U.S. and Mexican investors treatment no less favourable than that accorded in like circumstances to its investors with respect to measures affecting:

1. the establishment of new business enterprises;
2. the acquisition and expansion of business enterprises;
3. the management, conduct and operation of business enterprises; and
4. the sale or other disposition of business enterprises,

where such business enterprises are located in Canada. The term"investment" is broadly defined to include all types of ownership interests, whether direct or indirect. It does not include claims to money, such as those arising from commercial contracts for goods or services.

In addition, Canada may not impose on a U.S. or Mexican investor any of the following:

1. A minimum level of Canadian equity in a business enterprise located in Canada;
2. An obligation to export a specified level or percentage of goods or services;
3. An obligation to substitute goods or services from Canada for imported goods or services;
4. An obligation to purchase goods or services in Canada, or from suppliers located in Canada;

5. An obligation to accord a preference to goods or services produced in, or supplied from, Canada;

6. An obligation to achieve a given level or percentage of Canadian content;

7. Except for the purposes of public policy, a ban on the transfer of profits, dividends, royalties, fees, interest and other earnings from an investment, or the proceeds from the sale or liquidation of all or part of such investment; or

8. The nationalization or expropriation of an investment, except:

   (a) for a public purpose;

   (b) in accordance with due process of law;

   (c) on a non-discriminatory basis; and

   (d) upon the payment of adequate and effective compensation at the fair market value of the investment.

The above-mentioned rules are subject to certain exceptions which are specifically set out in the NAFTA document.

I. Services

NAFTA provides for some free trade in services. Unlike free trade in goods, in respect of which provision is made for the removal of both tariff and non-tariff barriers, free trade in services involves only the elimination of non-tariff barriers (given the fact that there are no tariffs on services). The right of establishment in the other country and the right to exercise one's profession in such country are examples of non-tariff barriers to free trade in services.

Under NAFTA, the governments of Canada, the United States and Mexico, and of each of their provinces and states, must accord to service providers of covered services from the other countries treatment no less favourable than that accorded to domestic persons and enterprises in like circumstances. As well, a NAFTA country may not require a service provider of another NAFTA country to maintain an office in such country as a condition to being permitted to provide such services.

This obligation is subject to any non-conforming provisions which were in existence as of January 1, 1994 and are listed in Annex I to the NAFTA document.

The provision of a service includes, for example, the production, distribution, sale, marketing and delivery of a covered service, and the establishment of a commercial presence for such purposes. It also includes access to and use of domestic distribution systems as well as any investment and any activity associated with the provision of a covered service. An enterprise located in North America but controlled by foreign interests may therefore receive national treatment if the service is in fact provided by the enterprise located in North America, and not indirectly through the foreign head office.

In addition to services relating to the distribution, sale and maintenance of goods, the provision of services covered by NAFTA include commercial education, construction, engineering, health care management, tourism, advertising, environmental services, consulting and architecture, among other things.

J. Financial Services

One of the objectives of NAFTA is to favour the establishment of financial institutions and the circulation of financial goods and services (except for insurance services). The Canadian government relaxed its rules governing the ownership of Canadian financial institutions, with the result that a U.S. or Mexican investor may hold more than 10% of the shares of a financial institution, and U.S. and Mexican investors as a group are not subject to the 25% ceiling on foreign ownership of shares of a financial institution, subject to Ministerial approval. Nevertheless, no single investor, whether Canadian, American, Mexican or foreign, may hold more than 10% of the shares of a Canadian chartered bank. In addition, under NAFTA, growth in the assets of U.S. and Mexican banks and the number of their branches in Canada is no longer limited, which is not the case with other foreign banks.

In mid 2000, the Canadian government announced proposed changes to legislation governing financial institutions. If the proposed changes become law, a shareholder may hold up to 20% of the outstanding shares of a large chartered bank, up to 65% of the outstanding shares of a medium sized bank, and unlimited shares of a small bank.

Canada has also undertaken not to use review powers governing the entry of foreign controlled financial institutions so as to indirectly prevent these institutions from exercising their above-mentioned rights under NAFTA. All rights and privileges respecting foreign controlled financial institutions set out in Canadian laws, regulations, practices, and stated policies as of January 31, 1994 are protected. Nevertheless, since the provisions of NAFTA relating to investment do not apply to financial services, Investment Canada will continue to review all financial acquisitions in Canada by U.S. and Mexican enterprises.

K. Conclusion

With time, free trade will have a considerable impact on the North American economy. U.S. and Mexican enterprises doing business in Canada will increasingly benefit from the same advantages as those enjoyed by enterprises located in Canada and vice versa. For non-North American enterprises engaged in the provision of services or the production of goods for the Canadian market, free trade will become a determining factor in the strategic choice they will have to make between providing services from within Canada or producing goods in Canada, and exporting such goods or services from their countries of origin.

XIII. Conclusion

There are numerous considerations that will be relevant to any entity wishing to carry on business in Canada. These materials attempt to highlight certain of those considerations. Any entity wishing to carry on business in Canada should consult with professional advisers to ensure that its specific concerns and requirements are properly addressed.

The Cultural Practice of Law or How to Successfully Do a Deal in a Foreign Jurisdiction

By J. Richard Hoel Jr.

February 2001 ACCA Docket

J. Richard Hoel Jr. is vice president and general counsel, Integrated Facilities Management-Commercial, at Johnson Controls, Inc., in Alpharetta, Georgia.

Although I did not know it at the time, I was fortunate to have my first cultural misstep happen so soon after my arrival in Hong Kong. Two weeks into my assignment as regional counsel for a U.S. multinational company with Asian headquarters in Hong Kong, our personnel director thought it would be a good idea to have a Feng Shui practitioner survey our offices. Feng Shui is the ancient Chinese art of analyzing and, where possible, altering the interaction between people and their environment to maximize positive energy or "chi" and thereby improve their quality of life.

I was out of town when the practitioner surveyed all of the offices on our floor. I am told that all was going very well-with the practitioner making modest suggestions for the rearrangement of some furniture and the addition here or there of a mirror or possibly a fish tank-until he entered my office. The practitioner recoiled as he stared in shock at the layout of my furniture. The arrangement of my desk and credenza formed a triangular prison in which imaginary lines extending from two piers in the Hong Kong Harbor, visible through a window, converged to seal my fate.

"Is he well?" the practitioner had asked. "Has Mr. Hoel been ill, or is his business doing poorly?" He had rarely seen things so grave.

I returned that evening to the bad news: rearrange my furniture or pay the consequences. When I laughingly said I would take the risk, our personnel director warned me that I was not the only one affected. In deadly earnest, the practitioner had predicted that any office in our building with such bad chi could cause company profits in China, perhaps in all of Asia, to plummet. The health of those around me could suffer. Still, I stalled.

It was not long before I noticed that our Chinese employees were not spending much time in my office. Finally, my secretary, who now was dropping things quickly on my desk and darting out, stepped out of character and confronted me, albeit indirectly, by volunteering the assistance of people who would be more than happy to help move my furniture. A week later, I was stunned to hear that representatives of one of our largest customers in China refused to conduct contract discussions in my office. How did they know?

I relented, and the Feng Shui practitioner swiftly returned to chalk the locations where my furniture should be moved. With the help of several complex charts, he noted the optimum dates and times in the upcoming weeks for the move. When the time arrived, my secretary interrupted a meeting I was having with several visitors from the United States, whom I enlisted to help rearrange the office. As we dismantled my triangular cell, I tried to alleviate suspicions by explaining to my guests that this was a new approach to growing the bottom line.

This experience became more valuable to me over time as I gained a deeper appreciation for the Chinese culture. I realize now that, although my co-workers were polite, never expressing anger at my attitude, my indifference was a serious display of disrespect. Fortunately, the incident ended happily, and I learned a valuable lesson. If we lawyers are to bridge cultural divides meaningfully, we must do more than take a brief predeparture course in etiquette. If we are to deal effectively in a different country, we must regard our cultural education as a continuous process that often requires real attitudinal change. The payoff, however, can be immense.

Common Truths

Those who have practiced law for any length of time in the international arena have encountered, and benefited from, a wealth of literature about the various cultures in which we conduct business. Without a doubt, when we prepare to do a deal in a foreign jurisdiction, we should learn as much as we can about the new culture. The world is not yet so small that significant differences do not exist between cultures; a socially graceful act in one country can still be an egregious faux pas in another. Sadly, the ugly American has not retired, as my Feng Shui story illustrates. Too often, Americans act as if the world were moving steadily in the direction of a global western culture and underestimate the value of striving to learn about and understand other cultures.

I once commented to a Japanese friend that I was astounded at how many American trappings I found among the Tokyo populace, such as Lee Jeans, Michael Jordan apparel, and western business suits. I asked him, "Is the rest of the world becoming more western? Is it only a matter of time until cultural barriers disappear and western norms predominate?" After all, I rarely saw Americans in traditional Japanese attire. My friend gently warned me not to fall into this trap. Becoming modern is not the same as becoming western, he said, stressing that external trappings belie the important and unique transformation that occurs when a culture modernizes.

I believe we can glean from our significant collective international experiences as lawyers certain common truths about dealing generally with cultural differences, certain principles and approaches that will serve us well when doing business in any culture. I have traveled to South America, Europe, and Africa, lived for three years in Asia, and made as many mistakes as I am entitled to in each, but as a result, I have learned what I believe are universal axioms that will help attorneys recognize the powerful tools at their disposal to help bridge cultural gaps and build lasting relationships that translate to successful deals. I offer the principles in this article to help lawyers in effectively addressing and taking advantage of factors that draw cultures together. A few may sound basic, even common-sensical, yet it is startling how many of us pay them no heed. In all of the successful international deals that I have seen, more often than not, the attorneys drew upon many of these principles.

People: Cultivating Relationships Is an Art That Pays Dividends

There are few international players who will not trumpet the importance of building and sustaining relationships. Not all, however, understand the significant complexity and work involved in this process. There is more to establishing and fostering successful and meaningful relationships with our foreign conterparts than getting to know one another. Below, I highlight the areas in which we all can benefit from more diligent effort and preparation. It is important to understand and study the various concepts that combine to make one culture different from another, as well as the qualities that appear to be universal, drawing people from different cultures naturally together: our own attitude toward others, differing perceptions of similar factors, unique cultural approaches toward authority and the use of time, listening behaviors, and gender. Each culture is a unique mosaic of myriad qualities. Those who strive to understand this notion will not only consummate successful transactions but also learn a great deal more about themselves in the process.

Embracing Humility

Before I embark upon a trip or tackle a project in a foreign country, I find it useful to spend some time thinking about how much I do not know. That idea may sound strange, but I believe that humility is the most successful attitude to effect in another culture. I could easily jump to conclusions based upon my initial observations abroad, or at home for that matter, only to discover later that I simply had not understood the underlying cultural dynamics at play. In a new culture, my initial observations are almost certainly going to be wrong. And yet, successful international players do not embark upon a foreign challenge with a sense of fear or dread, but with a sense of wonder and adventure, born of humility.

When I first started practicing international law, an insightful attorney from Singapore, who is now a good friend, explained this attitude to me by drawing an analogy to "The Story of the Cave" told by Plato in the Republic. Plato used this myth to explain his theory of knowledge as the search for the pure forms of all people and things in our lives. The story describes a group of people who have lived chained within the recesses of a cave, bound together in a way that prevents them from seeing one another or the world outside. With their backs to the entryway, the cave dwellers see only a cave wall that displays shadows cast by figures passing before a fire as they move about outside.

Breaking free, one of the dwellers escapes into the daylight and sees the real world for the first time. He returns to the cave to tell the others that all they have experienced thus far are shadows, which they have mistakenly, although understandably, believed to be real. The real world awaits them if they are willing to struggle free of their bonds.

My Singaporean friend used this story as one of his tools to reach a deeper understanding with attorneys from different parts of the world. He was constantly enthused with the pure joy of learning about others, and his enthusiasm was infectious. Yet, he was humble, constantly asking questions about the way we lived, what we believed, and how we perceived the world. I watched in awe as my friend was able to gain the trust of everyone involved in our deal, not because of his grasp of the substantive aspects of the transaction, but because of his sincere interest in the lives of those around him and his desire to learn. People naturally wanted to communicate with my friend.

In my view, the international lawyer's success flows from this humble approach. This perspective may generate decisions that seem counterintuitive to many lawyers, but they usually lead to a more successful intercultural experience. The time-honored position of always negotiating on home turf, for example, does not hold up when we recognize how much there is to learn about the other party's culture and the benefits of doing so. Today, writes a distinguished U.S. international law professor, "the effective global deal maker sees the negotiation as an opportunity to learn, and the best way to learn is to visit the other side's territory to conduct the negotiations."1 The visit demonstrates commitment and often transforms the visitor into the driving force in structuring a deal.

Within each culture, we meet people like my Singaporean friend who seem to embody a multicultural temperament. It is important that we seek these people out even as we strive to develop the characteristics of such a temperament in ourselves.

Anticipating Cultural Differences

All attorneys understand the need for thorough preparation. But preparation becomes more complex when we deal in a different culture. If we just read a book about the country we are about to enter on the flight over, we only scratch the surface.

When negotiating a transaction in a foreign country, we must learn as much as we can about the customs and negotiating styles of our counterparts. We also must learn as much as we can about the individuals with whom we will be dealing. What are their roles within their enterprise and their relationships to one another? Who has the authority to make decisions? If authority does not exist within the group with which we are dealing, where and with whom does it reside?

Frequently, a cultural interpreter, someone in the country whom we know and trust, is our best source of preparation. Much like a language interpreter, a person who knows both us and his or her own culture can prove invaluable in providing general cultural insights and in framing a clearer picture of the people with whom we deal. Such a person can be especially helpful during negotiations by deciphering what is really happening on the other side, thus giving us an opportunity to step outside of our cultural caves.

I met such a person in Vietnam while negotiating a contract with a local customer. A college student in Hanoi, whom we originally hired as a translator, this young man spoke excellent English and was exceptionally skilled at discerning intentions from the words and actions of our Vietnamese hosts. Interestingly, because of his excellent translation skills, he also helped our hosts and soon became an integral part of the negotiation process, playing a mediating role as we struggled with some of the more difficult issues. His insights into the internal debates occurring among our Vietnamese counterparts were particularly useful. During these tough negotiations, he often encouraged our team not to lose patience and not to display our growing frustration openly. I frankly did not have as much confidence in the process as he did, but his advice proved accurate. Our interpreter had correctly assessed a growing willingness on the part of our hosts to compromise.

Understanding Perceptions of the United States

And what about our culture? Rarely do we focus on our unique culture, but we should try to imagine how others will be looking at us. I find it tremendously useful to consult a book or other literature written for non-Americans that describes us and counsels readers on how to deal with us.2

Americans have been described as a collection of immigrants who are individualistic, hedonistic, and materialistic. We have been characterized as some of the world's toughest negotiators, yet easier to deal with than many because of our open, straightforward philosophy that we want to earn as much as we can as quickly as possible through hard work, opportunism, and, if necessary, raw power.3 But each culture brings its own perspective to bear upon this American assessment, and as a result, different cultures highlight, and often exaggerate, different qualities. The Japanese, for example, tend to regard Americans as nationalistic, decisive, frequently rude, and self-indulgent, while the Germans view us as energetic, inventive, sophisticated, and intelligent.

How prepared are we to help others to understand us? Inasmuch as our effectiveness will increase as our understanding of our counterpart's culture does, it is only logical to conclude that our deal-effectiveness quotient will double if we facilitate the other side's understanding of our culture. We have a tremendous, largely untapped opportunity to educate our counterparts about the best we Americans have to offer.

I often identify for my foreign counterparts the qualities that I believe Americans possess, such as forthrightness, persistence, tolerance, and compassion, and think of ways to help them truly understand these attributes and their genesis in our country. I have found that simply describing these qualities is of little value in an intercultural setting. But as my Singaporean friend understood, storytelling is an excellent tool. The myths, folklore, legends, and proverbs of a culture, and the personal experiences that its people share with one another constitute the knowledge about that culture. Storytelling transmits culture.4 To appreciate an American value, someone from a different culture needs first to visualize the notion and then to understand it in the context of an anecdote or story. I therefore am more likely to read Lincoln's Gettysburg address on my flight over than a book on cultural manners.

We attorneys have the training and a particularly useful platform to help others understand the American character and thus facilitate a degree of mutual understanding that can encourage successful deals. People remember points better if they are conveyed in the form of stories, not charts. This notion seems to be a universal truth. Before we begin negotiating in a foreign country, we need to find stories, anecdotes, and other creative means by which to describe our culture, our companies, ourselves, and the legal system in which we operate.

Appreciating Different Views on Authority

Members of different cultures have very different ways of perceiving and dealing with authority. At one end of the authority spectrum, Americans embody the single leader view of authority, exemplified in fact and lore by the rugged individualist who leads loyal troops into battle or stands alone bravely against overwhelming odds. From George Washington to Gary Cooper, the image endures. As a result, the personality of the leader is a very important factor with American business teams and often the focus of attention during negotiations. At the other end are the Japanese, who play down the importance of a leader and stress teamwork and building consensus. The real leader of a Japanese negotiating team is often not obvious. The Chinese, although governed autocratically, deal with authority in a manner similar to the Japanese; we should never be surprised to have our team of three met by a Chinese or Japanese delegation of twelve.5

The way in which a culture handles authority can significantly influence intercultural business interactions. For example, one consequence of the American style is that the leader often becomes the team in the eyes of Asian negotiators. I have seen numerous situations in which progress made over the course of several meetings evaporated when the American team showed up with a new leader, a commonplace occurrence in our fast-paced environment. To be successful, American attorneys must carefully prepare the other side for this eventuality.

One cultural study on attitudes regarding authority looked at how members of different societies regard inequality and deal with it on a regular basis.6 Local IBM employees in more than 50 countries answered three questions designed to illicit (1) subordinates' fear of superiors, (2) subordinates' perception of the type of authority, autocratic or paternalistic, wielded by their superiors, and (3) subordinates' preference for an autocratic or paternalistic style of authority.

Interestingly, perception correlated very closely with preference. For example, in Malaysia, the country ranking highest (most autocratic) on the resulting Power Distance Index ("PDI"), citizen/employees perceived their leadership as very autocratic and preferred it that way. Members of such a highly autocratic culture would be likely to view someone in authority as distant and difficult to approach, expecting and preferring that the leader make important decisions alone. Austria ranked in the study as the least autocratic society. Accordingly, we would expect most Austrians to view authority figures with less deference and fear and prefer consultative decision-making processes. I find it very useful to know where a country ranks on the PDI scale before I embark on a project.7

Discerning Time and Listening Aptitudes

As a young attorney, I had the opportunity to participate in a complex litigation battle between two aggressive, privately owned companies. An initial dispute in one jurisdiction quickly escalated with a series of seizure and attachment actions commenced by each party against the assets of the other in various locations, including Europe, Canada, the Cayman Islands, the United States, and Singapore. After several months, I attended a meeting of our client's attorneys from Great Britain, Canada, Portugal, and Singapore. I often reflect upon the significant role that cultural differences played in our deliberations.

The British attorney chaired the meeting. He adhered to a very strict agenda, scheduling time for everything, including bathroom breaks. While exchanging pleasantries, most of us became aware that our Singaporean associate was not very comfortable with small talk. He was so reserved that we had difficulty knowing whether or not he understood the conversations. During the meeting, he often asked questions, rather than make statements, which only heightened our impression that he was not understanding. Conversely, the attorney from Lisbon was more talkative than any of us and not very impressed with the rigid meeting format. He often interrupted with ideas and proposals that were not on the agenda and did not appear to listen to others' comments. He also requested frequent breaks to call his office on unrelated matters. We had a terrible time making progress, and we were all on the same side!

I know now, but did not appreciate then, that I was witnessing classic examples of three different cultural approaches to the concept of time.8 Linear-active people, exemplified by the British, Germans, Swiss, Swedes, and, to a lesser extent, Americans, think and work in a linear manner, attaching great importance to agendas, timetables, and deadlines. They see a logical progression to life. If they do A, they next do B, and C follows.

At the opposite end, multi-active people, such as the Portuguese, Italians, and other southern European and many Latin American cultures, are less concerned with timetables and punctuality than with flexibility and the ability to manage a number of things at once. If circumstances change, an Italian is apt not to see the sense in sticking to an agenda or keeping an appointment that may no longer have any real significance. Our meeting agenda made little sense to our Portuguese associate once he felt that it failed to address some of the real issues we faced. From his point of view, he would expect others to dispense willingly with such an agenda also.

The third group consists of the listeners, who come from reactive cultures in which members typically wait until the other side presents the facts or a position, then often pause before responding. In reactive cultures, such as Japan, China, Taiwan, Singapore, Korea, and Finland, we find the world's best listeners. They frequently respond with more questions to elicit additional facts and even then are reluctant to state a firm position, relying often upon the unspoken and on evolving consensus. People in these cultures are much more comfortable with silence than westerners, who frequently leap to fill a gap in conversation, often before a position has been thoroughly considered.

Is one culture right and another wrong? Was the Portuguese attorney rude to have interrupted or was the British attorney missing the boat by not being more flexible with his agenda? Did the Singaporean attorney have a particular strength to offer that others could not see because they concluded too abruptly that his silence and unwillingness to engage in small talk were signs of indifference, ignorance, or disrespect?

I was reminded of this meeting years later during a conversation with a Chinese friend about the different ways we view each other's culture. He confessed that Chinese often see Americans and Europeans as impatient, selfish, and opportunistic, with a singular focus upon individual needs and goals. I noted that Americans often view the Chinese as much too dependent on what others think (the face concept) and lacking in self-confidence. Some portion of each characterization is accurate because of our respective nation's history. The American frontier experience and the Industrial Revolution bred a country of self-reliant individuals. In China, famine and poverty naturally fostered a community need to rely on others, and Confucianism taught patience.

Our meeting of intelligent attorneys from all corners of the world could have led to some of the most creative solutions the world has to offer. Unfortunately, the things we did not understand about one another stood in the way; in the final analysis, little was accomplished. Had we been more aware of our cultural differences, I suspect that our initial judgmental reactions would have been different. We might not have seen the Portuguese attorney as necessarily rude for interrupting. The lawyer from Singapore was almost certainly not confused or disrespectful in choosing not to participate more vigorously. And our British leader was probably not protecting his lead role by insisting on sticking to an agenda. Had we focused upon our respective cultural strengths of discipline, flexibility, and patience, rather than on superficial conflicts, we could have achieved our potential. The recognition of cultural differences is the first step toward effective communication; in the international arena, compromise opens doors to creative opportunities to structure successful deals.

Evaluating Gender Differences

There are several ways of looking at gender as a cultural issue. Each culture has at least some unique characteristics that reflect the roles of men and women in that society. It is common, for example, to find that most dentists in Belgium and most doctors in Russia are women. In Japan you need to look hard to find a female manager, while many managers in the Philippines and Thailand are women. In Pakistan, most typists are male.9 Certainly, the role of women in Arab countries is far different from that in the West. In Japan and many other "masculine" cultures, parents reinforce stereotypical gender roles from birth.10

Despite these differences, some well-known gender-role characteristics are common to all cultures. Based in large measure upon biological development and reinforced to some extent in all societies by sex-role stereotypes, most cultures see men as more interested in roles outside of the home and associate such traits as assertiveness, toughness, and ambitiousness, with an emphasis upon material success, as masculine. Most cultures typically view women as home-oriented and more modest, tender, and concerned with the quality of life.

Although individual exceptions often shatter these role definitions, one prominent study has classified cultures based upon a predominance of masculine or feminine attributes.11 In the most masculine countries, Japan, Austria, and Italy, both men and women express a strong preference for distinct masculine and feminine roles with each sex preferring its traditional behavioral model. But in the most feminine countries, Denmark, Sweden, Norway, and the Netherlands, no difference exists between the responses of men and women, both indicating a preference for a tender and nurturing value system, as well as a personal desire for a tender, nurturing role.

I find it very helpful to know where a country ranks on the masculine-feminine scale.12 Countries seem to reflect predictable characteristics in business practices based upon their position on this scale. Masculine societies do tend toward heavy manufacturing industries, while feminine cultures lean toward service industries. Members of masculine cultures conduct business in a more aggressive style, viewing meetings as opportunities to express themselves and to sell ideas. In feminine cultures, meetings are opportunities for cooperative consensus building.

Establishing Personal Connections

Shortly before leaving Hong Kong, I asked a Chinese friend what she thought was the single biggest mistake that Americans make in conducting business in China. She said she was constantly surprised that Americans do not take an interest in Chinese culture or in the stories of Chinese people. She could not understand how anyone could do business with someone else before knowing that person, before establishing a relationship. Western SWAT teams, as she called them, paid little heed to personal connections. She thought, as a result, that deals that could have been completed with a little more patience were not and that some deals that had been consummated quickly did not survive.

Whenever we deal with people from different countries, we should bear in mind that two types of culture are at play: the vertical and the horizontal. As Americans, we are all members of the same vertical culture. But as lawyers, we have cultural kin in every country in the world, members of the horizontal culture of lawyers. Often, there is more common ground between two lawyers from different vertical cultures, than between a lawyer and a member of another profession in the same vertical culture.

We need to realize that, often with a purely domestic transaction, both sides know and understand equally the various ways to structure the deal. But when two different cultures are involved, synergistic forms of structuring a deal may occur by combining traditional approaches from each culture. If lawyers do not establish relationships and understandings that maximize the potential for creative alternatives, these new approaches often go undiscovered. All of the principles that I have described so far come to bear upon this process. I am convinced that many creative options never emerge because the lawyers have not established relationships that leverage the wealth of horizontal synergies. And yet, lawyers may be the only people in the deal-making group with the training and skills necessary to bridge difficult differences and find a creative solution.

Before moving to Hong Kong, I worked in Brazil to structure a joint venture with several Brazilian entities in order to bid on a government project. It was only after I had spent a great deal of time with my Brazilian counterparts negotiating the terms of the joint-venture agreement that we were able to see beyond the government's very rigid requirements for the venture structure. Repeated delays in the bid process actually gave me an opportunity to know my counterpart very well. After he had explained the history of his country's struggles with privatization in the context of an entrenched bureaucracy and I had described similar stories about deregulation in the United States, we discovered that we had had certain common experiences with the legislative process in our respective countries. Our talks led to a mutual decision to bring a government lawyer into the process to help us better understand our challenges. Ultimately, this step encouraged a fresh approach that resulted in liberalizing the bid requirements, a solution that may not have been possible if all of the attorneys involved had not been willing to think outside of the box.

The Deal: Every Agreement Has a Culture of Its Own

Observing the principles discussed above will put lawyers in a position to do what they do best: structure, negotiate, and close a successful transaction that will last. Although much of our deal preparation must focus on the deal's specifics, we also need to learn as much as we can about similar deals in the foreign culture. What are the precedents for what we are doing, and how have others overcome some of the difficulties that we are encountering?

Creating Rules of the Deal

I once worked with a team negotiating an extremely complex deal with the commercial arm of a government ministry in China. We spent a week getting to know each other, wining and dining in the traditional way, but skirting the key issues. Despite our best efforts, we were stiff in negotiations, in part because of the size of each team: six members on our side and eight on the other. Rigid hierarchical reporting relationships among our counterparts also restricted the free flow of horizontal discussion.

Although these formidable barriers threatened to undermine the deal, we all had a strong desire to succeed, and we made slow progress. One day as we struggled with a particular structure that involved several interlocking relationships with various subsidiaries in and out of the country, several of us started to move coffee cups and glasses around the conference table. Eventually, everyone joined in, using cups, glasses, and cans to illustrate the complex arrangement. Suddenly, we realized that, with pencils, coffee cups, and Coca-Cola cans, we had diagrammed a deal that we all thought would work.

Before we knew it, a waitress started to pick up the cans and cups. As one, we rose in protest. We all stared at one another in a terror that quickly ripened into the first real group laughter of the week. Much work remained to be done, but our breakthrough was significant. We photographed the table from various angles and used the photos as a reminder of the week. When we finally signed the deal, we each got a coffee cup inscribed with the name of the transaction and a framed picture of the table.

This story may seem trivial, but it is an example of a phenomenon that typically will occur with any lengthy negotiation. If recognized, such breakthrough collaboration can be built upon and lead to much greater understanding. I do not, by the way, arm myself with pop bottles before all international negotiations. That was one deal, and the accidental approach fit well. But I do now start all new sessions by candidly discussing with my counterpart the agendas and items that we can agree upon, such as the daily starting time or the seating arrangements. I suggest we put together a working statement of deal rules, which are separate from more formal documents, such as letters of intent or other memoranda of understanding. The other attorney is often excited to explore this exercise because it sets the stage for deeper understanding. It also presents an excellent opportunity for developing significant cultural compromises based upon honest discussions about the cultural differences that tend to prevent successful negotiation. As noted earlier, agendas may not suit all cultures, and any discussion of process should not shy away from stylistic differences.

I know that the sooner I can establish links with the foreign parties, the sooner we will be able to view ourselves as one team rather than two or more, and the better the chances are that the deal will be based on a full and candid discussion of all issues. We lawyers can play a key role in defining the new team and its unique culture.

Forging Genuine Understanding

Often, true negotiation stops in international negotiations when the deal is struck. At this stage, I become concerned if the other side does not dedicate as much effort to drafting the agreement documents as it did to negotiating the business terms. Its indifference raises the likelihood for me that the party does not intend to adhere to the contract terms. If I did not respond to this indifference, I would squander a critical opportunity to strengthen the relationship between the parties and to expose issues that may derail the relationship in the future.

My company was one of the first to set up a representative office in Vietnam after the United States had lifted its trade embargo. Much to our welcome surprise, Vietnamese businesspeople had a tremendous pent-up desire to do business with the West, particularly the United States. Resentments from the war appeared to be gone. The Vietnamese seemed to be genuinely fascinated with Americans and their products and services. We were deluged with opportunities.

We negotiated deals quickly. In one case, my Vietnamese counterpart asked that I prepare the contract, which was not a surprising request in a developing country. Much of the Vietnamese corporate law had recently been enacted and was largely a cut-and-paste job, using a great deal of U.S. statutory language even though many of the provisions were clearly inapplicable to the new markets of Vietnam. In much the same vein, the Vietnamese lawyer with whom I was dealing suggested that we use my form contract and did not propose many changes. I certainly thought that the contract protected our side and would have been proud to walk away with a deal in this form. But what would its true value have been? I remembered an adage that a law school professor had repeated ad nauseam: "Never let 'I didn't understand' be the legitimate basis for a contractual dispute."

When this type of situation arises, contrary to my first instinct, I force everyone to sit down and truly negotiate the terms of the contract, so that we all understand to what we are agreeing. I find that when I do this, my contracts tend to pattern the deal more particularly and often take form in a completely different way from that originally planned. I am not always as pleased with the substantive aspects of the document as I was when my form was pristine, but I am satisfied that the contract reflects the deal and the understanding of the parties. Most important, the deal takes on a life that cannot easily be denied at a later date.

More and more, I believe that successful negotiation is not getting my way, but getting a complete meeting of the minds. This point was driven home one day after I had spent the better part of a year negotiating a breakthrough sales agreement with a state-owned enterprise in the People's Republic of China. We signed the agreement with much fanfare, and all seemed well until the buyer suddenly demanded a steep reduction in the price of our product. My product manager's counterpart told him that if the reduction were not forthcoming, the customer would simply deal with a more competitive supplier. He asked me the obvious question, "Can they do this?"

I had felt pretty good when I had explained to my management team the year before that the contract had no provision requiring a reduction in price under these or any other circumstances. Unfortunately, the customer just told my team that it didn't care what the contract said. "Why," the buyer had asked in sincere surprise, "would we look to a contract that was signed a year ago, when circumstances have now changed so significantly?" In many Asian cultures, the concept of contract does have a different meaning from that which we apply in the West; Asians view a contract as a statement of present intent rather than as a roadmap to govern future dealings between the parties.

We managed to deal with these problems and keep the relationship intact, but this experience forced me to think about what could have been done earlier in the process to avoid this situation. Obviously, sitting down and truly negotiating all phases of the contract would likely have flushed out the possibility that one of the parties might not honor the contract if the price went up, an uncomfortable eventuality to face perhaps, but much easier to address at the outset. Certainly, I could have learned more about the different attitude that my counterparts had toward contracts generally. My role as the lawyer is to probe such issues and, if need be, to let my people know that they should take little comfort in a deal that reads well for them, but that is not fully understood and less likely to be observed by the other side.

Defining Language and Terms

I have found that, when efforts are made to truly negotiate the terms of an agreement and parties undertake the process honestly with the intent to inform, we can draft unique contracts. In many instances, the definition section becomes the most critical component of the entire agreement. The lawyer's role in this process is much more than that of a scribe or a negotiator; lawyers on both sides become educators, as well.

During this process, I am always surprised by how much we take for granted and typically find that many terms familiar to us are understood by our counterparts in a completely different way. Whenever I start to assume that all of us must have the same understanding of a basic term, I recall my wife's experience when she was first teaching at the Chinese University in Hong Kong. As she does in the United States, she had hung a sign on her door that read: "Please make an appointment to see me." The first day, she was inundated with people knocking on her door to make an appointment. People who were not taking her class and had no reason to see her took this message as a directive, not as a scheduling mechanism for those who otherwise wanted to see Pam.

But Americans also stumble over language. One of the most common mistakes committed by westerners in Asia is their failure to appreciate the tendency by Asian people to avoid directly saying "no" to anything. In part, they do not wish to offend, but they also have a cultural preference for avoiding direct confrontation. More likely than not, when an Asian negotiator says "maybe," "I will think about it," and "possibly," he is strongly hinting that a deal is headed in the wrong direction.

We must use all of the tools at our disposal to elicit a clear understanding of the real meaning of language and terms. We can never spend too much time on definitions. But defining our western terms is only half the story. I know the process is in full bloom when my counterparts are also adding to the definitional mix, helping me to understand the importance of their legal terms and definitions. Particularly in emerging markets, this process can mean the difference between a contract that lasts and one that is quickly ignored when crisis occurs. Some of my most successful contracts contain definition sections that are longer than the rest of the agreement.

Fashioning a Creative, Flexible Contract

Negotiating and drafting a contract is a much more exciting process when we view it as an opportunity to learn, teach, and build understanding. We must be creative. We should not be wedded to the forms that have come to be accepted in our country or any other for that matter. We should incorporate into our contracts the cultural bridges that we have built during our negotiations. Legal language is often unduly complex in our country; our legal jargon has to confuse lawyers from different cultures. To express the true bond that we have established with our foreign counterparts, we should create our own language. The contract should be a living embodiment of our business achievement, not some neutral, detached recitation of one lawyer's view of the deal.

I have a particularly effective approach for doing this in Asian countries, where relationships are so important. I learned that I could avoid or at least lessen the chances of a later circumstances-have-changed argument by addressing the relationship issue head-on in the contract. We hear repeatedly from many of our Asian partners that the contract itself is only words and that the true success of the deal will depend upon the strength of the bonds that the parties have formed and will cultivate this motion. This notion is undoubtedly true and a point that we in the West should focus upon more frequently. But there is validity to our point of view, as well; a written contract can and should be the basis of our dealings now and into the future. Not only do we expect the contract to be honored, but also we expect both parties to value it and to work within its guidelines.

The solution, I find, is to reflect in the agreement the parties' desire to cultivate the relationship continually and to rely upon that relationship to address problems before turning to mediation, arbitration, litigation, or another mechanism for dispute resolution. I use a relationship management clause in those cultures that stress the overriding importance of relationship. (See sidebar on next page for a sample relationship management clause.) It is a useful vehicle to head off disputes before they reach a serious level. We can always customize a contract so that it is truly meaningful to both parties. It is much more difficult to deny the applicability of an agreement when it is, in part, a creation and reflection of our own values and efforts.

sample relationship management clause

Conclusion

In order to glean similarities between cultures and establish platforms that will lead to creative, cooperative deal-making, we first have to recognize and understand core differences that have not disappeared as the world has become smaller. There are no shortcuts to this process. Although it is important to learn the proper way to shake hands or to exchange business cards in another country, we initially need to activate our intellectual curiosity and be willing to engage in the hard work of understanding the key cultural characteristics of our counterparts and ourselves.

When I consider the effort involved and the payoff, I can't help but think of my friend from Singapore and others like him. The one characteristic more than any other that makes these people so successful in this intercultural endeavor is their genuineness. Those who take a real interest in another's culture are those who take an equally genuine interest in their own and cultivate creative ways of teaching others about themselves. Lawyers who seriously engage in this dialogue establish an environment in which the very best qualities of each culture can be identified and blended to maximize the chances of long-term success.

We all have experienced deal failures. I see too many transactions in the international arena break down because of a fundamental misunderstanding that never surfaced during the negotiation either because the lawyers had failed to recognize it or because they had thought at the time that it would be easier to accept certain ambiguities in order to get a deal signed. Thankfully, we have also been involved in deals that survive crisis, often repeatedly. In these deals, the lawyers build a strong and lasting relationship and play an important role in structuring a culturally meaningful agreement. They also have more fun.

Once I have successfully completed a deal, my relationships with the people with whom I have worked abroad are just beginning. My effectiveness grows as I cultivate those relationships from the United States and reinforce what I have learned by passing my experiences on to others at home. In turn, people provide me their rich experiences, enabling me to reload my arsenal with stories and strategies for the next deal.

Notes

1. Jeswald W. Salacuse, MAKING GLOBAL DEALS 17 (1991).
2. See, e.g., Richard D. Lewis, WHEN CULTURES COLLIDE 165-71 (1996).
3. Id. at 167.
4. For basic reference, see, e.g., Rives Collins & Pamela J. Cooper, THE POWER OF STORYTELLING (2000); Audrey Fisher, HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE AND ACTION (1989).
5. See Salacuse, supra note 1, at 68-69.
6. See Geert H. Hofstede, CULTURES AND ORGANIZATIONS 23-48 (1997).
7. See id. at 26. The five highest-ranking countries were Malaysia, Guatemala, Panama, the Philippines, and Mexico. The five least autocratic cultures were Austria, Israel, Denmark, New Zealand, and Ireland. Other country rankings, with the lower number indicating a more autocratic culture, include India (10), South Korea (27), Spain (31), Japan (33), Italy (34), United

States (38), Germany (42), Britain (43), and Sweden (48). Note that some of these rankings do not readily correlate with the country's traditional views of leadership. The United States has a relatively low PDI, for example, in light of our focus upon the individual and a single-leader structure. But this situation makes sense when we consider that, despite the American desire for strong leaders and hierarchy, our culture does not evidence a great distance between leader and follower nor are we afraid to confront our bosses.

8. See Lewis, supra note 2, at 52-64.

9. See Hofstede, supra note 5, at 80-81.

10. See Norine Dresser, MULTICULTURAL MANNERS 125-26 (1996). In Japan, it is not uncommon for parents to pack sweets in their little boys' school lunches while girls receive none. Parents have higher expectations for boys and treat them accordingly. Id. at 125.

11. See Hofstede, supra note 5, at 79-108.

12. See id. at 84. Some sample country rankings, with lower numbers indicating masculinity, include Japan (1), Italy (4), Mexico (6), Germany (9), United States (15), India (20), Brazil (27), Israel (29), France (35), Spain (36), Thailand (44), and Finland (47).

Sidebar for The Cultural Practice of Law or How to Successfully Do a Deal in a Foreign Jurisdiction

Sample Relationship Management Clause

1. Relationship Management

The parties agree that the maintenance of a trusting and candid relationship is vital to the success of the Agreement. Accordingly, both parties will exercise their best efforts to identify and resolve any disputes before it becomes necessary to resort to arbitration, litigation, or any other form of alternative dispute resolution described later in this agreement.

With this goal in mind, the parties agree as follows:

Each Party shall appoint a relationship manager ("Manager") who shall be an individual who has been involved in and understands the history of the negotiations leading to this Agreement. Additionally, both Managers shall be familiar with all of the terms of this Agreement and Exhibits and shall be responsible for reviewing the same on a regular basis. To the extent that either Manager at any time feels that a portion of the Agreement is not clear and requires clarification, he will seek advice from that Party's appropriate representative.

Party A appoints _________________ as its Manager, and Party B appoints __________________ as its Manager.

The Managers will meet on a regular and frequent basis but no less than once every two weeks. The purpose of these meetings will be to discuss and identify any potential sources of misunderstanding that may have arisen with respect to the Agreement and the relationship between the Parties. Following such meetings, each Manager will report back to the Parties' respective management on the status of the Agreement.

In the event that any problems are identified, the Managers will discuss those problems with their respective management and attempt to resolve any issues together. At such time as both Managers agree that a problem has not been resolved and may lead to a dispute, the Managers will advise their respective managements and arrange a meeting between appropriate representatives of each Party for the purpose of resolving the issue.

Once the problem has been resolved, the Managers will prepare a joint written report and submit the report to their Management with a clear explanation of the problem, as well as the resolution.

2. Alternative Dispute Resolution

The Parties shall attempt to resolve all disputes relating to the Agreement as described in Section 1 and through good faith negotiations. If the Parties are unable to resolve such disputes through negotiations within thirty (30) days, they shall submit the dispute to a mutually acceptable professional mediator who shall assist the Parties to reach an acceptable solution to their dispute. Should the Parties be unable to resolve their dispute through mediation, then the Parties shall submit their dispute to arbitration as set out below.

3. Arbitration

All disputes that cannot be resolved as stated above shall be submitted to arbitration before (example: the International Chamber of Commerce in Paris, France) for resolution according to its rules then in effect. The arbitration shall be in (English). The award shall be final and binding upon the Parties, and any judgment consistent therewith may be entered in any court having jurisdiction over the parties.

Explore information related to this topic:

- CIA: The World Factbook at www.odci.gov/cia/publications/factbook/index.html.
- Rives Collins & Pamela J. Cooper, The Power of Storytelling (2000).
- Norine Dresser, Multicultural Manners (1996).
- Audrey Fisher, Human Communication as Narration: Toward a Philosophy of Reason, Value and Action (1989).
- Geert H. Hofstede, Cultures and Organizations (1997).
- "International Alliances: A Guide to Due Diligence," by Thomas M. Federico, ACCA Docket 15, no. 6 (1997).
- Richard D. Lewis, When Cultures Collide (1996).
- LexMundi Guides to Doing Business at www.lexmundi.org/publications/guides.html.
- Northwestern University Government Publications at www.library.nwu.edu/govpub/resource/internat/igo.html.
- Jeswald W. Salacuse, Making Global Deals (1991).

Adding Value Around the Globe
Monday, October 15, 2001

Website Resource List

Our panel on "Adding Value Around the Globe" will only touch upon some of the many issues that arise when a company located in one nation has business contacts in another. The following pages are examples of issues.

There are a number of companies that work with ACCA/GCCA and who provide products and services in this area. Some provide basic legal summaries and charts to the public at no cost, and some charge a fee. Here is a list of these entities and their websites for your reference:

Commercial Law Affiliates

www.claonline.org

Goodman and Carr

www.goodmancarr.com

Fragomen, Del Rey, Bernsen & Loewy

www.fragomen.com

Interlaw, Ltd.

www.interlaw.org

(**Cariola Diez Pérez-Cotapos & Cia. Ltda.** www.cariola.cl)
(**Stevenson, Wong & Co**. www.sw-hk.com)

Lex Mundi

www.lexmundi.org/publications/guides.html
www.lexmundi.org/committees/intl-tax-checklist.PDF
www.lexmundi.org/publications/ipdesk.html