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DOING BUSINESS IN CANADA

McMILLAN BINCH MENDELSON



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No decision to establish or invest in a business abroad should be made without a basic understanding of the legal framework in which the business will operate. The following broad overview of the Canadian legal environment will help the potential US investor become familiar with significant business laws and practices in Canada. However, this summary provides only an introduction to the Canadian system, and in no way constitutes an exhaustive analysis of the many statutes, regulations and conventions relevant to doing business in Canada. Accordingly, the prudent investor should discuss any Canadian investment proposal with Canadian legal counsel.

GOVERNMENT AND LEGAL SYSTEM

Like the United States, Canada has a federal system of government. The Canadian federal state consists of a federal government, ten provincial governments and three territorial governments, each with its own sphere of legislative competence. Additionally, the provincial governments may delegate legislative authority to local municipal governments. At all levels, governments may delegate regulatory power to specialized administrative agencies, boards or commissions. Consequently, a business may well be subject to federal, provincial and municipal legislation, as well as administrative regulation and the common law developed by the courts.

FOREIGN INVESTMENT LEGISLATION

Investment Canada Act

When foreign investors either establish a new Canadian business or acquire control of an existing Canadian business (whether from a Canadian or a non-Canadian), they are subject to the *Investment Canada Act* (ICA). Although this document addresses the ICA only in its application to corporations, the Act also covers partnerships, trusts and joint ventures. Under the ICA, a “non-Canadian corporation” exists whenever individuals who are neither Canadian citizens nor members of specified classes of Canadian permanent residents hold ultimate control, through ownership of voting shares.

Reviewable and Notifiable Transactions

The book value of the acquired business’ assets, the industry in which that business operates, and the investor’s nationality together determine whether the non-Canadian investor must simply notify the Investment Review Division of Industry Canada (the Division) or file a more onerous application for review with the Division. Consequently, it is important to recognize the distinction between a reviewable transaction and a notifiable transaction.

In general, a transaction subject to the ICA is a **reviewable transaction** if the acquired Canadian business’ book value, as seen in its most recent financial statements, exceeds the applicable threshold. If the investor is a “WTO Investor”, direct acquisitions of a Canadian business are reviewable only if the book value of the acquired business’ assets exceeds an annually adjusted threshold (currently Cdn\$281).

Conversely, the WTO Investor’s indirect acquisitions (for example, acquisitions by a foreign corporation through a Canadian subsidiary) are not subject to review. A WTO Investor is defined as an investor ultimately controlled by nationals of World Trade Organization member states, such as the US.

Review thresholds are reduced to Cdn\$5 million for direct acquisitions and Cdn\$50 million for indirect acquisitions in the following four industry sectors: culture, financial services, transportation, and uranium. Moreover, the Federal Cabinet, at its discretion, may initiate review of investments below even these thresholds in the cultural sector. The Cabinet frequently does exercise this right to review cultural sector transactions. Any review in this sector is conducted by the Department of Canadian Heritage instead of the Division.

If the book value of the acquired Canadian business’ assets exceeds the applicable threshold for review, the investor must file an application for review and obtain the approval of the Minister of Industry before implementing the transaction. In deciding whether to approve the reviewable transaction, the Minister considers whether the investment “is likely to be of net benefit to Canada”. This determination is made on the basis of economic and policy criteria included in the ICA. Often, the investor



must be prepared to meet with government officials and give undertakings concerning the acquired business.

The approval process begins with an initial review period of 45 days from the date the completed application is received. However, the Minister of Industry has authority to extend the review period unilaterally for 30 more days. Although any further extension requires the applicant's consent, the applicant typically has little choice but to agree. Fortunately, Division staff is sensitive to the demands of business deadlines and does make a real effort to deliver the decision before the anticipated closing date.

On the other hand, **notifiable transactions** involve a far less onerous process. A notifiable transaction exists where the book value of the acquired Canadian business' assets falls below the applicable thresholds described above. Such acquisitions are not subject to review and the investor need only notify the Division of the transaction either before or within 30 days of its completion. To meet the notification requirement, the investor simply files a two-page form.

Likewise, a non-Canadian who establishes a new Canadian business must comply with the notification requirement. Again, the Federal Cabinet has discretion to initiate review of a new Canadian business proposed in the cultural sector.

Specific Industry Legislation

In addition to the ICA, other statutes contain ownership and investment restrictions with respect to specified industries, such as financial services, broadcasting and telecommunications. Any proposed investment or acquisition in these sectors therefore must be assessed in light of the specific regulatory regime to which that industry is subject.

Currency or Exchange Controls

Notably, Canada has no system of currency or exchange controls restricting the repatriation of Canadian business capital or earnings to non-Canadian investors.

ALTERNATIVE VEHICLES FOR DOING BUSINESS

Foreign investors most often conduct business in Canada through either a Canadian branch operation or a Canadian subsidiary corporation. A foreign business might instead enter the Canadian market by forming an unlimited liability company, partnership, or joint venture with other parties. Alternatively, the foreign business may establish one or more Canadian sales representatives, distributors or franchisees.

A number of considerations must be addressed when choosing the appropriate commercial vehicle for entering the Canadian market. Tax consequences and limited liability tend to be the key considerations for most businesses. Incorporation of a limited liability subsidiary corporation is an attractive option because it ensures that Canadian operations will have a legal existence separate from that of the parent. However, if the Canadian operations are not expected to generate profit for some years, initial operation as a branch could produce considerable tax savings (as discussed more fully below).

Subsidiary Corporation

Subject to certain exceptions, a business may incorporate under the federal statute or any of the provincial statutes. In either case, incorporation is accomplished simply by filing Articles of Incorporation and paying a modest fee to the appropriate government authority.

A number of factors guide the investor in choosing between federal and provincial incorporation. Quite often, due consideration must be given to whether the company needs to protect its business name across the country. Whereas a federal corporation may carry on business in every province under its corporate name, similar rights may not apply to the provincially incorporated company. Thus, a problem could arise if the provincially incorporated company's name conflicts with that of an existing corporation or business entity in another province. On the other hand, provincial incorporation may offer advantages, particularly where corporate operations are restricted to a single province.



Canadian corporations generally act through a board of directors elected by the shareholders. If the subsidiary is incorporated under the federal statute, at least 25% of the subsidiary's board generally must be resident Canadians, defined as Canadian citizens or permanent residents ordinarily residing in Canada. For corporations involved in uranium mining, book publishing, distribution or retailing, or film or video distribution, a majority of the board members of the corporation must be resident Canadians. Provincial corporations statutes impose a range of differing requirements for the residency of directors. Ontario, for example, requires that a majority of the directors be resident Canadians except where an Ontario corporation has only two directors, in which case at least one director must be a resident Canadian. Both the Federal and Ontario Business Corporations Acts permit shareholders to use a unanimous shareholder agreement to partially or entirely restrict the directors' powers to manage the corporation's business and affairs.

Branch Operation

A foreign corporation operating a branch usually must obtain an extra-provincial licence from each province wherein it intends to conduct business. The law of each such province should be consulted. For example, to receive an Ontario extra-provincial licence, the foreign corporation must conduct and submit a corporate name search establishing that the company name complies with Ontario law.

TAXATION

As already noted above, the foreign investor must carefully consider local tax law. The federal, provincial and municipal governments each impose taxes on businesses in Canada.

Income Tax

Both the federal and provincial governments impose a tax on income. The federal *Income Tax Act* (ITA) and corresponding provincial statutes impose tax on the world-wide income of Canadian residents. By contrast, non-residents are taxed only on income from Canadian sources. Where applicable, proposed changes to the ITA (as announced by the Department of Finance) have been noted.

Income Tax on a Canadian Branch

A United States corporation entitled to the benefits of the *Canada-United States Income Tax Convention, 1980*, as amended (the Treaty), is subject to Canadian federal income tax on income earned from carrying on business through a Canadian permanent establishment. The Treaty defines a permanent establishment as a fixed place of business through which such a corporation (a US Resident Corporation) wholly or partly conducts business. This includes each of the following: places of management, branches, offices, factories, workshops, sites of natural resource extraction, and building sites or construction or installation projects lasting more than twelve months. A permanent establishment also exists where a dependent agent, acting on behalf of a US Resident Corporation, has authority to conclude contracts in the corporation's name and habitually exercises this power in Canada.

A US Resident Corporation carrying on business in Ontario through a permanent establishment (as defined in both Ontario tax legislation and the Treaty) pays combined tax at a general rate of 33.5% on business income attributable to the permanent establishment. Broken down, this rate consists of federal tax at 19.5% and Ontario tax at 14.0%. Lower rates apply to manufacturing and processing income. The other provinces levy income tax on business income attributable to permanent establishments in those provinces.

Ontario also imposes a corporate minimum tax on corporations that are subject to regular Ontario tax and that (either alone or together with associated corporations) have either total assets above Cdn\$5 million or total revenue above Cdn\$10 million. The Ontario minimum tax the corporation pays in any year may be credited against regular Ontario income tax owing in the next ten years.

In addition to the aforementioned basic corporate income taxes, a US Resident Corporation carrying on business in Canada through a permanent establishment pays a 5% federal branch tax. This tax applies to after-tax profits not invested in qualifying Canadian assets. However, it is subject to a cumulative exemption for the first Cdn\$500,000 of branch earnings. The tax is designed to equal the withholding tax that would have been levied



against dividends from a Canadian subsidiary had that commercial vehicle been used instead of a branch.

If the Canadian business anticipates that it will incur losses early on, it may be wiser to operate through a Canadian branch rather than a corporate subsidiary. Operating through a branch allows the corporation to use branch losses for US income tax purposes.

Income Tax on a Canadian Subsidiary

A subsidiary incorporated in Canada is deemed to be a Canadian resident and is therefore taxed in Canada on its world-wide income. Furthermore, the above tax and surtax rates for non-resident corporations carrying on business in Ontario also apply to Canadian subsidiaries operating in Ontario. However, the federal branch tax does not apply to Canadian subsidiaries.

If the subsidiary borrows from its US parent corporation or from other “specified non-residents”, the ability of the subsidiary to deduct interest is subject to thin capitalization rules. In essence, these rules preclude the Canadian subsidiary from deducting interest on the portion of its interest-bearing loans from specified non-residents that exceeds two times its equity (share capital and contributed surplus attributable to specified non-residents and non-consolidated retained earnings).

Certain types of amounts paid or credited by a Canadian subsidiary to a US Resident Corporation are subject to Canadian withholding tax. These include dividends, certain royalties and certain interest payments. The withholding tax rate for dividends is 5% where the recipient of the dividends is a corporation and owns at least 10% of the subsidiary’s voting stock (otherwise the rate is 15%). The rate for royalties is 10%. Effective January 1, 2008, withholding taxes are generally eliminated on conventional interest payments made to arm’s length non-residents of Canada. Proposed amendments to the *Canada-US Tax Treaty* (the “Treaty”) contemplate withholding taxes on interest payments between non-arm’s length persons being phased out over a three year period. In addition, Ontario legislation precludes the deduction of a portion of certain rents, royalties, and management or administration fees paid by a Canadian subsidiary to its non-resident parent or other non-arm’s length non-residents. This effectively

results in the imposition of an indirect 5% withholding tax.

A subsidiary may offset its business losses against its own income from any source and may carry unused business losses back three years and forward twenty years. However, because Canada does not have a consolidated tax reporting system, these losses cannot reduce the income of affiliated Canadian corporations. Business losses may be passed through to a Canadian successor corporation following an amalgamation. Likewise, such losses may pass to a Canadian parent corporation after its wholly-owned subsidiary is wound-up. Where control of a corporation has been acquired, use of business losses is restricted to prevent trading in losses.

Purchases of goods or services between a US Resident Corporation and its Canadian subsidiary must be for an arm’s length price. Should the parties agree to a different price, the Canadian tax authorities may recharacterize the transaction to have been concluded at an arm’s length price for income tax purposes. Taxpayers must contemporaneously document their transfer pricing methodology, as failure to do so may result in the imposition of potential penalties.

Capital Gains Realized by US Resident Corporations

A US Resident Corporation is subject to Canadian income tax on taxable capital gains realized on the disposition of certain types of Canadian property. A capital gain is basically the difference between the proceeds of disposition and cost of acquisition of a particular piece of property. One-half of the capital gain is included in taxable income.

The types of Canadian property held by a US Resident Corporation that are subject to Canadian capital gains tax include real property situated in Canada, capital property used in carrying on business in Canada that forms part of a Canadian permanent establishment, and shares of a Canadian subsidiary whose value is derived principally from real property situated in Canada.

Use of Hybrid Entities

The above discussion applies to US corporate entities (for example, US “C” corporations) that are entitled to the benefits of the Treaty. However, not all US entities are currently entitled to Treaty benefits. In particular,



Canadian taxing authorities have historically held the view that US limited liability companies (“US LLC”) are not entitled to Treaty benefits because they are flow-through entities for US tax purposes. Proposed amendments to the Treaty extend Treaty benefits to US LLCs by amending the residence provision of the Treaty. In simplified terms, the proposed amendments provide that a US resident earning income through an entity that is considered fiscally transparent for tax purposes, such as a US LLC, will generally be able to claim the benefits of the Treaty where the US treatment of the income derived through the entity is the same as it would have been had the income been derived directly by the US resident.

Additional proposed amendments to the Treaty will eventually effectively deny Treaty benefits to certain hybrid entities. Of particular significance, under the proposed amendments, US resident shareholders of a Canadian unlimited liability company formed under the laws of the province of Nova Scotia or Alberta (a “ULC”), which “checks-the-box” to be treated as a disregarded entity for US tax purposes, will generally not be entitled to claim Treaty benefits in respect of amounts paid to, or derived by, the US shareholder from the ULC. Accordingly, the general statutory rate of withholding tax (i.e., 25%) will be exigible in respect of such payments.

Other Taxes

Capital Taxes

The provincial governments of Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba and Saskatchewan each impose an annual capital tax. The capital on which tax is imposed generally consists of the aggregate of a corporation’s equity and most indebtedness minus a specified deduction amount and an allowance for certain reserves and other stipulated balance sheet items. The rates of provincial capital tax range from 0.1% in New Brunswick to 0.4% in Manitoba.

Ontario’s general capital tax rate is 0.225% and applies to corporations (other than those engaged primarily in manufacturing and resources activities) in a corporate group with taxable capital in excess of CDN\$15 million. A US Resident Corporation carrying on business in Ontario through a branch will generally pay Ontario capital tax only on capital employed in Ontario.

Federal Goods and Services Tax (GST) and Harmonized Sales Tax (HST)

The GST is a 5% multi-stage value-added tax that generally applies to domestic supplies of most types of property and services outside of the Canadian provinces of Nova Scotia, New Brunswick and Newfoundland/Labrador. The GST does not apply in the Canadian provinces of Nova Scotia, New Brunswick and Newfoundland/Labrador where HST applies. These three provinces have combined an 8% provincial sales tax component with the 5% federal GST rate for a 13% HST rate. Registration for the GST automatically results in HST registration so a person need not and cannot register separately for HST. A registered supplier generally collects the GST or HST at the time of sale, or on lease or licence payments, as agent for the federal tax authorities. A non-resident of Canada who carries on business in Canada and makes taxable supplies in Canada must generally register for the GST/HST.

Certain types of transactions are specifically exempted (e.g. financial or educational services) or are taxable at a 0% rate, that is, zero-rated (e.g. medical devices) such that no GST or HST applies. GST and HST are not generally intended to be costs of doing business. Registered businesses can generally claim input tax credits (ITCs) on their GST/HST returns to recover GST or HST payable by them on their business expenses, including on capital account. A person cannot claim an ITC to the extent that it acquires or imports the property or service for other than commercial activities (such as for making exempt supplies or for personal use). Imports of goods into Canada generally attract GST or HST. Persons must also pay GST or HST (through a self-assessment system) on imported services and intangible property intended for exempt or personal activities. Many “exports” of goods and services to non-residents of Canada are zero-rated so that no GST or HST applies.

Provincial Retail Sales Taxes

The provinces of Ontario, Manitoba, Saskatchewan, British Columbia and Prince Edward Island impose a single stage retail sales tax (tax is paid only by the final consumer, business, institution, or individual). The rate of this tax varies from province to province, with the current rate in the Province of Ontario being 8%. Subject to specific



exemptions, the consumer pays the retail sales tax on tangible personal property and certain taxable services at the time of purchase or import. A licensed vendor, lessor, or licensor collects this tax as agent for the provincial tax authority. A “purchaser” or “user” may be required to remit tax on goods imported into a province, or goods originally purchased for re-sale but converted for their own use. Vendors of taxable goods and services within a province in which they carry on business must obtain a vendor’s retail sales tax licence in the province unless they sell only at the wholesale level.

Quebec levies a 7.5% multi-stage value-added Quebec sales tax (QST) which generally mirrors the GST, and HST in nature. The 7.5% QST is imposed on the 5% GST included value of a supply for an effective combined rate of 12.88%.

Customs Duties

Canada levies customs duties on certain goods imported into Canada and applies additional excise taxes and duties on specific goods. The tariff classification and origin of imported goods determines the applicable rate of the customs duty. If the goods satisfy specific rule-of-origin criteria, they may qualify for preferential rates of duty. For example, US or Mexican goods which satisfy the NAFTA Rules of Origin generally qualify for duty free entry.

The “transaction value” of imported goods is generally used to determine the value of the goods for purposes of calculating customs duty and certain sales taxes at the border. Transaction value is defined as the sale price to the purchaser in Canada, adjusted by specified additions and deductions. GST applies to most imported goods, regardless of whether customs duties apply. However, the importer typically recovers the GST paid on imported commercial goods. Consumer imports of goods may attract HST, provincial retail sales tax, or QST.

Ontario Land Transfer Tax

A buyer of real property in Ontario must pay a land transfer tax, based on the value of the consideration paid, at the rate of 0.5% on the first Cdn\$55,000 of value, 1% on the next Cdn\$195,000 of value, and 1.5% on the balance, except in the case of a single family residence or two such

residences, where a rate of 2% applies on any consideration which exceeds \$400,000.

Municipal Taxes

Local governments levy annual real estate taxes on real property owners. These taxes are based on the assessed value of the property. In addition to the land transfer tax imposed by the Ontario government, effective February 1, 2008, buyers of real property in Toronto, Ontario, are required to pay a land transfer tax. The Toronto land transfer tax regime is similar to that for Ontario. Municipalities also levy local business taxes.

IMMIGRATION CONSIDERATIONS

In general, only a Canadian citizen or permanent resident may work in Canada without a valid employment authorization. Non-residents may seek either temporary or permanent permission to work in Canada. The employment authorization procedure seeks to ensure that positions secured by non-Canadians could not have been filled from the Canadian labour force.

Temporary Admission

An employee of a corporation that conducts business outside Canada is exempt from the general employment authorization rules if that employee will be in Canada for under ninety days to consult with or inspect a corporate subsidiary or branch. Similarly, non-Canadian employees, entering the country temporarily to work as senior executives or managers, establishing a permanent and continuing Canadian affiliate also receive favourable treatment.

Depending upon the country of origin, the individual may also need a visa to enter Canada. If so, the visa routinely is sought at the time of application for an employment authorization. As for US and Mexican citizens, NAFTA has substantially relaxed entry requirements for those who qualify as business visitors, traders, investors, intra-company transferees, and specialized professionals.



Permanent Admission

As part of its economic strategy, Canada encourages recruitment of business immigrants likely to contribute to economic development through increased capital formation and job creation. Three categories of business immigrants qualify for admission to Canada.

The first group consists of self-employed applicants. To qualify, the individual must have both the intention and the ability to establish a business that will contribute to Canadian economic, cultural, or artistic life and which will employ himself or herself.

Entrepreneurs comprise the second category. The entrepreneurial applicant must have the ability to establish or purchase a business that will significantly contribute to the economy. The business must also employ one or more Canadian citizens or permanent residents, other than the immigrant and his or her dependants. Finally, the applicant must be in a position to actively participate in management of the business on an on-going basis.

Investors constitute the last category of immigrants who may qualify. Designed to attract experienced business people willing to make a permanent investment in Canada, to qualify as an investor a person must have a minimum net worth of Cdn\$800,000 and be willing to invest Cdn\$400,000. The federal government acts as an agent on behalf of the provinces which secure the investment.

In addition to the above, other opportunities to qualify for permanent admission may exist for individuals in particular circumstances.

LABOUR AND EMPLOYMENT LAW CONSIDERATIONS

Legislative authority over labour and employment is divided between the federal and provincial governments. Federal law governs employment in federal works, undertakings and businesses. Aeronautics, banking, and communications are examples of industries under federal jurisdiction. The vast majority of employment relationships in Canada are governed by provincial authority.

Minimum Standards

All Canadian jurisdictions have enacted minimum standards for the basic terms and conditions of employment. Such legislation may include minimum standards for such matters as working conditions, hourly wages, hours of work, overtime pay, statutory holidays, vacation, maternity leave, parental leave, individual and mass termination and lay-off. Neither employers nor employees are free to avoid or “contract out of” the minimum standards by individual contract.

Trade Unions and Collective Bargaining

Federal and provincial legislation also governs collective bargaining between employers and trade unions. A trade union may be certified as exclusive bargaining agent for an appropriate group of employees, known as the bargaining unit. Managers and other employees in a position of confidence concerning labour relations are usually excluded from the bargaining unit. Once the union is certified, the employer must bargain with the union in good faith and attempt to reach a collective agreement. A strike or lockout can be called lawfully only after compulsory bargaining procedures expire. Legislation also prohibits any strike or lock-out during the term of the collective bargaining agreement. Any disputes arising from or subject to the agreement must be resolved through grievance and arbitration procedures.

Workers' Compensation and Occupational Health and Safety

The federal *Canada Labour Code* and various provincial statutes (for example, Ontario's *Occupational Health and Safety Act*) regulate occupational health and safety. Additionally, provincial legislation mandates that employers in specified industries contribute levies to the workers' compensation accident fund. This no-fault statutory system of compensation seeks to address the claims of workers injured on the job or stricken with an industrial disease. In Ontario, the *Workplace Safety and Insurance Act* is the governing legislation.



Pension and Employment Insurance Contributions

Canadian employers must contribute to both the Canada Pension Plan and Employment Insurance on behalf of their employees. Contributions may then be deducted as a business expense for income tax purposes. Furthermore, employers must collect from employee income and remit to appropriate authorities their employees' income tax, Employment Insurance premiums and Canada Pension Plan contributions.

Pay Equity

The federal and several provincial governments have enacted pay equity legislation mandating "equal pay for equal work." Such legislation is designed to redress gender discrimination in the wages paid to female employees.

Public Health Care

Each Canadian province has a public health care system providing its residents with universal access to medical care in the province. Ontario imposes an employer health tax based on the employer's gross payroll subject to certain exemptions (approximately 2%). Health care costs for Canadian employers are generally significantly lower than those of US employers.

COMPETITION, MARKETING AND PRODUCTS REGULATION

Competition Law

The *Competition Act* is Canada's primary antitrust and trade practices legislation. The Act contains a mixture of criminal offences, discretionary reviewable practices, and private damage actions. Criminal offences, such as conspiracy, bid-rigging, some forms of misleading advertising, and discriminatory pricing, are prosecuted in criminal courts. As such, the case must be proven beyond a reasonable doubt and strict rules of evidence apply. Non-criminal reviewable practices include mergers, abuse of dominant position, refusals to deal, and various vertical market restrictions. Practices that result in a substantial lessening of competition are subject to restraint and corrective action by the Competition Tribunal (the Tribunal), a specialized adjudicative body for non-criminal antitrust matters.

Mergers

The *Competition Act* applies to any merger, regardless of size, that either occurs in Canada or causes a substantial lessening of competition in Canada. Mergers that stifle competition are regulated by discretionary administrative and civil laws rather than by criminal prohibitions. The Commissioner of Competition (the Commissioner), and ultimately the Tribunal should the Commissioner refer the case, scrutinizes the merger to determine whether it is likely to prevent or substantially reduce competition. Although the Tribunal may not find against a merger solely on the basis of market share, concentration data remains a key consideration in any analysis. Ease of entry into the market, effectiveness of remaining competition, and the likelihood of business failure are other factors that the Commissioner must consider under the Act.

Merger Pre-notification

Size-of-person and size-of-transaction tests determine merger pre-notification filing requirements in Canada. Parties who, together with their affiliates, do not have Canadian assets or annual gross revenues from sales in, from or into Canada exceeding Cdn\$400 million are exempt. Pre-notification is necessary only if the value of the Canadian assets to be acquired, or annual gross revenues from sales generated by those assets, exceeds Cdn\$50 million or Cdn\$70 million for corporate amalgamations. Similar albeit more complicated thresholds apply to acquisitions of voting shares.

If pre-notification is required, the parties may not close the transaction until the mandatory waiting period expires. The period commences when the completed filing is delivered to the Commissioner. Parties may choose either a short- or long-form pre-notification. If a long-form is used, the waiting period is forty-two days (except in the case of a stock exchange share acquisition, where special rules apply). If instead a short-form is used, the waiting period is only fourteen days, unless the Commissioner exercises his right to require the parties to file a long-form. A fee of Cdn\$50,000 is payable in connection with a filing.

The *Competition Act* does not provide for mandatory extension of waiting periods by the Commissioner. In practice, however, the statutory waiting periods

are invariably extended by consent in cases where any competitive impact is anticipated. If the parties refuse to grant an extension, the Commissioner may seek early injunctive relief, to prevent closing, or costly post-closure divestiture proceedings.

Marketing and Product Regulation

A number of federal and provincial statutes, as well as the common law, regulate advertising and marketing of products in Canada.

INTELLECTUAL PROPERTY

The most common types of intellectual property are trade-marks, trade secrets (including know-how and show-how), trade-names, patents, industrial designs and copyrights.

Trade-marks

A trade-mark is a word, design, combination of words and designs, or slogan used by a business to distinguish wares or services manufactured, sold, leased or performed by the business from those manufactured, sold, leased or performed by others.

Although registration is not essential to acquire or protect trade-mark rights, it does provide a number of significant advantages. Under the *Trade-marks Act*, registration of a trade-mark in association with wares and/or services, unless proven to be invalid, gives the owner of the mark the exclusive right to use the mark throughout Canada. Registration under the Act can ensure this exclusive right for fifteen years, and may be renewed indefinitely. A registration application may be based on actual use or proposed use of the mark in Canada. Under certain circumstances, foreign applicants may register on the basis of registration and use in a foreign country. In some cases, such applicants may obtain priority for the mark on the basis of a foreign trade-mark application.

The distinctiveness of a trade-mark may be preserved in Canada if all users of the mark, other than the trade-mark owner, are licensed to use the mark by or with the owner's authority and if the owner of the mark has direct or indirect control over the character and quality of the wares or services in association with which the trade-mark is used.

Trade-names

The name under which a business operates constitutes that business' trade-name. This is so regardless of whether it is the name of a corporation, a partnership, or an individual. In practice, the trade-name often is an abbreviation of the full corporate name, shortened for convenience. Notably, the *Trade-marks Act* does not provide for registration of trade-names. While provincial business names legislation does require a business to register its trade-name, such legislation does not provide the registrant with any exclusive right in the registered trade-name.

Patents

In Canada, letters patent are available to protect inventions. One may obtain the patent for any new or improved useful art, process, machine, manufacture or composition of matter. Under the *Patent Act*, the patent holder has the exclusive right, for the term of the patent, to make, construct, use, and sell the invention. Under current Canadian patent law, a patent can protect the holder for a maximum term of twenty years from the date of filing. Applications for a patent are open for public inspection eighteen months after they are filed.

Copyrights

Copyright law protects the owners of a broad range of original works. Such works include art (such as paintings, photographs and diagrams), literature (such as books, business documents and computer programs), drama (such as films and plays) and music. Copyright protects against unauthorized reproduction or performance of the work, as well as the sale, distribution or importation of infringing works.

Under Canadian law, the author of a work is the first owner of the work. However, there are a few exceptions to this principle. For example, employers own the works created by their employees in the course of employment, in the absence of a contrary agreement.

Although registration is not required for copyright protection, registration under the *Copyright Act* does provide significant benefits.



ENVIRONMENTAL LEGISLATION

Both the federal and provincial governments, and to some extent municipal governments, regulate environmental matters in Canada. At the federal level, there is general legislation dealing with environmental protection as well as specific regulatory schemes dealing with matters such as fisheries and protection of fish habitat, transportation and handling of dangerous goods, import/export of hazardous wastes, and identification and monitoring of new chemical and biological substances. Provincial legislation deals with waste management, waste reduction and recycling, spills and spill reporting, emission allowances and reporting, contaminated sites and clean up, and environmental assessment and review. An example of municipal regulation is found in Montreal, Quebec where the regulation of industrial air pollution is done by the regional municipal government. Provincial regulation tends to be more comprehensive than its federal counterpart which is more concentrated in the specific areas of regulation such as those noted above. However, there is some degree of overlap and depending on the location and the nature of the activities, a business may face compliance with applicable legislation from all three levels of government.

A CAUTIONARY NOTE

The foregoing provides a summary of aspects of Canadian law that may interest US investors considering doing business in Canada. A group of McMillan Binch lawyers prepared this information, which is accurate at the time of writing. Readers are cautioned against making decisions based on this material alone. Rather, any proposal to do business in Canada should most definitely be discussed with qualified professional advisers.

January 2008