Government of Canada | Gouvernement du Canada

Oil Sands

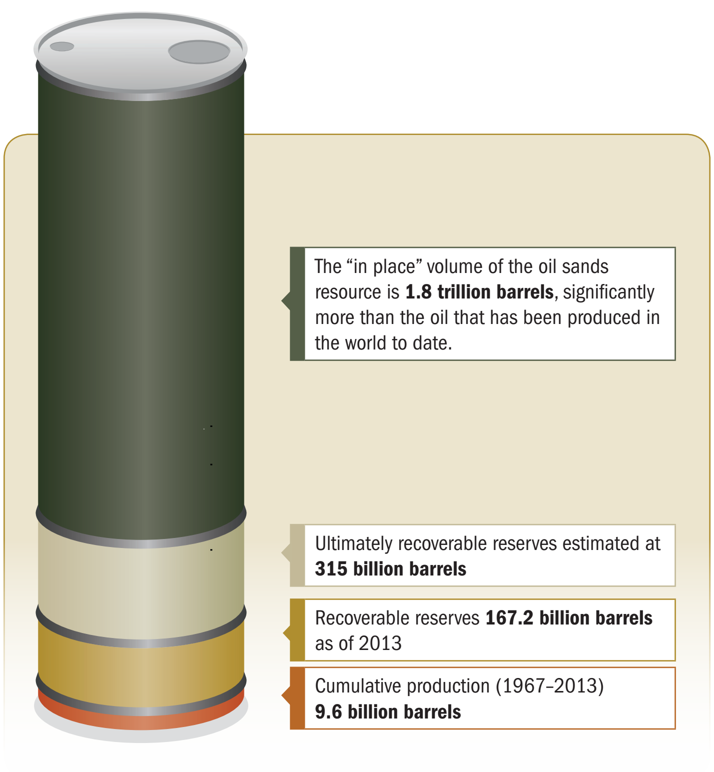
A strategic resource for Canada, North America and the global market

The oil sands are a strategic resource that contributes to economic opportunity and energy security for Canada, North America and the global market. The oil sands comprise 167.2 billion barrels of crude oil – 97 percent of Canada's 172.5 billion barrels of proven oil reserves – and are a vital part of the Canadian economy. The industry is one of Canada's largest employers, with about 514,000 people deriving direct, indirect and induced employment from the oil sands and supporting sectors.[1]

In 2013, production from the oil sands was 2.1 million barrels per day (mb/d). While more than 9.6 billion barrels of oil sands crude oil have been produced to date, this represents only a small portion of the overall resource. Continued demand for oil is expected to contribute to ongoing growth in oil sands production for years to come. However, the economic importance of the oil sands reaches beyond its role as a crucial source of global supply. Eighty percent of the world's oil reserves are controlled by national governments or state-owned oil companies. Of the 20 percent that remains open to investment, about 50 percent is found in Canada's oil sands.

Oil plays a dominant role in meeting the world's energy needs and will for decades to come. Even with the investments that Canada and other countries are making in renewable energy, energy efficiency and other measures to support a low-carbon economy, the International Energy Agency's 2014 *World Energy Outlook* expects world oil demand to increase by 14.1 percent from 90.1 mb/d in 2013 to 102.8 mb/d in 2035 and the global economy to continue to rely more on oil than any other fuel.

As more easily accessible and lighter crude oils are depleted around the world, countries are turning increasingly to heavier and less accessible oil resources, which require more processing. As this shift in global production toward heavier crude continues, the carbon intensity of global oil supply will increase.



Source: Alberta Energy Regulator

[1] Canadian Energy Research Institute (2014): *Canadian Economic Impacts of New and Existing Oil Sands Development (2014–2038)*

Canada

Through strict regulatory regimes and new technological developments, Canada is committed to the responsible development of our resources, including reducing the carbon intensity of oil sands production and processing, and will become an increasingly important player in providing secure and reliable energy to the world.

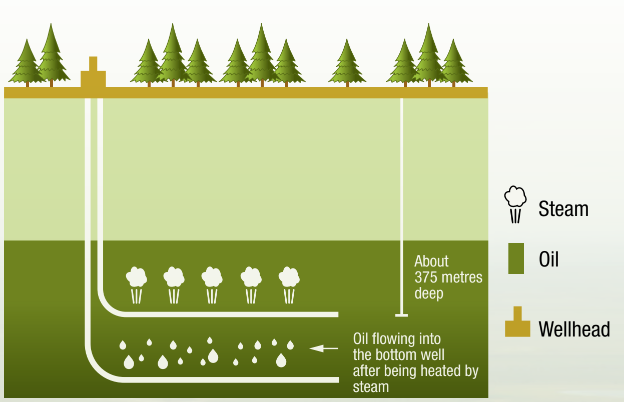
What are the oil sands?

The oil sands are the third-largest proven or established deposit of crude oil in the world, underlying a land mass of 142,000 square kilometres (km²) (54,827 square miles [sq. mi.]). The oil sands are found in western Canada, beneath sections of boreal forest, prairie and muskeg. They consist of crude bitumen suspended in an ore that is a mixture of sand, clay and water.

Bitumen can be extracted using two methods, depending on how deep the deposits are below the surface. About 20 percent of the oil sands resource is within 75 metres (250 feet) of the surface and can be accessed through conventional mining. The ore is dug up and mixed with hot water to separate and recover the bitumen from the sand. The remaining 80 percent of the oil sands resource is too deep to mine, and some form of drilling technology is required to extract the bitumen. Generally, drilled (in-situ) oil sands production involves pumping steam underground to separate the bitumen from the sand and then recovering the bitumen through wells.

Raw bitumen, like other heavy oils, cannot be shipped because it is too thick for pipeline transportation. Bitumen is either diluted with lighter hydrocarbons to allow it to flow through pipelines or upgraded. Upgraders are similar to refineries and specialize in transforming bitumen into lighter crude oil.

In-situ production



Source: Cenovus, adapted by Natural Resources Canada, 2010

Production and investment

Canada's oil sands are developed by the private sector, with major investments from companies based in Canada, the United States, Europe and Asia. As a result, the economic benefits of their development reach across Canada and around the globe. An estimated C$217 billion of capital expenditures have been invested in the oil sands industry to date, including $33 billion in 2013.

Since 1967, when commercial oil sands development began, production has grown as the technology to extract and process the resource has advanced and allowed commercial operations to become more cost-effective. Today, the oil sands and supporting sectors generate economic benefits across the country. Various projections forecast oil sands crude production will rise to over 3 mb/d by 2020.

Governance

The Government of Canada's policy toward the development of the oil sands and other natural resources has its basis in an open market where companies make business decisions within a regulatory framework designed to protect current and future Canadian interests. In Canada, the provinces of Alberta and Saskatchewan have jurisdiction over the development of oil sands within their provincial boundaries. The Government of Canada shares responsibility with the provinces for environmental protection and is committed to ensuring the economic and energy security benefits of the oil sands are balanced by sound environmental stewardship.

Oil sands development is subject to environmental standards that are among the most stringent in the world. Major oil sands projects require substantive environmental assessments before they are approved. Governments also require extensive environmental monitoring and reporting throughout the life of each project.

Addressing the environmental impacts

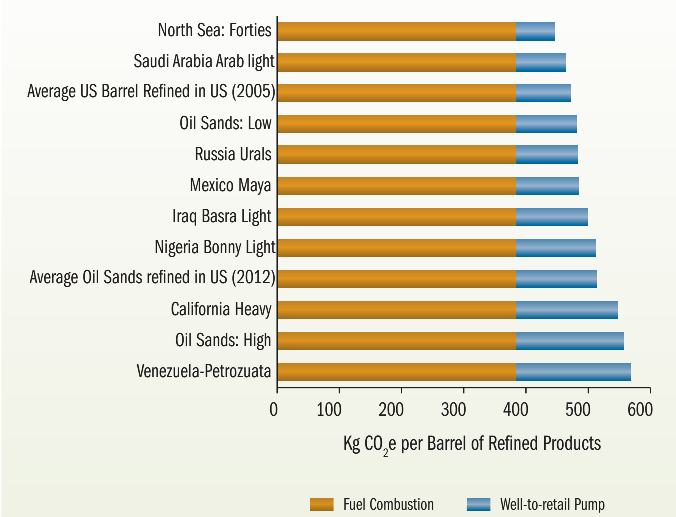
Similar to other existing and emerging energy sources, the development of the oil sands has impacts on air, water and land.

Greenhouse gas (GHG) emissions: The Government of Canada is implementing a sector-by-sector regulatory approach to reducing GHG emissions that protects the environment and supports economic prosperity. Oil sands facilities currently account for about 8.5 percent of Canada's GHG emissions or approximately 0.1 percent of global emissions. The oil sands industry has made significant progress in reducing its emissions per barrel of oil produced. GHG emissions per barrel of oil sands in 2013 were

30 percent below 1990 levels.[2] Oil sands facilities must continue to reduce their GHG emissions as part of Canada's commitment to emissions reductions.

GHG emissions from oil production should be considered in their full effect, taking into account the emissions that are produced when the oil is consumed. Life cycle assessment tracks GHG emissions from the extraction of crude through to production and use of the end product. All sources of oil have relatively similar life cycle GHG intensities due mainly to the fact that transportation fuel derived from any crude oil source has the same emissions at the end-use or combustion stage, which accounts for 70 to 80 percent of total life cycle emissions.

Life cycle GHG emissions for various sources of crude oil

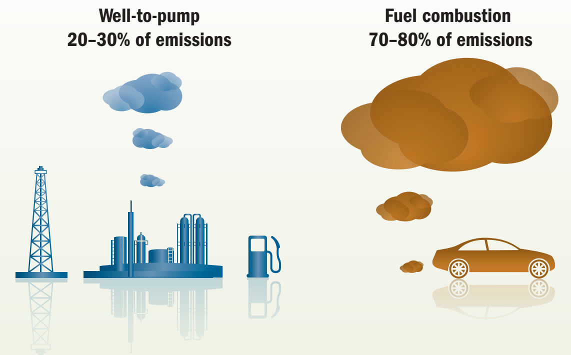


Source: IHS ENERGY, *Comparing GHG Intensity of the Oil Sands and the Average US Crude Oil*, May 2014

Water use and tailings ponds: Water use in oil sands production varies depending on the technology used for extraction. For instance, oil sands mining operations use three to four barrels of new water per barrel of bitumen produced, while oil sands in-situ operations requires an average of 0.4 barrels of fresh water per barrel of bitumen. In-situ projects rely largely on groundwater for their water needs, with an increasing amount being saline or brackish water.

Mining operations take much of their water from the Athabasca River in Alberta. The government manages this water use by setting a limit on the water that can be withdrawn from the river.

Life cycle emissions



Source: IHS ENERGY, *Comparing GHG Intensity of the Oil Sands and the Average US Crude Oil*, May 2014

The Athabasca River Water Management Framework ensures that annual withdrawals by oil sands companies never exceed 3 percent of Athabasca River flow. In practice, annual withdrawals are often less than 1 percent. Regulations also control instantaneous flows, based on the given flow in the river, as river flow changes considerably from season to season. To protect the quality of the river water, no production water is returned to the river. Instead, it is stored in tailings ponds and then recycled to the production process. The Government of Alberta has established performance criteria for the reduction of tailings that result from the oil sands mining process. The in-situ method of accessing oil sands resources does not produce tailings.

Boreal forest: Companies are required by law to remediate and reclaim 100 percent of the land after the oil sands have been extracted, returning it to an equivalent self-sustaining ecosystem. Canada's boreal forest stretches more than 5,000 km (3,100 mi.) from coast to coast and covers about 30 percent of the country's land mass.[3] After almost 50 years of oil sands development, oil sands mining has impacted 895 km² (346 sq. mi.) of land. While oil sands operations are projected to expand, the vast majority of this growth is anticipated to arise from in-situ operations. The land impact of an in-situ project is 10 to 15 percent the size of a similar mining operation.

2 Environment Canada, *National Inventory Report 1990-2013: Greenhouse Gas Sources and Sinks in Canada* and Natural Resources Canada

3 The boreal forest, as described here, includes forest and other wooded land in Canada's boreal zone.

Using technology to achieve sustainability

Innovation has been, and will continue to be, critical to reducing the environmental footprint of oil sands development. Industry and governments are making substantial investments to support a range of new technologies. For example, the federal and provincial governments are committed to exploring carbon capture and storage (CCS) to reduce GHG emissions in key sectors of the Canadian economy, including thermal electricity generation and the oil sands. Working collaboratively, the governments of Canada, Alberta, Saskatchewan and British Columbia have committed more than C$1.8 billion to support CCS research, development and demonstration initiatives. With leveraged private sector investments, the total Canadian investment in CCS has the potential to rise to around C$4.5 billion. This includes funding for two oil sands-related, large-scale demonstration projects: the Quest Project and the Alberta Carbon Trunk Line, currently under construction in Alberta.

New technologies are also being developed by government, industry and universities to reduce land impacts, water use and GHG emissions from oil sands development. Technologies that reduce steam requirements for in-situ oil sands are being developed and piloted to reduce water use and improve energy efficiency. These technologies use solvents in conjunction with steam or employ radically new techniques such as heating the bitumen through electricity to move the bitumen toward the wells. Oil sands mining research includes processes to separate the bitumen from the sand more efficiently and to reduce energy and water requirements as well as processes that will reduce the need for, and speed the reclamation of, large tailings ponds.

Advances in upgrader technologies include innovative combustion techniques, such as gasification, which could reduce the industry's reliance on natural gas while enabling the use of other transformative technologies, such as CCS.

The oil sands are a strategic resource for Canada, North America and the global market. The challenges associated with their development are being addressed through regulations, technological innovation and the political commitment to develop this resource in a responsible way.

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May 2015

Canadian Energy Dynamics
Review of 2014

National Energy Board

Office national de l'énergie

Energy Market Assessment
February 2015

Canada

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Photo de la couverture :
Vapeur montant d’une centrale d’ENMAX fournissant chauffage et eau chaude à des immeubles du centre-ville de Calgary par une froide journée de janvier.

TABLE OF CONTENTS

Canadian Energy Dynamics
Overview

The energy sector in Canada is continually being shaped by new sources of supply, changing demand, and integrated infrastructure development. The National Energy Board (NEB or Board) believes that well-functioning, competitive markets efficiently balance supply and demand, and lead to innovative and robust energy systems.

In support of its regulatory role, the Board actively monitors energy markets and produces independent, fact-based energy information for Canadians. These products increase the transparency of Canadian energy markets and support Canadian energy literacy. This report, *Canadian Energy Dynamics: Review of 2014*, describes many important developments witnessed in Canadian energy markets in 2014, while providing useful information and statistics.[1]

Canadian crude oil production has been resilient in the face of constrained pipeline capacity, increased U.S. supply, and falling global oil prices. Greater access to coastal markets, via railroads and from pipeline additions in the U.S., led to the narrowing of oil price discounts in 2014, and higher revenues for Canadian producers. Other factors that assisted earnings for producers include the depreciation of the Canadian dollar and the lower cost of diluent. Pipeline oil exports increased to new highs, in part due to extra capacity leading to higher exports on the Enbridge Mainline system. Crude exports by rail continued a steep increase, reaching over 180 Mb/d by year end. Refineries in Eastern Canada received greater amounts of crude by rail, sourced from Western Canada and the U.S. The rail shipments to the Canadian and U.S. East Coast displaced imports from other countries, while some oil produced from offshore Atlantic Canada has been rerouted to Europe or South America.

Strong production growth in the eastern U.S. from the Marcellus and Utica Shales continue to change gas flows across North America, and notably into Ontario and Québec. In the west, the Montney Formation, which contains roughly 140 times Canada's annual natural gas needs, continued to produce more gas. There were also numerous successful production tests from the emerging Duvernay Shale in 2014. The Board continued to receive licence applications to export natural gas in liquefied form, primarily to markets in Asia and Europe. Companies have also found new uses for liquefied natural gas, including as an alternative to diesel as a transportation fuel and for power generation.

The development of shale gas has also increased the availability of natural gas liquids, with U.S. propane production growing to new records. This helped drive propane inventories in Canada and the U.S. to record highs after the price spikes and delivery challenges experienced during the Polar Vortex last winter. Also in 2014, the Board received its first licence application for the export of propane to the Asia-Pacific market via the U.S.

The closure of the Thunder Bay Generating Station (photo at left) in April 2014 marked the completion of Ontario's coal phase out. The plant will be converted to burn biomass starting in 2015. Another milestone was reached when SaskPower completed the carbon capture project at the Boundary Dam coal plant. Across the country, hydroelectric and wind projects were advanced, with construction starting at Muskrat Falls in Newfoundland and approval granted for Site C in B.C.

[1] Some annual statistics quoted in this report include estimates for one or more months of data for 2014.

Crude Oil
International Overview

Prices Decline on Strong U.S. Production and OPEC Maintaining Production Targets

In June, West Texas Intermediate (WTI) and Brent were trading at US$105.23 and US$111.65 per barrel respectively. The ensuing months would see world oil prices fall to the lowest levels since the 2009 recession. This time, however, the fall was not a result of a global economic slowdown. Instead, the rapid expansion in North American oil supply has led to a surplus supply situation. In late November, amid speculation that the Organization of Petroleum Exporting Countries (OPEC) might cut production to support oil prices that had fallen for five consecutive months, OPEC announced it would maintain its crude oil production target of 30 MMb/d. This decision signaled the loss of a key price support mechanism. WTI stood at US$73.70 per barrel on November 26, the day before the OPEC meeting, and it fell over 30 per cent to under US$50 per barrel in January 2015. The volume of WTI trading on NYMEX typically bottoms in December; however, in 2014 it increased by 15 per cent – the first increase from November to December since 2009.

The U.S. Energy Information Agency (EIA) estimated that combined U.S. and Canadian oil supply increased by nine, ten and eleven per cent in 2012, 2013 and 2014, respectively. As shown in Figure 1, this continuous growth has exceeded the decline in supply from other non-OPEC nations and the growth in global petroleum demand. Thus, the share of the world market available for OPEC producers has declined. In 2013, OPEC supply was reduced by over one MMb/d, primarily due to geo-political related outages in Libya, Nigeria, Iran and Iraq. Supply from OPEC nations was relatively flat in 2014.

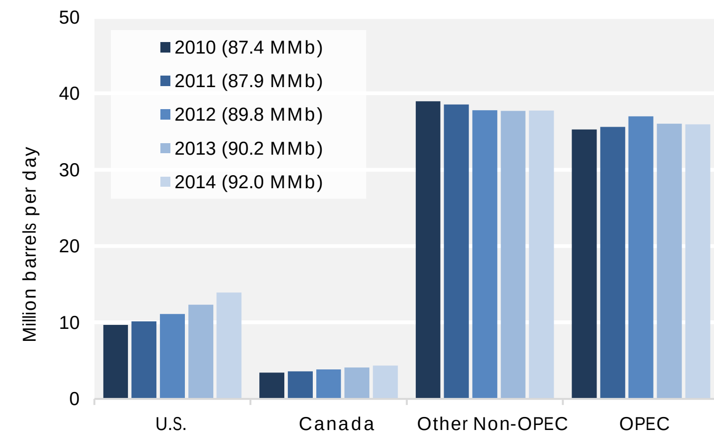
Canadian Crude Oil Searching for New Markets Overseas

Prior to 2013, Canadian crude oil exports to destinations other than the U.S. were relatively minor, and were predominately either light crude shipments from offshore Newfoundland and Labrador to Europe, or Alberta crude shipped from Trans Mountain's Burnaby, B.C. marine terminal to Asia. However, in the past two years, volumes from Atlantic Canada that historically would have been sent to refineries in Eastern Canada and the U.S. have been sent elsewhere, displaced by growing U.S. supply. Canadian crude exports to Europe have grown to account for over three per cent of total exports, and exports to South America have also increased considerably. Figure 2 shows the breakdown of Canadian crude oil exports to markets other than the U.S.

In September 2014, Suncor loaded its first tanker of heavy crude on the Canadian East Coast. Western Canadian heavy crude was railed from Alberta to a port near Montreal where it was loaded on a tanker and delivered to Italy. Canadian crudes have also been shipped from American ports to markets in countries such as Spain and Switzerland.

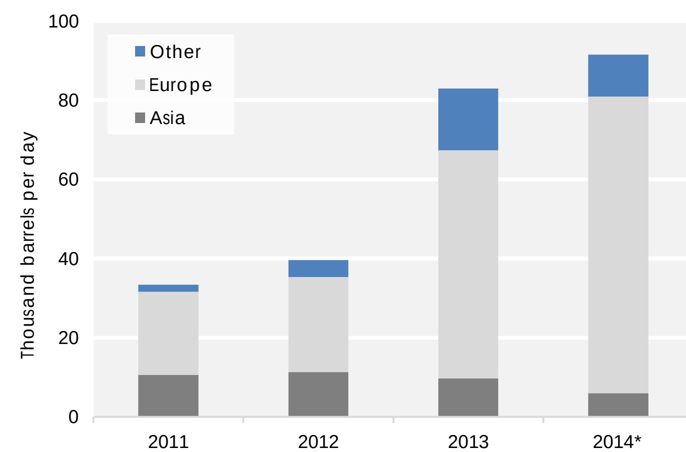
The long term viability of Europe as a market for Canada's crude oil will depend on, among other things, the price discounts for Canadian crude, security of Russian oil supplies to European refineries and policies that influence the types of crude that are refined in Europe. In October 2014, the European Union proposed amendments to its Fuel Quality Directive that would remove discriminatory treatment of oil sands crude and products. A ratification vote for the directive, as written, will be held in early 2015.

Figure 1 Global Oil and Liquids Supply*



* Includes NGLs, biofuels and refinery gains.
Note: Number in legend corresponds with annual total global supply.

Figure 2 Crude Oil Exports from Canada to Non-U.S. Destinations



* 2014 includes only data from January to October

Crude Oil
Western Canada

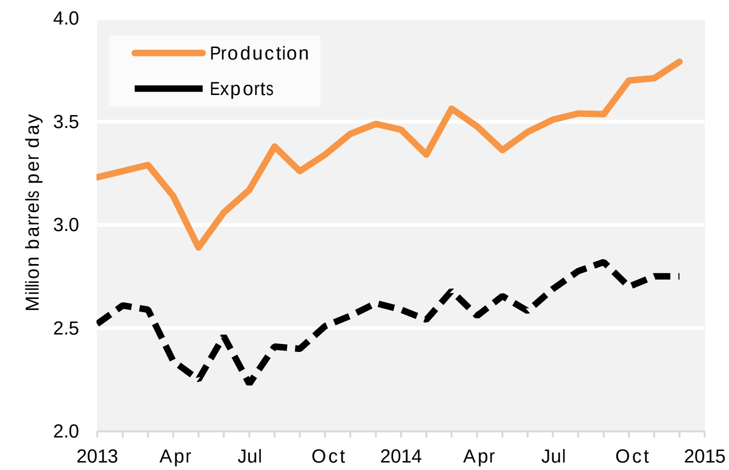
Higher Western Crude Oil Production and Exports

Crude oil production from the Western Canada Sedimentary Basin (WCSB) continued to show significant growth in 2014. Average production was approximately 3.55 MMb/d, representing an 9.2 per cent increase over the previous year, and ended the year at 3.79 MMb/d. Light crude oil production grew by 7.0 per cent as horizontal drilling and multi-stage fracturing techniques were applied in tight oil formations in Alberta (Cardium and Montney) and Saskatchewan (Viking). This continued to reverse a decades-long trend of production decline for light crude oil.

In the oil sands, growth from in-situ projects continued to exceed mining projects, a trend that is expected to continue in the future as additional steam-assisted gravity drainage (SAGD) projects start commercial operations. SAGD production averaged 728 Mb/d, which was 25 per cent higher than 2013. Total oil sands production was approximately 2.30 MMb/d, a 10.2 per cent increase over the previous year.

Crude oil exports from Western Canada averaged approximately 2.66 MMb/d in 2014, 8.5 per cent higher than the previous year. Additional capacity on Enbridge's Canadian and U.S. systems allowed more Western Canadian crude to access markets at lower cost. As a result, crude-by-rail exports did not increase as much as in the previous year. Pipeline exports averaged 2.45 MMb/d with an average price of $91.06 per barrel, whereas total crude-by-rail exports averaged 169 Mb/d with an average price of $88.80 per barrel. In addition, surging domestic production in the United States began to displace Canadian crude-by-rail volumes, primarily in California. However, Western Canadian exports of heavy crude via rail to the U.S. East and Gulf Coast continue showing an upward trend.

Figure 3 Western Canadian Production and Exports



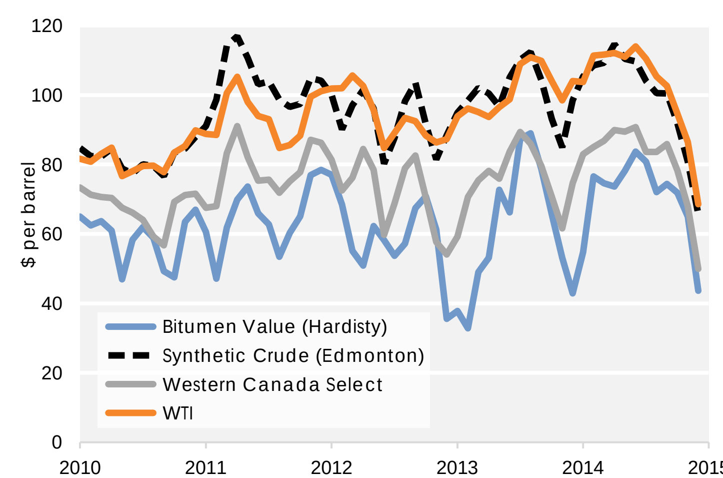
Bitumen Prices Slower to Fall than World Benchmarks

Canadian crude oil prices increased at the beginning of the year, peaked during the summer due to favorable market access conditions and record demand in major U.S. refinery markets, then decreased as global crude oil benchmark prices collapsed. Strong U.S. demand for heavier crudes and greater export capacity translated into lower price discounts between Canadian and U.S. crude oil varieties. In addition, a depreciating Canadian dollar lowered the overall impact of falling crude oil prices on Canadian crude producers whose products are sold in U.S. dollars while costs are primarily based in Canadian dollars. Heavy crude oil price discounts, which peaked in early 2013, decreased consistently as the year progressed and are expected to remain at current low levels until production growth surpasses existing transportation capacity.

Statistics from the Alberta Government show that the average value of bitumen at Hardisty, Alberta increased by approximately 20 per cent in 2014 relative to 2013, even after accounting for the price fall that occurred during the second half of the year. In addition to benefiting from lower price discounts and a lower Canadian dollar, the value of bitumen also improved due to lower diluent prices. The Cochin Pipeline, which was reversed in mid-2014, now delivers supplies of condensate (a type of diluent) from the U.S. to Alberta's market. Diluent is blended with heavy crudes and bitumen to assist in moving it through pipelines.

Overall increases in prices and production translated into higher revenues for the upstream oil sector in Canada. Revenues for this sector increased by 14 per cent relative to 2013 and reached approximately $115 billion which was three-and-a half times the total revenue of the natural gas upstream sector.

Figure 4 Crude Oil and Bitumen Prices



Crude Oil

Ontario and Eastern Canada

Declining Crude Imports in Eastern Canada

Crude oil imports into Canada for the first ten months of 2014 averaged 615 Mb/d, 11.2 per cent lower than over the same period in 2013. The downward trend that started in 2008 (Figure 5) is partly related to closures of refineries in Montreal (Shell in 2010), Dartmouth (Imperial in 2013) and most recently, Sarnia (NOVA in June 2014). In addition, refinery demand data from Statistics Canada shows that domestic crude oil has also increased its share of the Canadian refinery market and in particular in Eastern Canada, which receives almost all of the imports. Crude oil imports from offshore regions into Ontario have all but disappeared starting mid-2014.

While total imports have declined, imports from the U.S. have grown from 19.5 per cent of total 2013 imports to 50.7 per cent in 2014, largely at the expense of light oil imports from the North Sea and Africa. Most of the increase is related to growing volumes of Bakken crude oil moved by rail to refineries in Québec and the Maritimes and more recently, Eagle Ford crude moved by tanker from the U.S. Gulf. These lower-priced supplies of light crude oil have been displacing crude oil supplies from offshore Atlantic Canada and offshore imports into Eastern Canada's refineries. Most of the displaced Atlantic crude oil has been shipped to Europe.

Harvest Operations Corp, the Canadian subsidiary of the Korean National Oil Corp. completed the sale of the Come-by-Chance refinery in Newfoundland to Silver Range Financial Partners LLC of New York on November 17, 2014. The refinery has been struggling with poor margins for years, as it relies on expensive offshore crude oil imports. The new owners plan to continue to operate the refinery, switching it to use U.S. shale oil as feedstock. There was market speculation that the facility would have shut down indefinitely after its September 2014 scheduled maintenance shutdown if no new buyer was found.

Atlantic Offshore Developments Show Potential

Atlantic Canada produces 230 Mb/d annually, about seven per cent of Canada's total crude oil production, from developments in the Jeanne D'Arc Basin offshore Newfoundland. Projects to develop neighbouring (satellite) fields are underway to extend the life of the existing developments.

As shown in Figure 6, new discoveries have been made further offshore in the Flemish Pass Basin, but development may be many years into the future. Statoil's Bay du Nord prospect there was reported to hold up to 600 MMb of recoverable oil and followed two earlier discoveries in the area: Mizzen (estimated at 100 to 200 MMb) and Harpoon.

In 2011 and 2012, Nova Scotia issued 12 exploration licences for the Nova Scotia Offshore region with a total work expenditure commitment of nearly $2.1 billion. In 2014, Shell and BP conducted seismic and seabed surveying in preparation for drilling, which is anticipated to occur in the 2015 to 2017 time frame.

In November 2014, Junex announced an oil discovery near Gaspé, Québec. This is the first horizontal oil exploration well ever drilled in Québec. Additional exploration wells are planned for 2015.

Figure 5 Canadian Crude Oil Imports by Source and Eastern Canada's Share

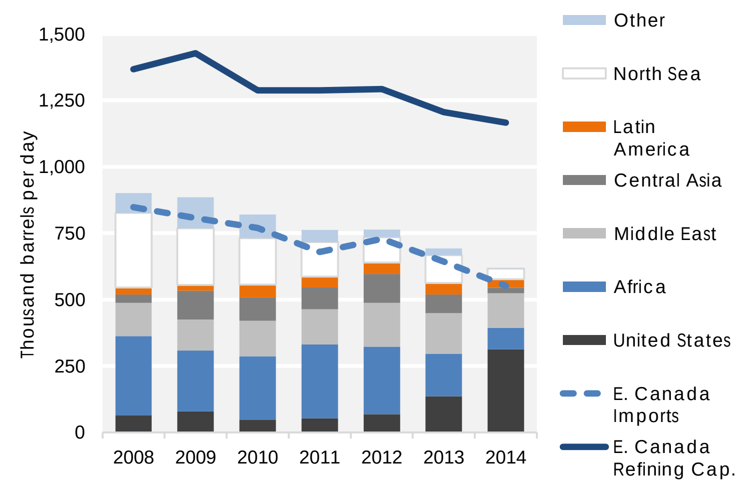
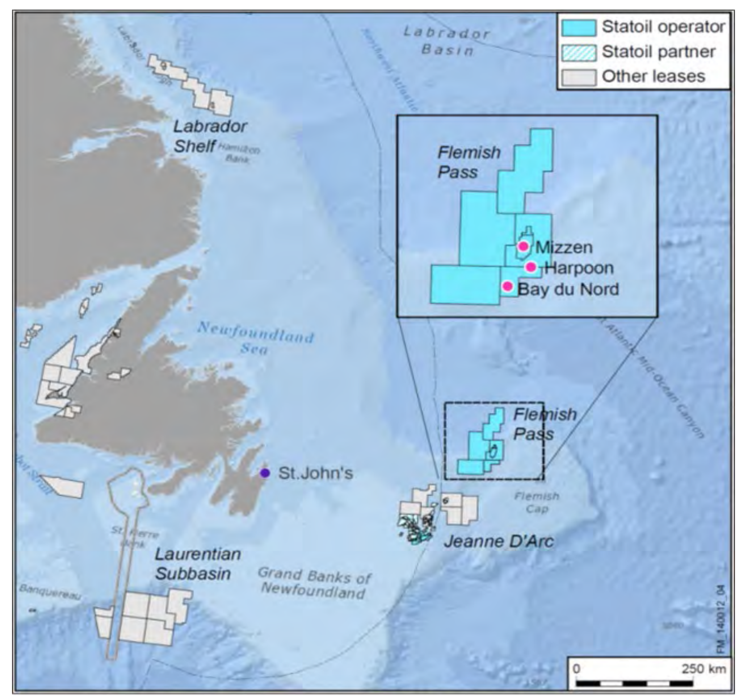


Figure 6 Exploration in the Flemish Pass Basin



Natural Gas Liquids

Propane Markets Stabilize After Polar Vortex, Prices Dive in December

The Polar Vortex resulted in near-record cold temperatures across most of Canada and the U.S. during the 2013/14 winter. Wholesale and retail propane prices spiked in response to strong demand and the logistical challenges of delivering propane to end users during extreme weather conditions. To examine these issues faced by propane markets and to investigate the possibility of anti-competitive behaviour by propane firms, the Competition Bureau and NEB released the Propane Market Review in April 2014.

Since the peak of the propane crisis in January and February 2014, propane prices returned to more normal, seasonal levels for most of 2014 before declining rapidly later in the year. Wholesale prices at Edmonton and Sarnia have declined from highs of 63 and 72 cents/L reached in January 2014 to 8 and 25 cents/L, respectively, in December 2014, primarily due to a very well supplied propane market. While this has resulted in lower prices for propane consumers, it has had a significant negative effect on the fractionation spread (the margin received by midstream companies for extracting liquids from the natural gas stream). Figure 8 illustrates the sharp decline in the spread starting in October 2015.

While the U.S. continues exporting record volumes of propane to overseas markets, the overall supply picture at the beginning of 2015 appears better prepared than it did prior to last winter's Polar Vortex-driven crisis. U.S. propane production remains robust, with 2014 production approximately 20 per cent higher than 2013 production and now exceeding 1.0 MMb/d. Lastly, propane demand at the start of the 2014 North American crop drying and heating seasons has been lower than 2013, leaving Midwest and Canadian propane storage at high levels. Total underground inventories in Canada and the U.S. on January 1st were 82 per cent higher in 2015 than 2014, sitting at 81.9 million barrels. Inventories in Canada alone on January 1st were at 6.2 million barrels, 134 per cent higher in 2015 than 2014 and 10 per cent higher than the January record previously set in 2002.

The Cochin Pipeline Reverses and Canadian Propane Searches for New Markets

Historically, Canada has produced more propane than it consumes and this surplus production is exported to the U.S. Unlike other hydrocarbons (namely oil and natural gas), Canadian propane is primarily exported by rail. Until March 2014, Western Canada had the option of moving propane to markets in the U.S. Midwest via the Cochin Pipeline. In March, the Cochin Pipeline ceased this service, preparing to reverse direction to import condensate, leaving propane producers more reliant on rail, other pipelines (where propane is mixed with other hydrocarbons, such as Enbridge or Alliance), and to a lesser extent truck, to export propane to the U.S. As a result, midstream firms in Alberta such as Keyera and Plains Midstream are adjusting to the new landscape. Keyera is developing a 40 Mb/d rail terminal in Josephsburg, Alberta while Plains is adding rail capabilities to its Fort Saskatchewan fractionation and storage facility that previously was only served by truck and pipeline.

Some in the propane industry have proposed selling propane to new markets outside of North America. In August 2014, the Board received an application from Pembina for a licence to export propane from Canada for a period of 25 years. Pembina's 37 Mb/d export terminal would be located in Portland, Oregon but would source propane from Western Canada. Pembina has proposed to begin exporting in 2018. Other firms considering liquids exports from the west coast include AltaGas/Petrogas Energy/Idemitsu Kosan (located in Ferndale, Washington), and Sage Midstream (Longview, Washington).

Figure 7 Monthly Average Propane Prices at Major Hubs

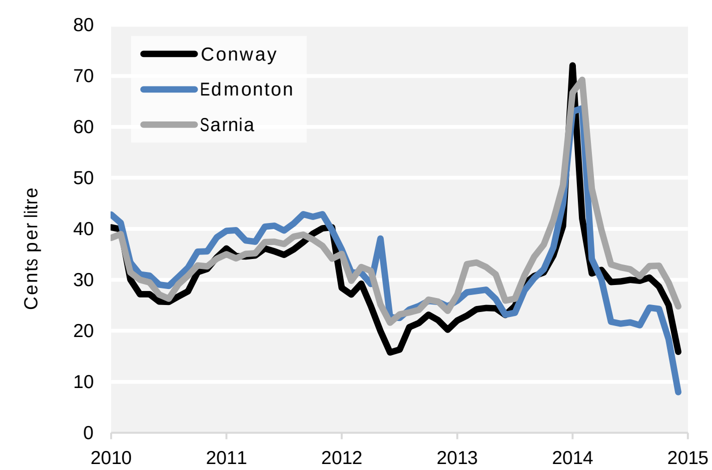
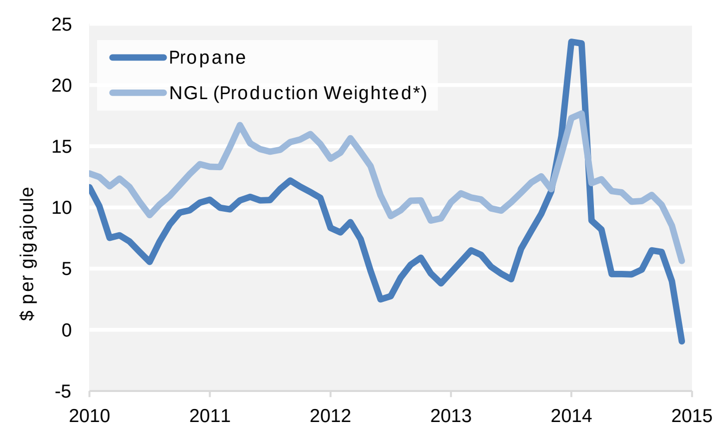


Figure 8 Fractionation Spreads in Alberta



Note: Calculated with intra-Alberta natural gas prices and NGL prices at Edmonton. * NGL production weighted 40 per cent propane, 20 per cent butane, 40 per cent condensate.

Producers Focusing on Montney Tight Gas

Natural gas production from the WCSB has been relatively stable over the past three years. However, where and how WCSB gas is produced has transformed significantly. Like in the U.S., conventional natural gas drilling has declined dramatically, whereas multi-stage hydraulic fracturing and long-reach horizontal drilling have become the norm. These techniques have focused activity in certain formations in Western Canada, like the Montney.

The Montney Formation straddles the northern part of the Alberta-B.C. border and covers approximately 130,000 square kilometres, roughly the size of Nova Scotia and New Brunswick combined. The Montney primarily produces tight gas (natural gas produced from reservoirs that have significant difficulty producing without being hydraulically fractured). The tight gas resource base of Montney is very large, estimated to contain 449 Tcf of marketable natural gas. To put this in perspective, Canada consumed about 3.2 Tcf of gas in 2013.

Gas drilling activity in the Montney has grown to nearly two-thirds of all gas drilling activity in the WCSB. While other substantial shale and tight gas prospects have been identified in Western Canada such as the Horn River Basin, Liard Basin, Cordova Embayment and Duvernay Shale, the combined number of rigs drilling in those other areas averaged 17 in 2014, compared to an average of 72 rigs operating in the Montney.

Montney wells are highly productive, with an average production rate of 4.5 MMcf/d during the first three months, over double the 2013 WCSB average rate of 1.9 MMcf/d. Furthermore, significant proportions of natural gas liquids in the gas stream improve the economics of Montney gas. The Montney also benefits from nearby natural gas and NGLs infrastructure, which is there because of previous conventional natural gas activity as well as significant investments already made by the proponents of west coast liquefied natural gas export terminals. For the first half of 2014, total Montney (Alberta and B.C.) marketable production averaged 2.35 Bcf/d, representing 16 per cent of total marketable Canadian gas production, and an increase from the 2013 average of 1.97 Bcf/d.

While the Montney is the most active amongst the various gas prospects in Western Canada, other areas still have significant potential. Production tests in the Horn River Basin (estimated to contain 78 Tcf of marketable gas resources) and the Liard Basin have resulted in wells with very high flow rates. Given the right economic conditions, activity in these areas and others outside of the Montney could also contribute to Canadian gas production in the future.

The Uncertain Potential of Duvernay Shale Gas

Production tests in Alberta's Duvernay basin have demonstrated that its gas has significant amounts of NGLs, which can help the economics of production. While the Duvernay has been labeled a "shale oil" area, most producers have been targeting its rich gas areas (high content of condensate and other NGLs). Duvernay wells have been producing between 100 and 500 barrels of condensate for every million cubic feet of gas – far higher than what is being produced from the Montney and potentially higher than rich gas production from Texas' Eagle Ford Shale. However, the Duvernay is still in the testing stage of exploration and industry activity. While the Duvernay shows some promise, its wells are expensive and technically challenging and it may take a while before we learn more about its true potential.

Figure 9 Drilling Rigs Inside and Outside the Montney

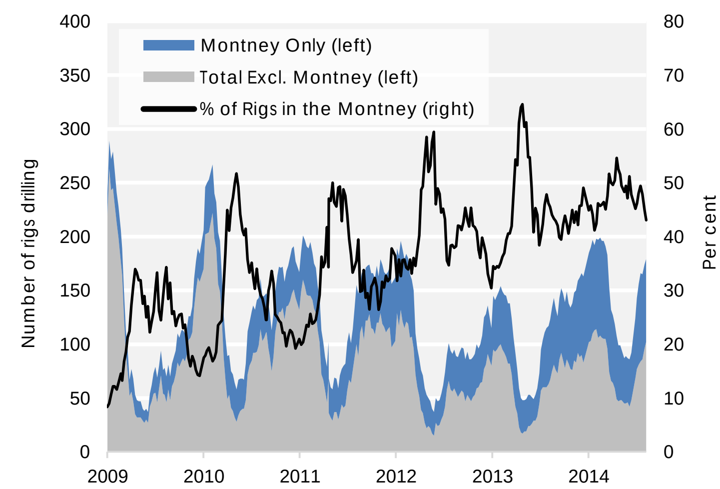
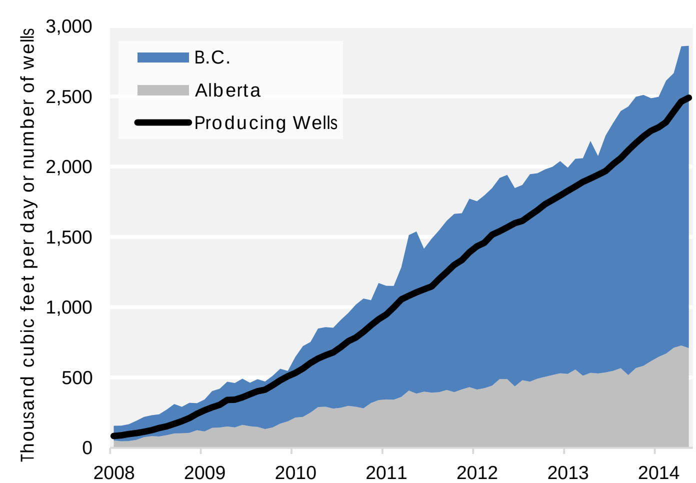


Figure 10 Montney Natural Gas Production



Natural Gas
Ontario and Québec

Polar Vortex Shakes Up Ontario and Québec Gas Markets

From December 2013 through April 2014 an enduring cold dubbed the Polar Vortex gripped most of Canada and the U.S. and natural gas demand greatly exceeded production. As large volumes of gas in storage were withdrawn, total gas in storage eventually dipped below 25 per cent of storage capacity and prices became volatile. Natural gas prices that were steadily less than $5/GJ increased to over $35/GJ at the Dawn hub in southern Ontario. Figure 11 shows how the natural gas price responded at Dawn to storage levels during the Polar Vortex and later as storage volumes built up in the summer.

Throughout the 2014 summer, analysts were concerned about the market's ability to refill storage in time for the upcoming 2014-15 winter. However, strong North American production resulted in record injection levels, refilling storage in time for the 2014-15 heating season.

Gas Flows Continue Changing in Ontario and Québec

Historically, Eastern Canada has received most of its natural gas from Western Canada. Natural gas from Western Canada was also exported to the northeast U.S. via several export points in Ontario and Québec. However, the rapid development of the Marcellus Shale in the northeast U.S. is changing this, as gas exports from Ontario and Québec to the U.S. dropped 12 per cent from 2013 to 2014, for a total decline of 38 per cent since 2010 as shown in Figure 12. Some former export points are now being used to both import and export natural gas. In the near future, more export points are expected to be used to import gas from the U.S., either occasionally or permanently.

Pipeline Infrastructure Responds to Changing Gas Flows

Consumers in Ontario and Québec are increasingly aiming to access natural gas from the nearby Marcellus Shale, and several pipeline companies are considering building or expanding pipelines to move natural gas from the U.S. into Ontario and Québec.

Over the last year TransCanada announced plans to invest almost $2 billion to tap into growing Marcellus supplies. TransCanada's proposed facilities in the "Eastern Triangle" (North Bay-Toronto-Iroquois) include the Eastern Mainline Project, the Parkway West Connection, the Hamilton Area Project, and the Vaughan pipeline project. The proposed King's North Connection would connect with new Enbridge Gas Distribution pipeline facilities.

Enbridge is proceeding with its Greater Toronto Area Project and is also assessing the feasibility of its proposed Niagara Link Gas Storage that would offer more storage and transportation near the Dawn hub. Spectra Energy and DTE Energy have proposed the NEXUS Gas Transmission Project to further connect Ontario with growing supplies of Marcellus and Utica gas.

Union Gas is also trying to improve access to new, lower cost supplies located in Pennsylvania and Ohio. This includes compressors at Lobo and Parkway West and additional pipeline projects such as the Dawn Parkway System Expansion, Sarnia Expansion, Brantford-Kirkwall Pipeline, and Burlington-Oakville Pipeline.

Figure 11 Gas Storage in Ontario vs. Dawn Gas Price in 2013/14

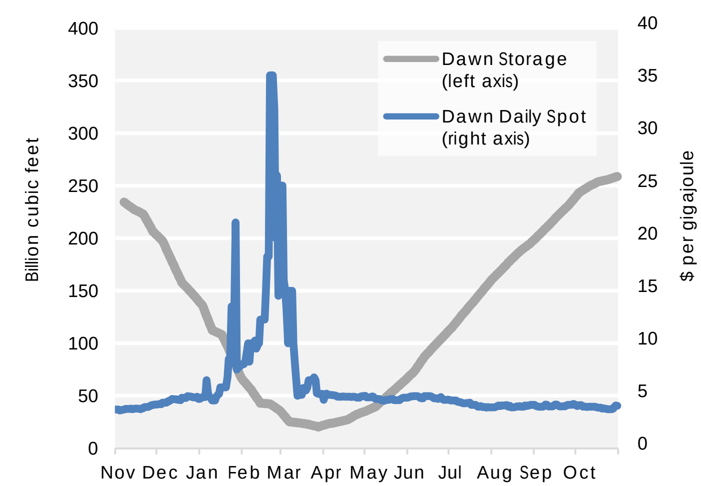
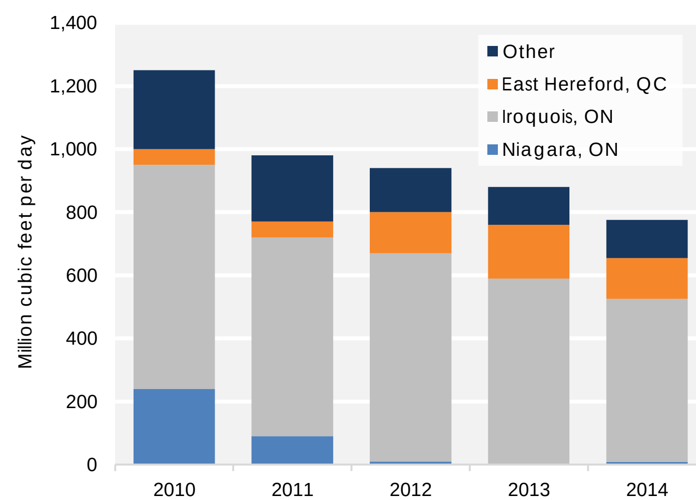


Figure 12 Exports of Natural Gas from Points in Ontario and Québec



Liquefied Natural Gas

Canada's Role in Global LNG

Strong Interest in Exporting Canadian Gas as LNG

Global natural gas consumption in 2013 averaged approximately 330 Bcf/d. Of that volume, roughly 32 Bcf/d was transported to market via tankers as liquefied natural gas (LNG). Because natural gas prices in North America are currently lower than global LNG prices, there is significant interest in exporting natural gas from North America in the form of LNG.

Between 2010 and 2014, the NEB has received over 20 long-term LNG export licence applications. To date, these applications have requested approval for a total of approximately 48 Bcf/d of natural gas for export. While earlier applications specified west coast locations as the export points, more recent applications have proposed export points on Canada's eastern shores in Nova Scotia and Québec. As of December 2014, the Board had issued 9 LNG export licences for a total of 20.8 Bcf/d. The cumulative volumes of applied for and approved long-term LNG export licences are shown in Figure 13.

Canadian Proposals Face Challenges and Global Competition

Most LNG liquefaction terminals are multi-billion dollar investments. So far, none of the projects in Canada have broken ground. In December 2014, Petronas announced that it was delaying its final investment decision on the Pacific NorthWest LNG Project due to concerns about project economics. In general, project economics for Canadian LNG projects are affected by factors such as: remote resource locations, remote plant sites, significant environmental and regulatory requirements, and cost considerations. These liquefaction terminals must be constructed from scratch and hundreds of kilometers of pipelines must be built or expanded to transport natural gas from northeast B.C. to the coast. Applications or project descriptions for several LNG-related pipelines in Western Canada have been filed with the B.C. Environmental Assessment Office or the NEB. These pipeline proposals in B.C. are shown in Figure 14. In the Maritimes, the existing Maritimes & Northeast Pipeline would likely need to be expanded to accommodate higher volumes of gas flowing north to Canada for export as LNG.

Canadian proposals face competition from projects around the globe. In the U.S., over 40 export applications have been filed requesting a total volume of approximately 40 Bcf/d of LNG exports. A number of the facilities proposed in the U.S. consist of converting existing underutilized LNG import terminals into export terminals and would cost less than proposed Canadian greenfield projects. There are currently four liquefaction facilities under construction in Louisiana, Texas and Maryland. In other parts of the world, liquefaction terminals are under construction or have been proposed in Australia, Russia, Mozambique, Nigeria and other countries.

Although global demand is expected to grow at over three per cent per year, the volume of proposed LNG exports from North America alone exceeds projected world demand growth over the next 20 years. This suggests only the most competitive projects will proceed. Finally, LNG contracts are typically indexed to crude oil prices, so any sustained decline in crude oil prices will likely dampen investment in new LNG liquefaction terminals.

Figure 13 Long-Term LNG Export Licence Applications in Canada

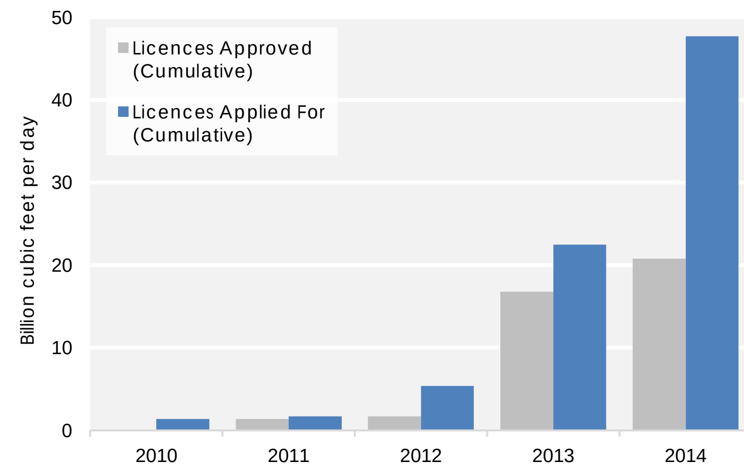
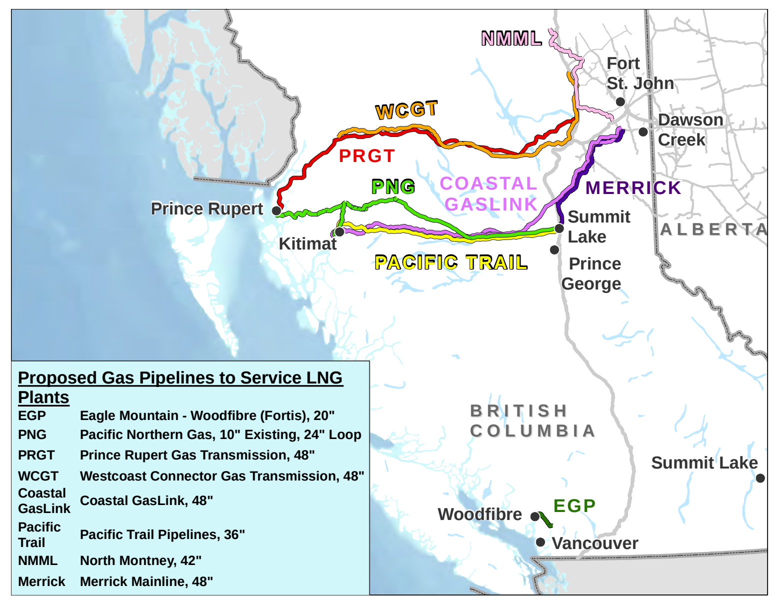


Figure 14 Proposed Pipeline Projects for West Coast LNG Facilities



Small-Scale Liquefied Natural Gas

An Emerging Demand Trend

To date, the adoption of LNG as an alternative to diesel has mainly been impeded by the lack of refueling and liquefaction infrastructure. In 2014, there were signs that this issue is being addressed. It appears that, even with recently lower crude oil and diesel prices, LNG remains an economic alternative to diesel for transportation and electric generation. As an example, ENN Canada is currently charging $0.81 per diesel litre equivalent (after taxes) of LNG at its station in Merritt, B.C. In the nearby city of Kamloops, B.C., the wholesale diesel price was comparable at $0.65/L in December 2014, while the retail price was significantly higher, at $1.20/L.

Midstream Infrastructure Developments

In May 2014, Ferus Natural Gas Fuels (Ferus NGF) opened a small-scale liquefaction facility in Elmworth, Alberta, while Altagas Ltd plans to build a facility in Dawson Creek, B.C. Furthermore, several LNG facilities used for peak-shaving (that is, balancing loads or providing temporary storage during peak demand periods) are looking at expanding capacity to accommodate increased demand for LNG. FortisBC announced the expansion of its Tilbury Island, B.C. liquefaction facility, while Gaz Métro plans to triple the output from its Montreal LNG and storage facility. In Ontario, Union Gas filed with the Ontario Energy Board to begin selling LNG from its Hagar LNG facility to interested parties in the region. Stolt LNGaz is proposing to build a new facility in Bécancour, Québec to serve remote communities via tanker trucks, and Northeast Midstream is proposing to build a facility in Thorold, Ontario to potentially serve emerging LNG markets in the U.S.

Along several of Canada's main freight corridors, natural gas refueling infrastructure for heavy duty freight vehicles continues to grow with the hopes of displacing higher cost diesel fuel. Shell's refueling station in Calgary is fueled by Encana's liquefaction facility in Stathmore, Alberta and ENN Canada is proposing to open new facilities in Edmonton and Vancouver to coincide with Ferus NGF's planned facilities. ENN Canada also has one LNG refueling station along the Highway 401 corridor in Woodstock, Ontario and two along B.C.'s trucking routes in Chilliwack and Merritt. Gaz Métro is developing its "Blue Road" project linking Toronto and Quebec City and currently has three public LNG refueling sites running in Cornwall, Ontario, and, Levis and Sainte-Julie in Québec.

New Demand for Canadian Natural Gas Starting to Materialize

Development of small-scale LNG infrastructure have also helped in facilitating a diverse variety of end-user interest in Canadian LNG. BC Ferries plans to have five vessels using dual diesel/LNG-fuelled engines by 2018 and Sociétés des Traversiers du Québec will begin commissioning three similar ferries in 2015. In Québec, Group Desgagnés ordered two freight vessels and Seaspan Ferries Corporation ordered two ferries, both for delivery in 2016. In Alberta, Shell and Caterpillar have agreed to test LNG on heavy-haulers in the oil sands starting in 2016, while CN is testing it as a locomotive fuel. In the oil and gas services sector, Prometheus Energy has imported LNG via truck, and Ferus opened its Elmworth facility in the heart of the Montney tight gas region.

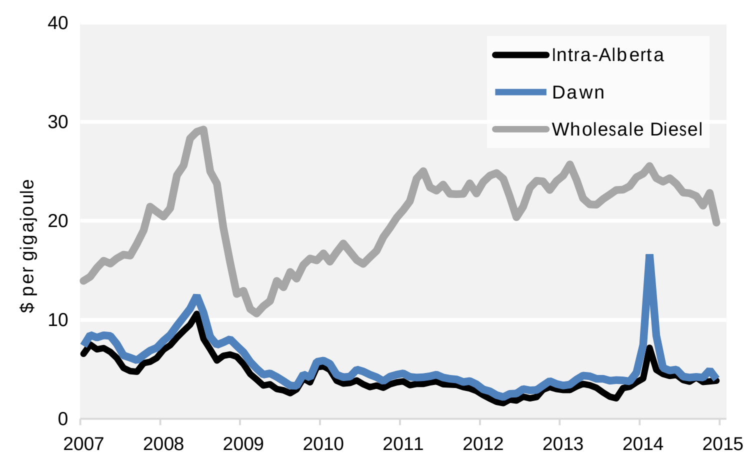
LNG is emerging as an alternative to diesel fuel in areas that lack or have constrained natural gas distribution. A power plant in Inuvik has converted to LNG, and Yukon Energy has been approved to start trucking LNG to Whitehorse. While Gaz Métro sold LNG to power plants in New England in 2014, the company also plans to truck LNG to remote communities and industries in Québec. Perhaps the most exotic new use for Canadian LNG is in Hawaii, where Hawaiian Electric has committed to purchasing LNG from the Tilbury Island LNG expansion for 15 years starting in 2017.

Table 1 Existing and Proposed Small-Scale LNG Facilities in Canada

Company	Facility Location	Date Commissioned/ Expected	Expansion Date	Capacity (MMcf/d)	
				Current/ Proposed	Expansion/ Potential
AltaGas	Dawson Creek, BC	2015	By 2020	1.65	41.30*
Encana	Strathmore, AB	2013	-	0.41	-
FerusNGF	Vancouver, BC	2016	-	8.26	-
FerusNGF	Edmonton, AB	2016	-	8.26	-
FerusNGF	Elmworth, AB	2014	N/A	4.13	20.65
FortisBC	Tilbury Island, BC	1971	2016	4.24	36.74
FortisBC	Mt. Hayes, BC	2011	-	7.50	-
Gaz Métro	Montreal, QC	1969	2016	10.04	29.22
Northeast Midstream	Thorold, ON	2016	-	29.74	-
Stolt LNGaz	Bécancour, QC	2018	-	70.33	-
Union Gas	Hagar, ON	1968	2015	N/A **	3.00

* Represents Altagas' planned small-scale LNG expansion across B.C. and not necessarily at the Dawson Creek facility.
** Currently only available for Union North system integrity requirements.

Figure 15 Wholesale Natural Gas and Canadian-Average Diesel Prices



Electricity
Power from Water and Wind

Canadian Hydro Developments Move Ahead

Hydroelectricity constitutes 59 per cent of the 127,762 MW of installed generating capacity in Canada. New projects and upgrades to existing dams currently under construction and slated to become operational between 2014 and 2020 will add 4,569 MW of capacity. Construction is underway on the La Romaine project in Québec, the Muskrat Falls project in Labrador and the Keeyask dam in Manitoba. Keeyask received approval from the Manitoba government in mid-2014.

In B.C., new hydroelectric projects and upgrades are planned to meet the expected 40 per cent increase in electricity demand over the next 20 years. The installation of a fifth and sixth turbine at the Mica dam in 2015 will add 1,000 MW of capacity. In December, the provincial government approved the 1,100 MW Site C project to be located on the Peace River in northeastern B.C. Construction on the $8.8 billion facility is expected to start in summer 2015 although the project faces opposition and potential legal challenges.

Historically, the provinces with the most hydroelectric capacity have led the country in electricity exports. However, plans to build hydroelectric dams specifically to service export markets have stalled in recent years as electricity prices in the U.S. dropped on lower demand and lower natural gas prices.

On the other hand, environmental regulations and the retirement of coal-fired generating plants in the U.S. open new opportunities for hydroelectric exports from Canada. In Manitoba, work proceeds on the Manitoba-Minnesota Transmission Project which is needed to service new sales agreements between Manitoba Hydro and U.S. utilities. New power lines to the U.S. have also been proposed in Québec and Ontario.

Strong Growth Continues for Wind Energy

As shown in Figure 17, over 1,800 MW of wind capacity was installed in Canada in 2014, surpassing the 1,600 MW added in 2013. Most of the new projects were located in Québec, Ontario and Alberta. These are the three largest electricity markets in the country and these markets all offer unique advantages for wind developers. Industries in Alberta have used credits gained from wind generation against emissions charges under provincial regulations which were extended from expiry in December 2014 to at least June 2015. In Québec, vast hydroelectric supplies can be used to back-up wind power. Lastly, in Ontario, the stable investment environment created by Ontario's Feed-In-Tariff program has led not only to it leading Canada in wind power capacity, but has also helped reduce the cost of other renewable technologies such as solar photovoltaic cells.

Total installed wind capacity in the country grew to nearly 9,700 MW as of December 2014, which represents about seven per cent of total installed capacity. However, electricity production can be uncertain due to fluctuating wind strength. For that reason, the percentage of electricity actually produced from wind tends to be significantly lower than the share of wind in total installed capacity. During the first ten months of 2014, about 1.4 per cent of electricity produced in Canada was generated from wind.

Figure 16 Map of Canadian Hydroelectric Projects with Capacity and Status

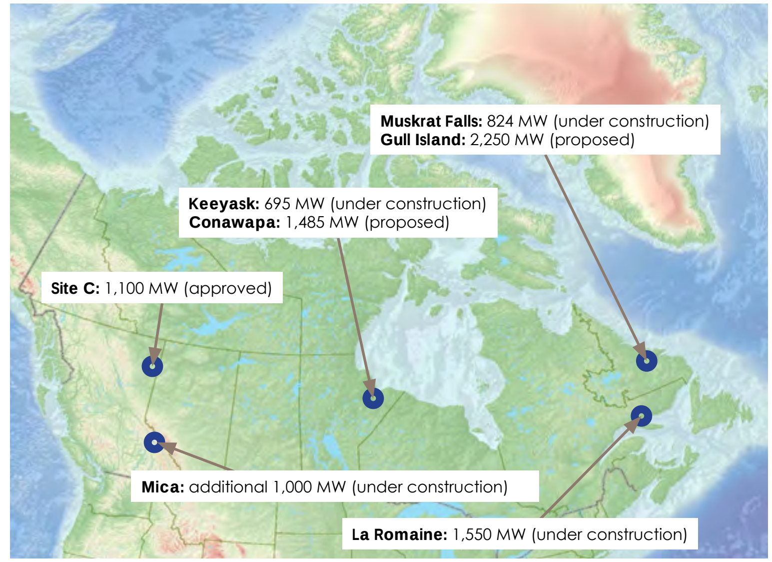
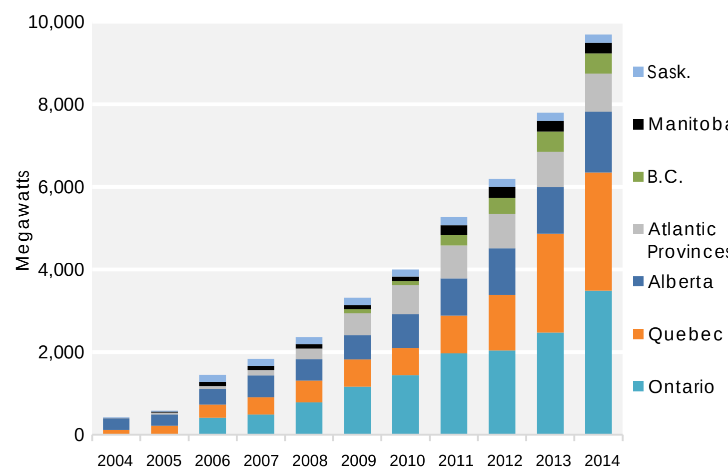


Figure 17 A Decade of Growth for Installed Wind Capacity



Electricity
Thermal Generation

An Era Ends for Coal, Another Begins

In April 2014, the Thunder Bay Generating Station ended its coal-fired operations, marking the completion of Ontario's coal plant phase-out. The station will be converted to burn biomass starting in 2015 with an expected capacity of approximately 150 MW. The transition away from coal started in 2005 when Toronto's Lakeview plant was shut down. As the coal plants were gradually phased-out over the past decade, Ontario pursued replacement supply including contracting for new gas-fired plants, establishing fixed rates to procure renewables, and enhancing the transmission system. Ontario now has more gas-fired generation capacity than hydroelectric capacity, and it has more wind capacity than any other province.

While Ontario has chosen to shut-down all of its coal plants, Saskatchewan has taken a different approach to mitigating the environmental impact of coal-fired generation. In October 2014, the world's first commercial scale coal plant equipped with carbon capture and storage (CCS) technology was placed into service at Boundary Dam, Saskatchewan. While generating about 110 MW of power onsite, the Boundary Dam CCS facility captures 90 per cent of the carbon dioxide produced from the coal burn and then pipes it into nearby oil reservoirs for enhanced oil recovery.

In Canada, most private sector investors have indicated that the lower cost and shorter timelines for building gas-fired generation make it preferable to building or retrofitting coal plants with CCS units. However, the potential for higher natural gas prices over time, lack of access to gas in certain areas, or evolving GHG regulations could lead to greater consideration of CCS units. In the U.S., there are two major CCS projects scheduled to be completed in 2015 or 2016, and the Global CCS institute has identified twenty other major CCS projects in the power sector worldwide.

Cogeneration Leads New Capacity Builds in Alberta

New generation added to Alberta's fleet since the market was deregulated in the late 1990s has been dominated by natural gas-fired units, specifically cogeneration. Three out of the seven generators installed in Alberta in 2014 were small cogeneration units, while two large units at Imperial Oil's Cold Lake and Kearl oil sands operations were near completion by year-end. Many companies or institutions have chosen to build cogeneration units to supply both power and heat to their facilities. Universities and hospitals can use the steam in district heating systems, whereas the oil sands producers primarily use the steam to heat or upgrade bitumen. Due to unfamiliarity with the power industry, some oil sands companies are reluctant to invest in cogeneration units. However, having power on site has unique benefits, such as reliability of the operation's power supply, less exposure to the steadily increasing transmission costs in the province, and additional revenue from selling any excess power in Alberta's market.

In its most recent long term forecast, the Alberta Electric System Operator (AESO) estimated the cost of building cogeneration for power supply to be higher than combined-cycle units or wind, and similar to that of simple-cycle gas-fired units at around $105-110/MW.h over the life of the project. However, if a reasonable value for the steam production is applied, the estimated cost of the power drops to below any other generation type. The AESO estimates that combined-cycle units will lead all generation additions for the remainder of the decade. However, aside from Calgary's 800 MW Shepard Energy plant scheduled for completion in 2015, many utilities' projects appear to be uncertain given the potential for excess electricity supply from new oil sands cogeneration units to lead to lower electricity prices.

Figure 18 Available Installed Capacity in Ontario

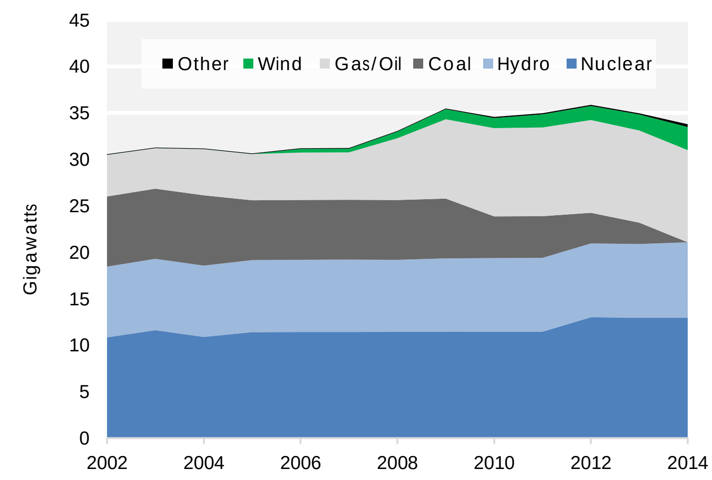
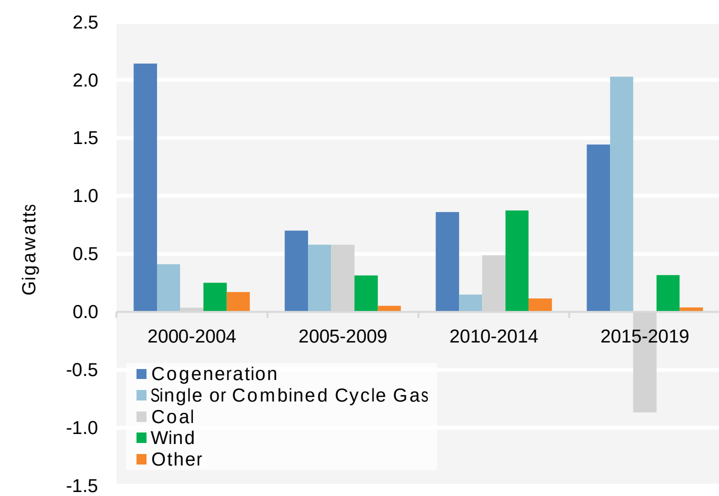


Figure 19 Generation Capacity Additions/Retirements in Alberta



Energy in Atlantic Canada
Natural Gas and Power Markets

A Natural Gas Market Tied to New England's Market

Energy prices in Atlantic Canada are generally higher than in other provinces. For example, higher natural gas prices in the region, particularly during the winter, are due to limited natural gas production in the Maritimes, lack of regional gas storage facilities and ongoing pipeline bottlenecks in the U.S. northeast. There are no trading hubs in the Maritimes, so natural gas is priced based on regional trading hubs such as Dracut or Algonquin, both located in Massachusetts. The winter 2014 spot price for natural gas averaged US$7.98/MMBtu ($8.34/GJ) at Algonquin and US$16.64/MMBtu ($17.39/GJ) at the smaller and less active Dracut hub. For most of 2014, the Maritimes was a net exporter of natural gas. However, on certain days when Atlantic Canada's offshore production was low, the Maritimes imported natural gas on the bidirectional Maritimes & Northeast Pipeline (M&NP) (see Figure 20).

During January to October 2014, natural gas demand in the Maritimes averaged approximately 175 MMcf/d. Over the same period, production from the two offshore fields in the Maritimes, Sable Island and Deep Panuke, averaged approximately 320 MMcf/d. The Canaport LNG terminal in New Brunswick provided another 50 MMcf/d into the region. Canaport's output was low, however, because high LNG prices globally discouraged LNG imports into New Brunswick.

While there are plans to expand the capacity of M&NP or improve interconnections with other pipelines, additional pipeline capacity into the region will not be available in the short term. The Maritimes' first natural gas storage facility started construction in late 2014 and will have an initial capacity of 4.0 Bcf. When commissioned, the storage facility is anticipated to moderate price volatility in the region. Lastly, 2014 saw increasing deliveries of compressed natural gas by truck to customers in the Maritimes and Maine.

Electric Utilities Looking to New Versions of Old Technologies

Power prices have also been of concern in Atlantic Canada. A significant portion of the power price is related to fuel prices, and prices for gas, coal and oil tend to be higher there than other parts of the continent. Over the past decade, Nova Scotia Power has shifted away from heavy fuel oil and has used natural gas instead. However, given the high gas prices in the region and declining oil prices, recent regulatory filings indicate that Nova Scotia Power will reverse this trend by using more heavy fuel oil this winter.

In 2014, construction started on the Muskrat Falls generating station in the Labrador Peninsula's Lower Churchill area. Construction also began on the associated transmission lines that will bring power to Newfoundland and the Maritimes. The Upper Churchill hydroelectric dam was built in 1970, and Newfoundland and Labrador has now made concrete progress in increasing the region's power production. The power from Muskrat Falls will allow the province to reduce its use of oil-fired generation.

In October 2014, FORCE, an organization supported by federal and provincial governments and private industry, completed construction of subsea cables in the Bay of Fundy's Minas Passage. This was an early and significant step in increasing the area's power from tidal energy. Nova Scotia's first tidal power plant was built in 1984, adding 20 MW of power to the grid. FORCE's infrastructure will allow four tidal generators to employ different electric turbine technologies. The potential for tidal energy from the Minas Passage has been estimated at 2,500 MW, with total potential in the Bay of Fundy many times larger.

Figure 20 Daily Flows on the Maritimes & Northeast Pipeline

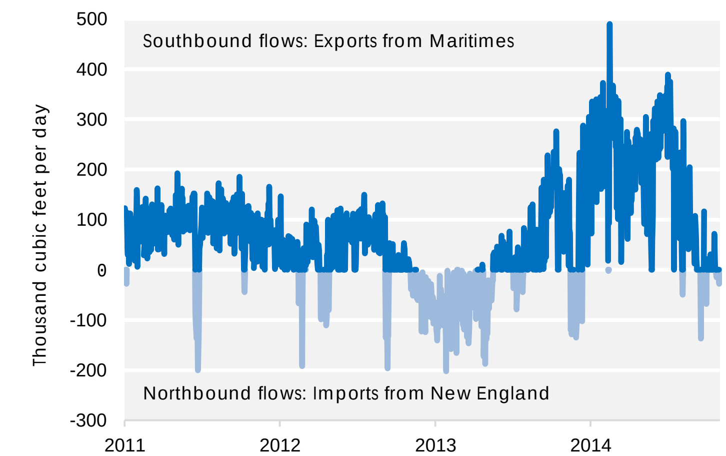
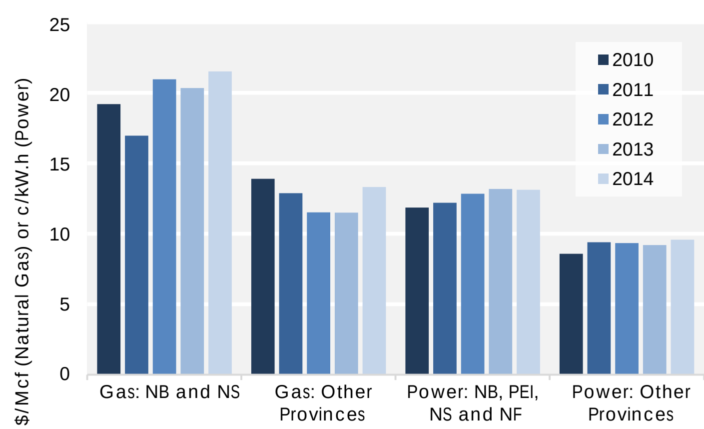


Figure 21 Average Residential Rates for Natural Gas and Power



Note: Rates for natural gas are in $/Mcf. Rates for power are in cents per kilowatt hour. All rates are inclusive of all charges (for example, commodity and distribution charges).

Energy in the North

Onshore Oil and Gas Production in the North

The NEB currently has regulatory responsibilities for oil and gas exploration and production activities in Nunavut. In April 2014, regulation of the oil and natural gas industry in the onshore Northwest Territories (N.W.T.) was transferred from the NEB to the Government of the N.W.T. in a process referred to as devolution. In November 2014, the N.W.T. had its first Oil and Gas Call for Nominations for land in the Central Mackenzie Valley and the Mackenzie Delta/Arctic Islands. Parties have expressed interest in acquiring petroleum rights, and a Call for Bids on nominated lands has been placed and is set to expire on 2 June 2015.

In June the N.W.T. announced that it plans to review the regulations on hydraulic fracturing that it inherited from the NEB and develop its own filing requirements. Such regulations would guide development of crude oil in its Canol shale. As illustrated in Figure 22, N.W.T. oil production declined slightly in 2014, down 0.6 per cent. N.W.T. natural gas production continued a steady decline, down 9.8 per cent for the year.

Potential Offshore Drilling in the Beaufort Sea

Imperial Oil Resources Ventures and Chevron Canada Ltd. both requested advanced rulings from the NEB on whether their proposed well control methods would meet the intended outcome of the NEB's Same Season Relief Well (SSRW) policy. The Board agreed to conduct SSRW technical proceedings. However, in December 2014, Chevron withdrew from the technical proceeding and put its drilling plans on hold indefinitely, citing economic uncertainty in the oil industry.

Electricity Generation Alternatives Growing

While hydroelectricity makes up roughly half of the electricity generated in the North, diesel generation is used to service peak loads and remote areas. The high cost of diesel and delivery via truck makes generation in the North the most costly in Canada. A drought in the summer of 2014 decreased reservoir levels at the Snare Hydro dam and will likely increase the need for diesel generation over a two year span. To prevent the highest power prices in the country from rising further, the N.W.T. government is covering the local utility's projected $20 million incremental diesel costs over the next two years.

Due in part to these high costs, 2014 saw several signs of the Yukon and the N.W.T. making long-term plans to decrease their reliance on diesel generation. The Yukon Energy Corporation (YEC) has decided to integrate five to ten MW of wind generation into its power plan and is currently deciding between Tehcho or Mount Sumanik for the wind farm's location. Northwest Territories Power Corporation (NTPC) plans to construct a 54 kilowatt solar and electricity storage pilot project in Colville Lake. NTPC also announced that 2015 will see promotion of a net metering program to encourage renewable usage.

LNG also gained momentum as a power alternative. NTPC has been trucking LNG from Tilbury, B.C. to displace diesel power generation in Inuvik and YEC has received approval to truck LNG into Whitehorse for the same purpose. The success of the Inuvik conversion led NTPC to consider performing similar fuel switches in Yellowknife and Fort Simpson. Both YEC and NTPC have stated that they plan to capitalize on closer liquefaction facilities than Tilbury as they are constructed, which should further reduce the price paid by end-users.

Figure 22 Oil (Top) and Gas (Bottom) Production in N.W.T.

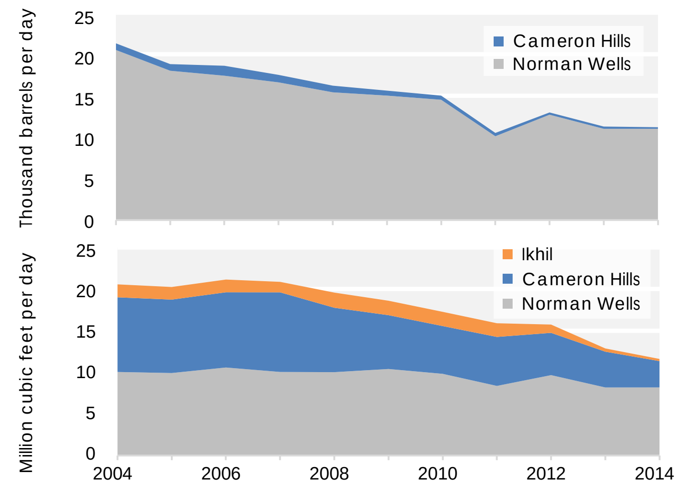
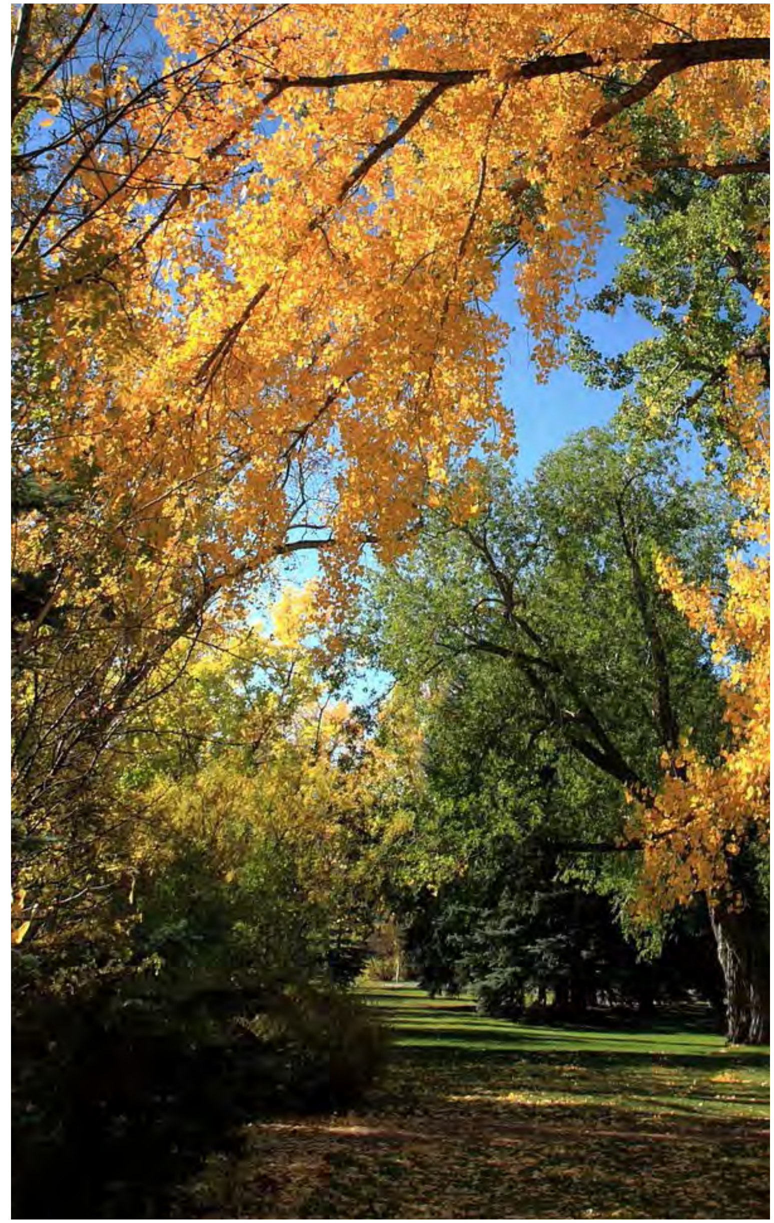


Figure 23 NTPC's Inuvik LNG Storage Facility

Appendix A.1

List of Acronyms

/d	Per day
AESO	Alberta Electric System Operator
B.C.	British Columbia
b	barrel
Bcf	Billion cubic feet
CCS	Carbon capture and storage
GHG	Greenhouse gases
GJ	Gigajoule
GW	Gigawatt
kW.h	Kilowatt hour
L	Litre
LNG	Liquefied natural gas
M&NP	Maritimes & Northeast Pipeline
Mb	Thousand barrels
Mcf	Thousand cubic feet
MMb	Million barrels
MMBtu	Million British thermal units
MMcf	Million cubic feet
MW	Megawatt
MW.h	Megawatt hour
NGLs	Natural gas liquids
N.W.T.	Northwest Territories
NTPC	Northwest Territories Power Corporation
OPEC	Organization of the Petroleum Exporting Countries
SAGD	Steam-assisted gravity drainage
SSRW	Same Season Relief Well
U.S.	United States of America
WCSB	Western Canada Sedimentary Basin
WTI	West Texas Intermediate
YEC	Yukon Energy Corporation



Appendix A.2
Data Sources

Page	Figure/Table	Source
2	Figure 1	EIA
2	Figure 2	NEB
3	Figure 3	NEB
3	Figure 4	PIRA, Government of Alberta, NEB calculations
4	Figure 5	Statistics Canada
4	Figure 6	StatOil
5	Figure 7	Butane-Propane News, Bank of Canada, NEB calculations
5	Figure 8	NEB
6	Figure 9	JuneWarren-Nickles
6	Figure 10	Divestco
7	Figure 11	NGX, Canadian Enerdata
7	Figure 12	NEB
8	Figure 13	NEB
8	Figure 14	NEB
9	Table 1	Various sources
9	Figure 15	Canadian Natural Gas Focus (GLJ), Bank of Canada, Natural Resources Canada
10	Figure 16	NEB
10	Figure 17	Canadian Wind Energy Association
11	Figure 18	IESO
11	Figure 19	Alberta Government, AESO
12	Figure 20	Spectra Energy
12	Figure 21	Statistics Canada, Hydro-Québec
13	Figure 22	NEB
13	Figure 23	NTPC

Appendix A.3
About this Report

The NEB is an independent federal regulator whose purpose is to promote safety and security, environmental protection and efficient infrastructure and markets in the Canadian public interest within the mandate set by Parliament for the regulation of pipelines, energy development, and trade.

The Board's main responsibilities include regulating:

- the construction, operation and abandonment of oil and gas pipelines that cross international borders or provincial/territorial boundaries, as well as the associated pipeline tolls and tariffs;
- the construction and operation of international power lines, and designated interprovincial power lines; and
- imports of natural gas and exports of crude oil, natural gas, natural gas liquids (NGLs), refined petroleum products and electricity.

Additionally, the Board has regulatory responsibilities for oil and gas exploration and production activities in frontier lands not otherwise regulated under joint federal/provincial accords. These regulatory responsibilities are set out in the *Canada Oil and Gas Operations Act*, the *Canada Petroleum Resources Act*.

For oil and natural gas exports, the Board's role is to evaluate whether the oil and natural gas proposed to be exported is surplus to reasonably foreseeable Canadian requirements, having regard to the trends in the discovery of oil or gas in Canada. The Board monitors energy markets, and assesses Canadian energy requirements and trends in discovery of oil and natural gas to support its responsibilities under Part VI of the *National Energy Board Act* (the NEB Act). The Board periodically publishes assessments of Canadian energy supply, demand and markets in support of its ongoing market monitoring. These assessments address various aspects of energy markets in Canada. This report, *Canadian Energy Dynamics: Review of 2014* is one such assessment that examines elements of Canadian energy markets and how these elements changed in 2014.

If a party wishes to rely on material from this report in any regulatory proceeding before the NEB, it may submit the material, just as it may submit any public document. Under these circumstances, the submitting party in effect adopts the material and that party could be required to answer questions pertaining to the material. This report does not provide an indication about whether any application will be approved or not. The Board will decide on specific applications based on the material in evidence before it at that time.

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Key Issues in Regulation of Interfuel Economics and Competition

Technological/economic developments, as well as legal/regulatory changes, have increased competitive pressures in and among the multiple energy industries.

- Changes in Technology and Economics
  - Natural gas is competing head-to-head with coal.
    - Natural gas fired generation is displacing coal-fired generation, for instance in U.S. Southeast, as a result of the fracking revolution and may do so increasingly because of environmental regulations' impact on coal.
  - Renewable resources are producing greater competitive pressures
    - Studies suggest roof top solar panels are now competitive in a number of markets with utility-generated power and with natural gas for certain uses.
    - Wind power now is reported to be competitive with natural gas-fired generation in portions of upper Midwest (Northern States Power–MN's President & CEO, Megawatt Daily, pg. 12, July 18, 2013) (" 'Wind prices are extremely competitive right now, offering lower costs than other possible resources like natural gas plants.' ")
      - As renewables generate more electricity, they compete against fuels such as natural gas and coal.
      - As natural gas is displaced from higher value markets (*e.g.*, retail household consumption) by conservation and renewables, commodity prices decline and natural gas becomes better able to displace coal.

- Natural gas prices in the last 3 years have become much less volatile relative to changes in weather than at any time in past 30 years.
- The means of energy transmission have become more varied than they have been in 100 years, as oil increasingly is using railcars (with attendant safety issues) (Reuters, 03/16/15: oil ranks 6th in revenue among products hauled by railroads in 2014) and natural gas supplies increasingly are eyed for liquefaction.

- Regulation
  - It’s hard to believe, but 30 years ago it was against US public policy to burn natural gas in a boiler to generate electricity in many circumstances (see, *e.g.*, former 42 U.S.C.A. § 8341).
    - That has changed.
  - 30 years ago, natural gas pipelines produced or bought and resold to their customers more than 95% of all interstate gas supply, usually on an average price basis, shielding an individual gas producer from the immediate consequence of pricing its gas significantly above what most other gas supplies were selling for (*see* Order No. 436, *et seq.*).
    - That has changed; natural gas is sold at wholesale on an unbundled basis.
  - 30 years ago, wholesale electric transactions were predominately priced on a historic cost plus return basis, a formula rate basis, or an avoided cost basis.
    - That has changed. Now the energy and capacity components of wholesale electric prices usually are established pursuant to market-based rate authority.

- A little over 30 years ago, prices for most natural gas production at the wellhead were set by statute or by FERC (*see e.g.* the Supreme Court's decision *Phillips*).
  - That has changed. Natural gas prices are now market-driven.
- 30 years ago, natural gas pipelines' construction and rates were more tightly regulated.
  - That has changed. Now additional flexibility and avenues /means of regulatory authorization exist for facilities changes.

    Further, rates on many pipelines, although capped based on historic costs, often are at a level below the cost-based cap because of competition.
  - While pipelines' opportunities for obtaining regulatory review and authorization have been expanded, the consequences of actions noted by TransCanada's General Counsel (*i.e.*, exponentially greater costs and delays in project development) tend to narrow the number of entities that can successfully pursue major projects and reduce the number of projects any market participant can pursue because of the resulting resource demands.

- 30 years ago, there were no merchant electric transmission lines.
  - That has changed, as merchant developers seek project opportunities.
- In traditional regulatory paradigms 30 years ago, a single decision-maker (*i.e.*, the facilities' owner) effectuated, subject to regulatory review, how and when to market transmission capacity.
  - That has changed. The industry now involves multiple participants making those decisions:
    - Pipelines: Capacity release by incumbent shippers as well as service offered by pipeline itself
    - Stakeholder meetings at Regional Transmission Organizations
    - Joint ventures owning transmission facilities

Consequences from the U.S. Regulatory Perspective

- Ostensibly, more competition between markets and different fuels arguably should reduce instances of direct regulation or legal action (historical cost-based rate-setting by an agency), but has not been the case in many instances.
- Greater antitrust exposure may arise despite increased competition because of loosening/less hands-on federal rate regulation combined with entities' greater opportunity to influence inputs to production or entities greater activity in more than one energy market.
- Greater exposure to antitrust claims may arise despite a greater number of participants in any one decision or sector based on notions of collusion to limit competition.

- There is a greater peril to multi-jurisdictional and multi-industry participants, as FERC and other market monitors/regulators look across energy markets to see if actions in Market #1 were designed to benefit the actor in Market #2.

  See e.g., *BP America, et al.*, 147 FERC ¶ 61,130 (alleged manipulation of trading in natural gas at specific hubs to affect financial instruments' settlements based on price indices) ($28 million penalty plus $800,000 disgorgement);

  Barclays Bank PLC, *et al.*, 144 FERC ¶ 61,041 (alleged manipulation of electricity trading to affect index prices used to settle finance instruments) ($450 million civil penalties, plus $36 million disgorgement);

  Constellation Energy Commodities Group, Inc., 138 FERC ¶ 61,168 (accord) ($135 million in penalties plus $110 million in disgorgement.)

- Project development is being negatively impacted by the disruption of the regulatory process and social license, as previously noted. Ultimately, this impacts public policy outcomes.
- A new round of potential stranded cost claims may be on the horizon
  - Xcel Energy in Colorado has stated it intends to seek from FERC a determination of stranded costs for Boulder, CO, which is creating its own municipal utility in part to enhance the amount of renewable resources generating power [Source: *Boulder County News*, 05/19/15]
  - Roof top solar in the desert Southwest is impacting supply
  - Coal plants are being retired before their useful lives have otherwise expired due to emissions controls and costs
- New scrutiny is being applied by state regulators regarding retail utilities' policies associated with renewables' use by end users

WORLD RECOGNITION OF DISTINGUISHED GENERAL COUNSEL

Directors Roundtable

The Harvard Club, New York

June 10, 2015

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DEVELOPMENTS IN ECONOMIC REGULATION OF ENERGY UTILITIES

- Technological and economic developments have inspired judicial and regulatory decisions that transfer risk from customers to shareholders

- Risk transfer will impact
  - Incentive to invest in infrastructure
  - Utility cost of capital

ECONOMIC REGULATION

- Surrogate for competition
- "Regulatory compact" is historical basis for utility investment
- Utilities provided opportunity to recover (through rates) costs prudently incurred in the provision of service
- Prudent costs include cost of capital
  - reasonable cost of debt
  - return on equity

- Return on equity determined through 3-element fair return standard
  - comparable risk—utility is entitled to a return commensurate with the returns available from investment in enterprises of similar risk
  - financial integrity—return must allow utility to maintain its financial integrity—no ratings downgrade

– capital attraction—return must allow the utility to raise funds on reasonable terms and conditions

  – *Northwestern Utilities v. City of Edmonton* [1929] S.C.R. 186 per Lamont, J. at 193; [1929] 2 D.L.R. 4 at 8; *Bluefield Waterworks & Improvement Company v. Public Service Commission of the State of West Virginia et al*, 262 U.S. 679 (1923) at 692 (United States Supreme Court); *Federal Power Commission et al v. Hope Natural Gas Co.*, 320 U.S. 59(1944) at 603 (*(Hope)* at 603 (United States Supreme Court).

- TransCanada--$11 billion investment in Mainline facilities to transport gas from Western Canada to markets in Eastern Canada and USA

TECHNOLOGICAL/ECONOMIC DEVELOPMENTS

- Natural gas industry
  - "fracking" creates sea change in North American gas transportation industry
  - Abundant volumes of gas available in proximity to markets, fundamentally change economics
- Power industry
  - distributed generation
  - roof top solar

IMPACT ON UTILITY RISK

- Judicial and regulatory decisions have moved the risk of technological development from utility customers to utility shareholders—not just stranded costs but underutilized facilities and technological improvements

- Decreased incentive to invest in utility infrastructure

- Increasing evidence of impact on utility debt costs

- No regulatory recognition in cost of equity

RISK TRANSFER

- 2006—SCC held that gain on the disposition of gas utility assets, outside the ordinary course of business, no longer used to provide utility service, is for the account of utility shareholders
  - *ATCO Gas & Pipelines Ltd. v Alberta (Utilities Commission)* 2006 SCC 4 (ATCO Stores Block)
- Series of Alberta Utilities Commission (AUC) decisions that stipulate that risk of technological improvements now lies with shareholders, not customers:

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– AUC interpreted *Stores Block* to say that all proceeds, including any gains or realized losses, on the disposition of gas utility assets outside the ordinary course of business were for the account of utility shareholders

  - *AUC Decision 2013-417, page 83, para. 329*

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– AUC held that any stranded assets, regardless of the reason for stranding, should not remain in rate base. The utility must bear the risk where the assets are no longer required for utility service

- *AUC Decision 2011-474—"…the Commission finds when a utility asset is stranded and is no longer required to be used for utility service, any outstanding costs related to that asset cannot be recovered from other customers. The Commission relies on the decision of the Supreme Court of Canada in Stores Block for this conclusion. In that decision, the Court states that any assets that are no longer required to be used in utility service are to be removed from rate base.*

– AUC held that all assets that are "no longer used or required to be used as the result of causes that were not reasonably assumed to have been anticipated or contemplated in prior depreciation or amortization provisions" must be removed from rate base.

- Surplus land; depreciable property that is *"obsolete property, property to be abandoned, overdeveloped property, more facilities than necessary for future needs, property used for non-utility purposes, property that should be removed because of circumstances including unusual casualties (fire, storm, flood, etc.), sudden and complete obsolesce, or un-expected and permanent shutdown of an entire operating assembly or plant"*
  - *AUC Decision 2013-417 Utility Asset Disposition, pages 82-83, para. 327.*

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- AUC held that shareholders are not entitled to return of remaining capital after an early retirement due to a fire.
- No disposition, nor was retirement voluntary.
  - *AUC Decision 2014-297, ATCO Electric Ltd. 2012 Distribution Deferral Accounts and Annual Filing for Adjustment Balances, October 29, 2014 (*Slave Lake decision) page 15, para 58

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- “*Applying these fundamental principles to the present case leads the Commission to conclude that any losses and any gains in notional value of utility assets arising from the destruction of those assets should be treated no differently than if the assets were removed from rate base or disposed of by the utility either voluntarily or otherwise.*”

- AUC determined that shareholders should not be entitled to return of capital in a replacement situation—where replacement of existing meters with technologically advanced meters would be beneficial to consumers
  - AUC *Decision 3100-D01-2015, EPCOR Distribution & Transmission Inc., 2013 PBR, Capital Tracker True-up and 2014-2015 PBR Capital Tracker Forecast*, January 25, 2015.

- AUC found that no adjustment to allowed ROE or capital structure is warranted to account for the application of the principles identified in the AUC UAD decision—finding that no evidence that transfer of risk to utility shareholders resulted in higher cost of debt or equity capital; no impact on ability to raise debt capital at reasonable rates (as demonstrated by history of credit spreads) and no change in credit ratings arising from the increase in risk
  - *AUC Decision 2191-D01-2015 2013 Generic Cost of Capital, March 23, 2015, page 72, para. 351 (AUC GCOC 2013)*

- National Energy Board held that, to be just and reasonable, a toll must be “competitive”. Any costs, previously found to have been prudently incurred and included in rate base for recovery through tolls, may be disallowed if circumstances change such that the inclusion of those costs would not result in tolls that are “competitive” and therefore just and reasonable.
    - *National Energy Board Reasons for Decision, TransCanada PipeLines Limited, NOVA Gas Transmission Ltd., and Foothills Pipe Lines Ltd., RH-003-2011, Tolls and Tariff, March 2013, pp. 37-40.*

- Two SCC decisions imminent on appeals re recoverability of prudently incurred costs
  - *Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2013 ABCA 310 [2014 ABCA 397], SCC File No. 35624;
  - *Power Workers Union v. Ontario Energy Board*, 2013 ONCA 359, SCC File No. 35506

IMPACT ON UTILITY INVESTMENT

- Utility that proposes a replacement of facilities that is beneficial to customers is punished by denial of recovery of remaining capital of the asset being replaced
- Strong incentive for utility NOT to make technology advances and replacements that are in the interest of customers

- Disincentive to infrastructure investment
  - If regulators do not provide investors with what they consider to be adequate compensation for the increased risk
    - *AUC GCOC 2013*

IMPACT ON UTILITY FINANCE

- Delayed reaction of capital markets
- Concern in capital markets
  - S&P, DBRS, Scotiabank, BMO
  - Credit rating downgrade risk
  - Increase in corporate debt spreads
- Additional costs should lead to higher customer rates

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USA RELEVANCE

- Disincentive to infrastructure investment
- Cost of capital implications
- Potential new round of stranded cost considerations

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Canadian Public M&A Deal Study

Seventh Annual Edition
2015

Blake, Cassels & Graydon LLP | blakes.com

Blakes Canadian Public M&A Deal Study

2 INTRODUCTION

The seventh annual *Blakes Canadian Public M&A Deal Study* focuses on recurring and emerging issues in the structuring and negotiation of Target-supported public company acquisitions in Canada. The topics covered in the Study range from overall transaction structure and timing, such as the strategic review process and the formation of special committees, to specific contractual provisions, such as tax covenants, break and reciprocal break fees and non-solicitation provisions.

Blakes prepared this Study based on a review of the 50 largest Canadian Target-supported transactions announced between June 1, 2013 and May 31, 2014, excluding transactions initiated without Target support. Where noted, we have included data from prior Blakes studies, resulting in deal information taken from over 250 transactions. For additional information on the method used to prepare the Study and the transactions reviewed, see Appendices A and B.

We invite you to review the results of the Study, which we hope will provide you with valuable insight for future transactions.

About Blakes Mergers and Acquisitions Practice

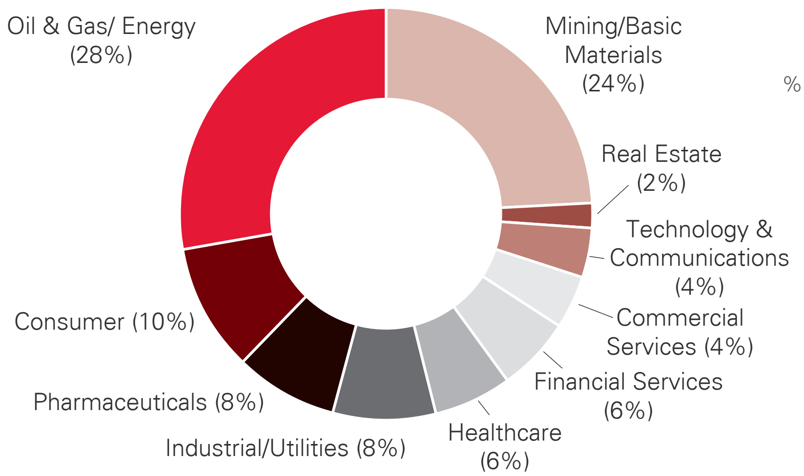
Blakes has one of the largest and most active mergers and acquisitions practices in Canada, having been involved in more than 1,100 public and private M&A transactions, with an aggregate dollar value in excess of US$1-trillion, in the past seven years.

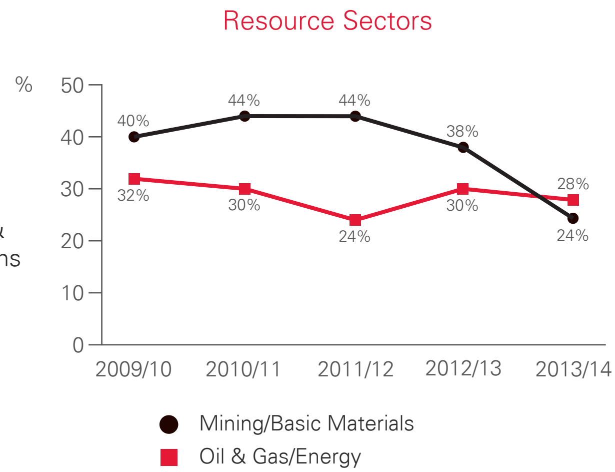
According to Bloomberg, Blakes is the No. 1 Canadian law firm in both Canadian and global M&A deals by deal value and deal count for the years covered by the Blakes studies, 2008-2014.

Transactions on which we regularly advise range from negotiated acquisitions of private companies to the largest public company or trust mergers and acquisitions completed by way of take-over bids, amalgamations and plans of arrangement. We advise clients on structuring considerations, related-party rules, special committee obligations, take-over defences and contested shareholder meetings.

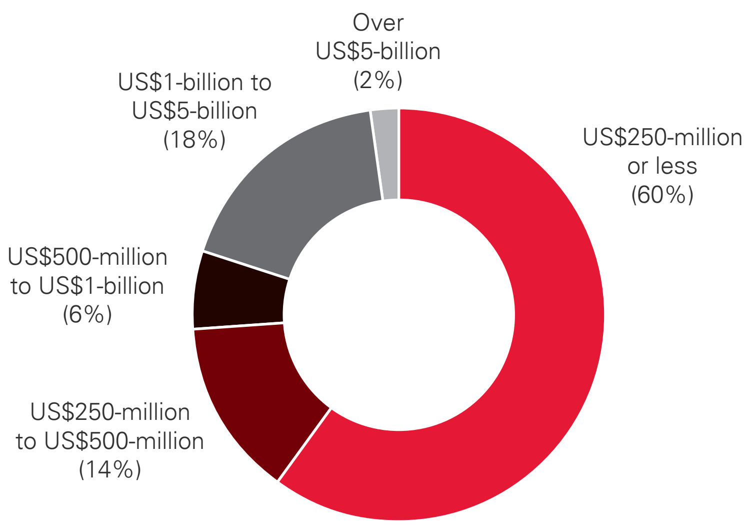
For more information on our mergers and acquisitions practice, see Appendix C or visit **www.blakes.com**.

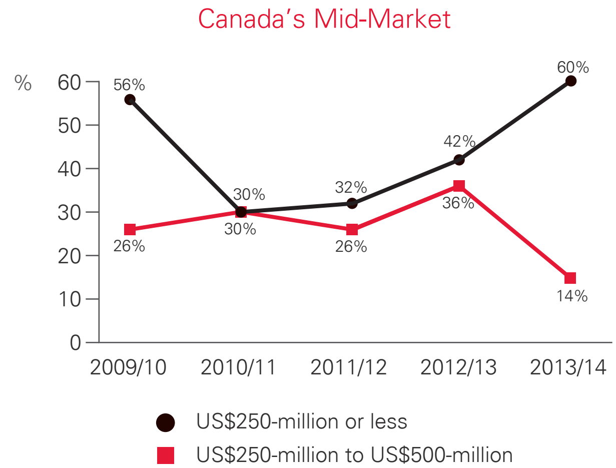
Industry Classification





Transaction Size

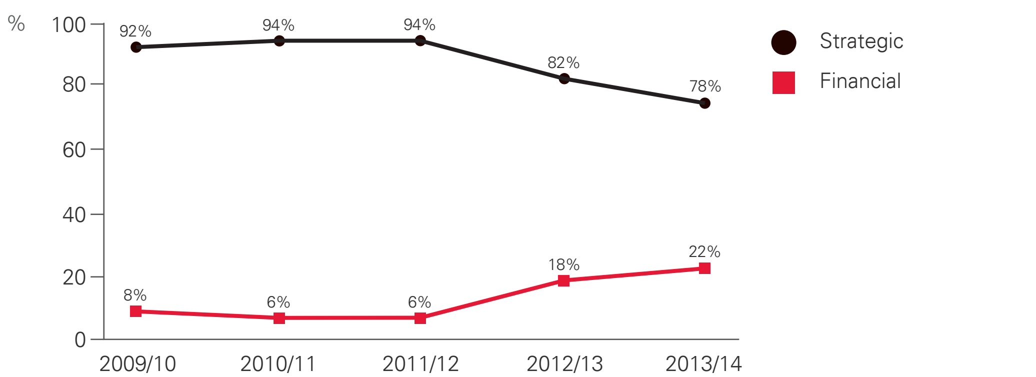




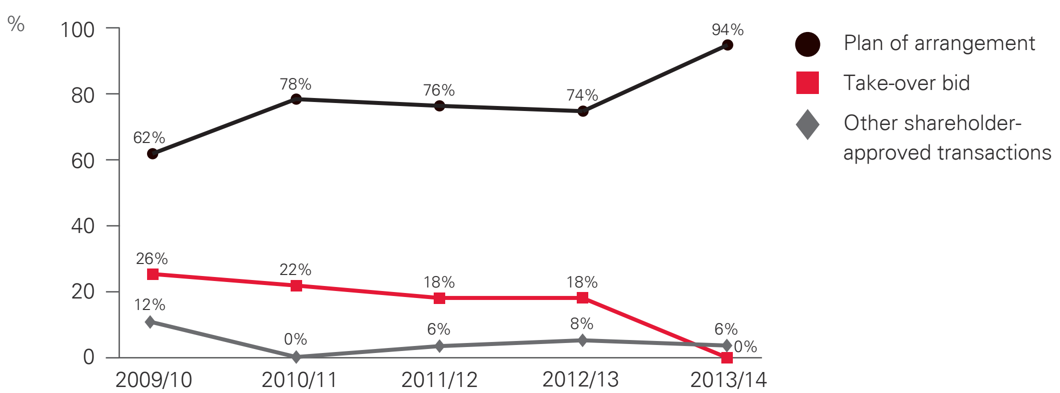
4 TRANSACTIONS OVERVIEW

Industry Classification
Transaction Size
Buyer Type
Transaction Structure
Consideration Type

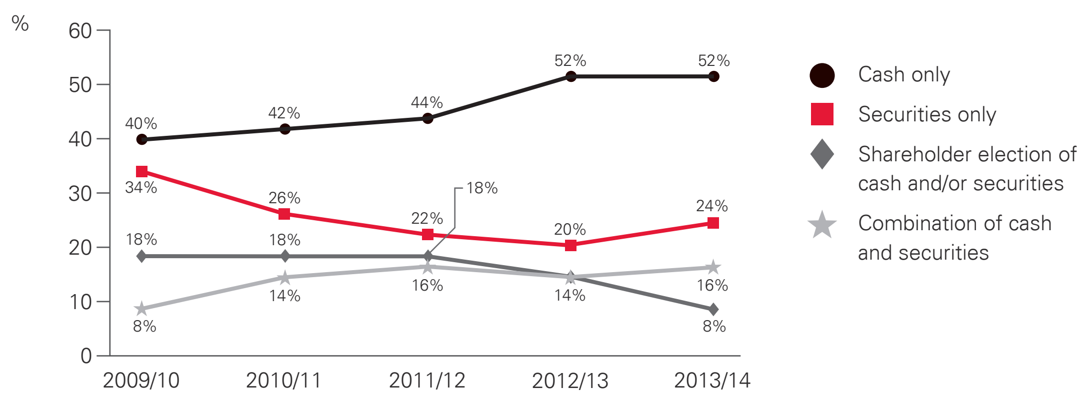
Buyer Type



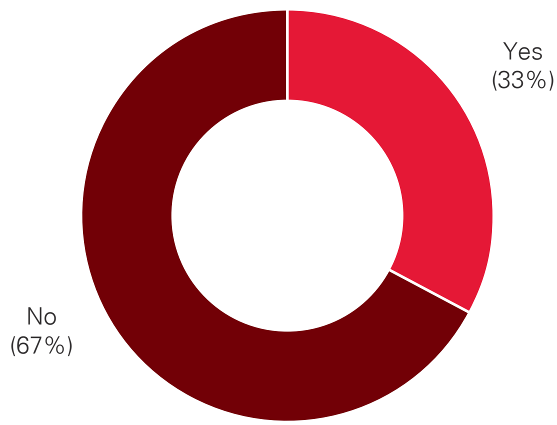
Transaction Structure



Consideration Type



If consideration consisted of a mix of cash and securities, was the cash component nominal (relative to the share consideration)?

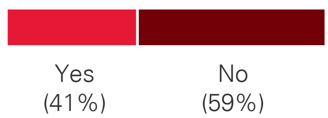


In 96% of transactions, compared to 100% in the previous year, where Buyer securities were included as consideration, the exchange ratio was fixed (i.e., a specified number of Buyer securities were offered per Target security).

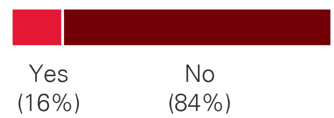
Initiation of Transaction Process

Based on disclosure in the Target circular, did Target undertake a review of strategic alternatives before contact with Buyer was established?

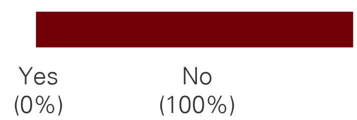
If so, was the review of strategic alternatives publicly announced by Target?



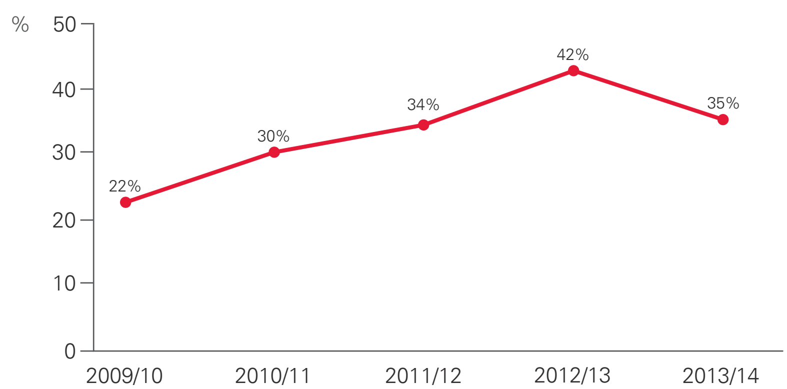
If not, was a market check conducted by Target following contact with Buyer?



If not, did the acquisition agreement include a "go-shop" period?

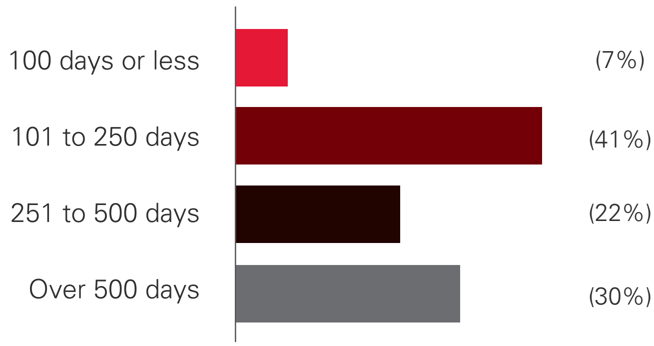


In what percentage of transactions was there no review of strategic alternatives prior to contact with Buyer and no market check following contact with Buyer?

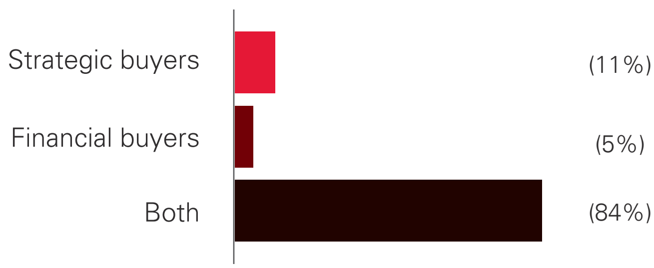


Initiation of Transaction Process (cont'd)

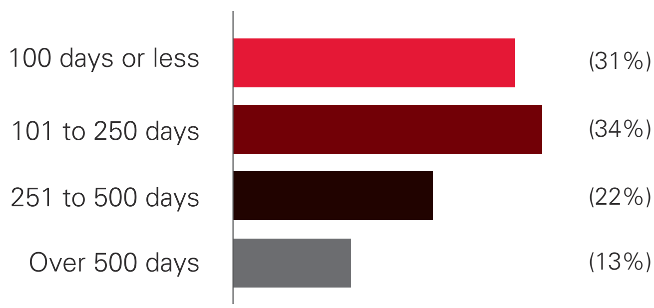
If a strategic review process was undertaken, what was the number of days between initiation of the process and announcement of the transaction?



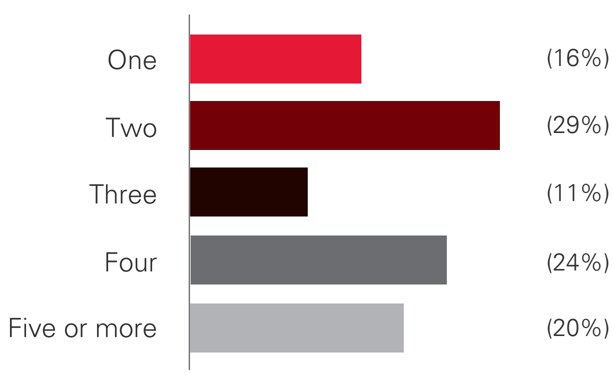
If a strategic review process was undertaken, what potential transaction counterparties were contracted?



What was the number of days between initial contact with Buyer and announcement of the transaction?

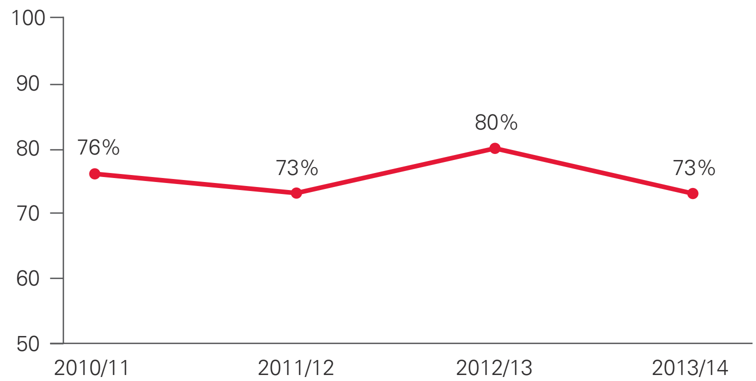


What was the number of proposals submitted by Buyer to Target?



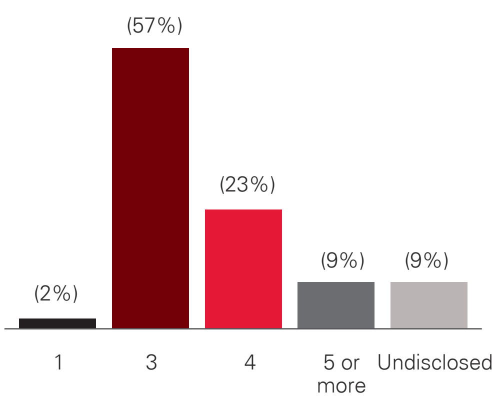
Initiation of Transaction Process (cont'd)

In what percentage of transactions did Target establish a special committee of directors?

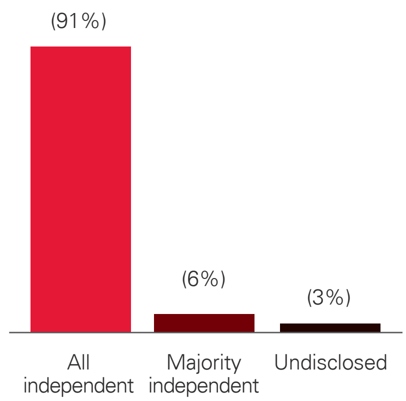


What was the composition of the special committee of Target?

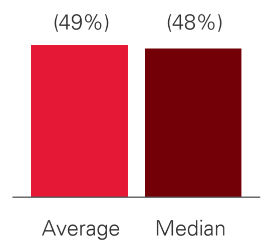
Number of Members



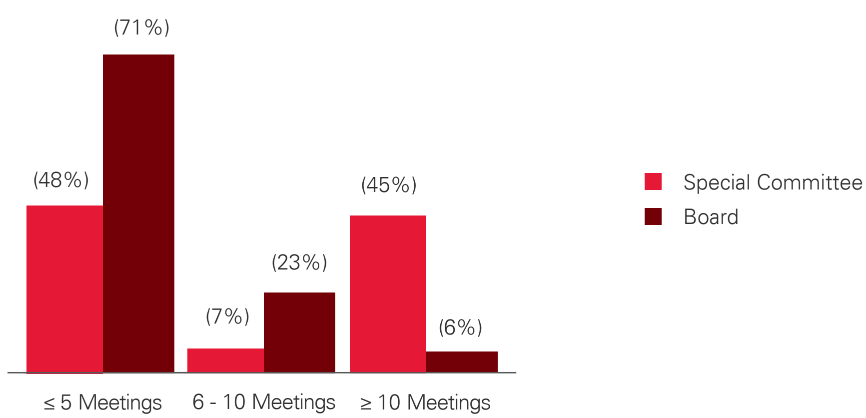
Independence



Number of Members as Percentage of Board Size

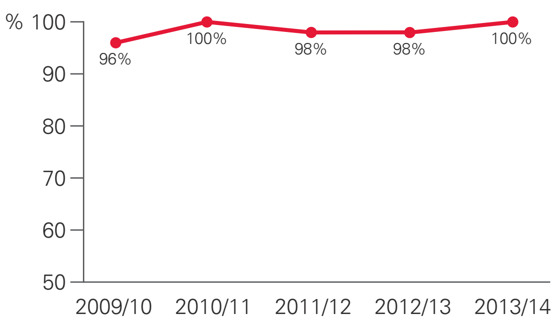


How many meetings were held by each of the special committee and the board of Target?

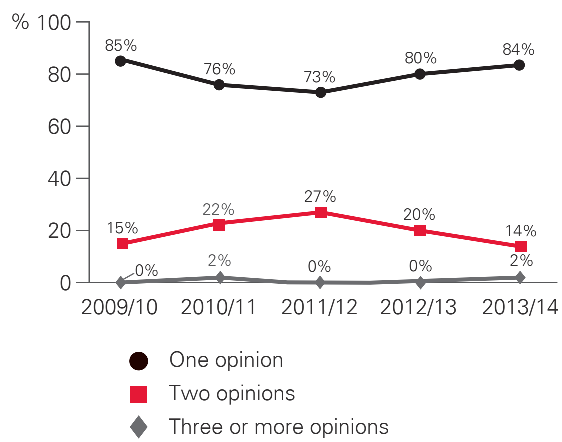


Financial Advisors and Fairness Opinions

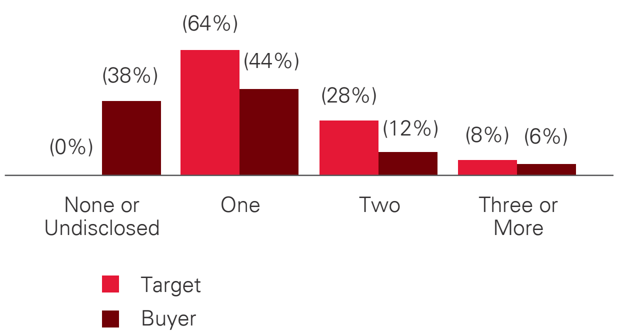
In what percentage of transactions did Target obtain a fairness opinion?



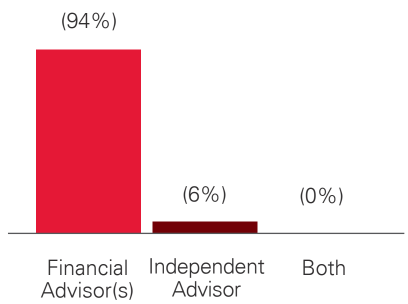
In what percentage of transactions was the specified number of fairness opinions obtained by Target?



In what percentage of transactions was the specified number of financial advisors engaged by Target and Buyer?

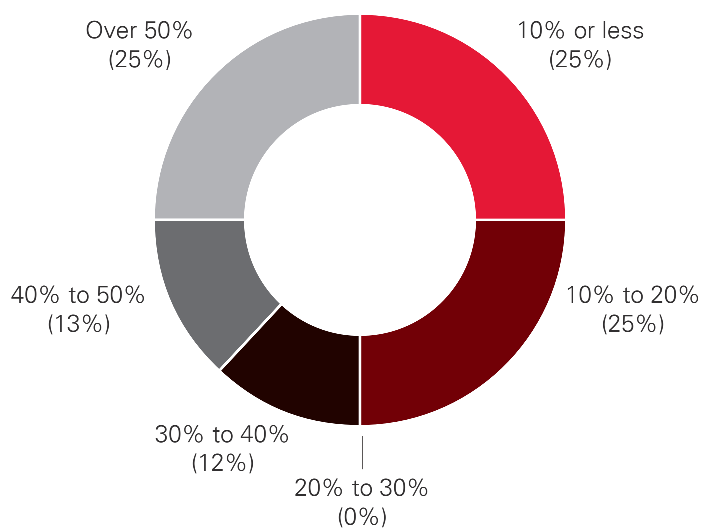


Where related party and other provisions of Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions* were inapplicable, who provided the fairness opinion(s) to Target?

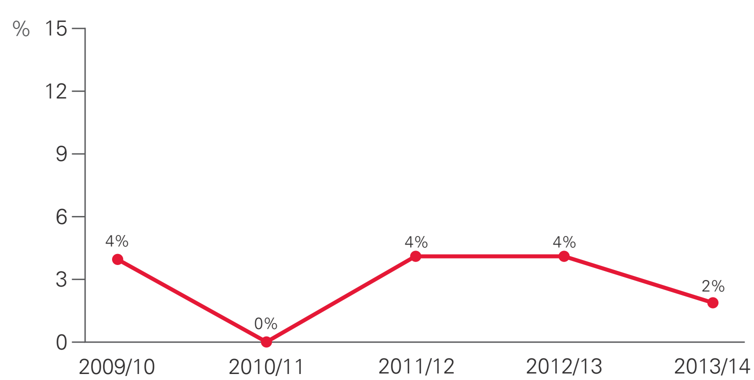


Ownership of Target Securities

In 17% of transactions, compared to 18% in the previous year, Buyer owned Target securities prior to execution of the transaction agreement. In these transactions, what was Buyer's ownership level in Target prior to the acquisition transaction?

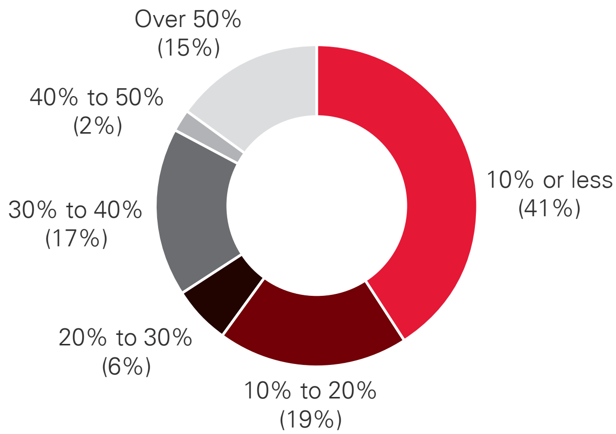


In what percentage of transactions did Buyer agree to subscribe for Target shares in connection with execution of the transaction agreement?



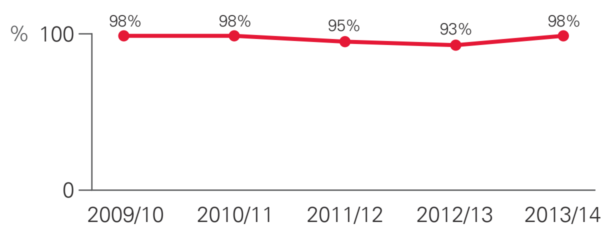
Lock-up Agreements

In 94% of transactions, compared to 90% in the prior year, lock-up agreements were entered into with Target shareholder(s). In what percentage of these transactions was the specified percentage of Target securities locked up?

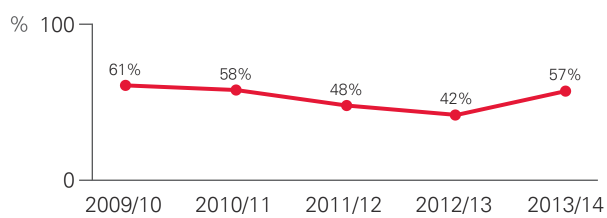


If a lock-up agreement was entered into, what was the percentage of transactions where:

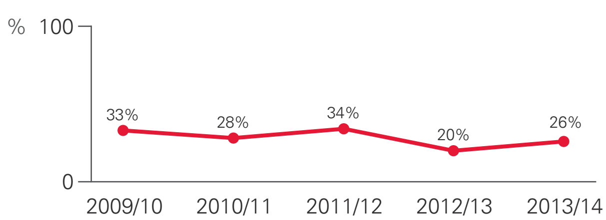
Target management and/or directors were locked up?



Parties other than Target management and/or directors were locked up?

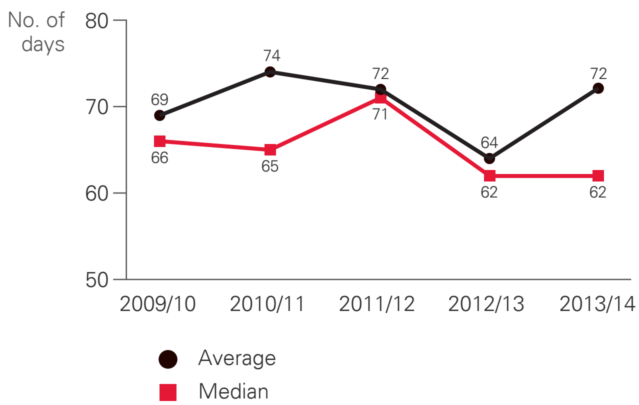


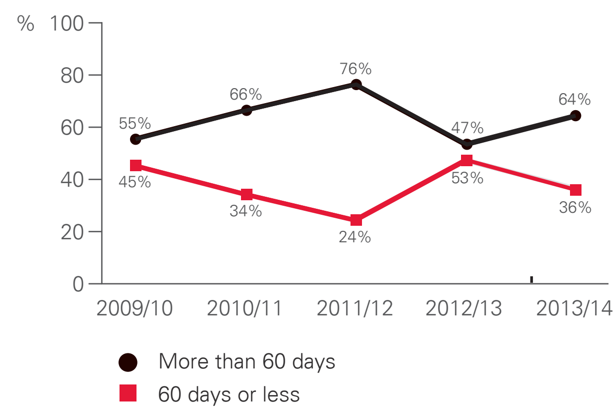
Breach of the lock-up agreement triggered a termination right for Buyer under the transaction agreement?



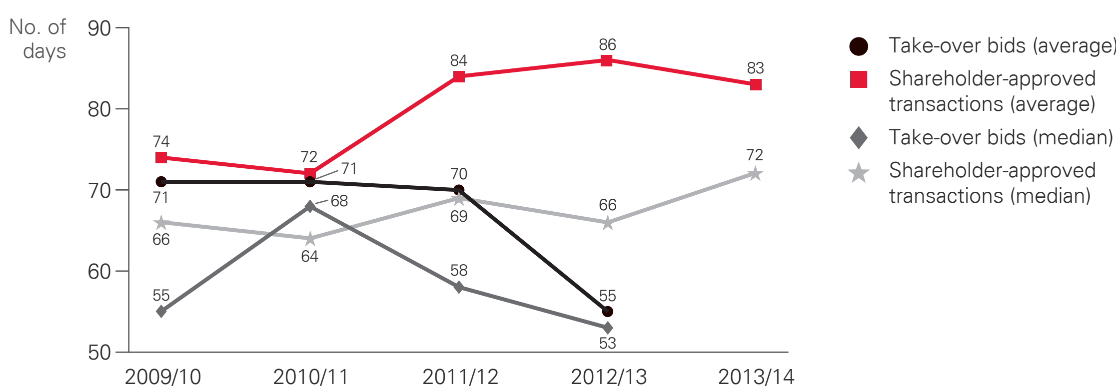
Transaction Timing

For shareholder-approved transactions, where an outside meeting date was imposed, what was the number of days between the date of the transaction agreement and the outside meeting date?





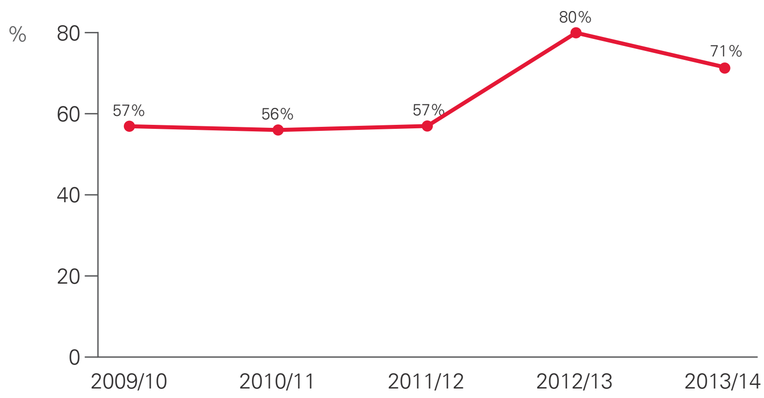
What was the number of days between the date of the transaction agreement and the actual closing date?



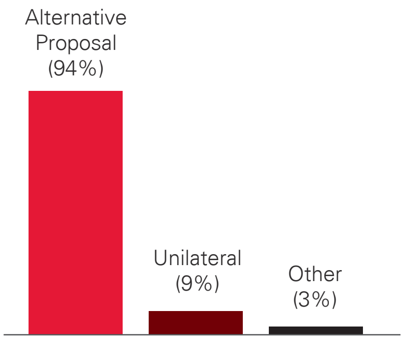
Shareholder-approved transactions undertaken under foreign statutes, which were excluded above, closed in an average of 103 days, with a median of 124 days.

Special Meeting Process

For shareholder-approved transactions, in what percentage of transactions could Buyer require Target to adjourn the special meeting of Target's shareholders?



On what basis could Buyer require an adjournment?

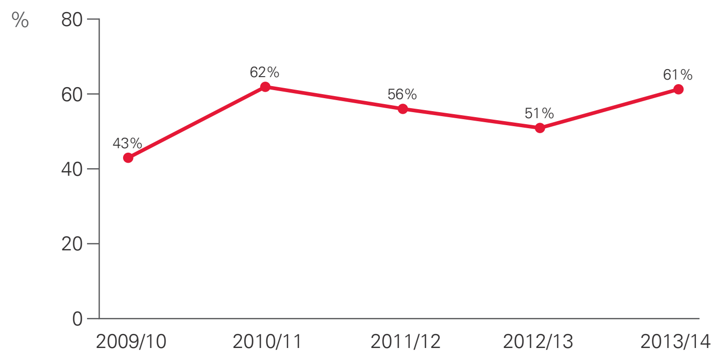


When Buyer could require Target to adjourn the special meeting of Target's shareholders, the average maximum length of adjournment permitted was 12 business days.

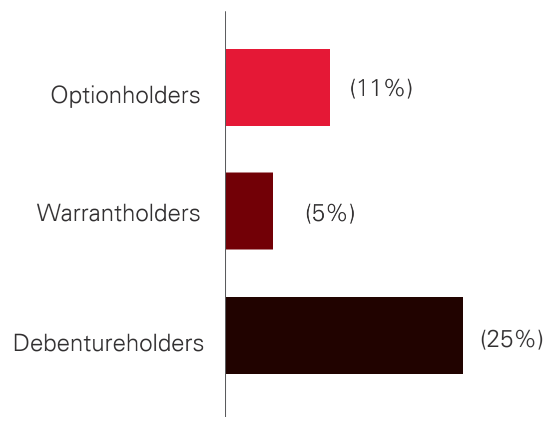
In 47% of transactions, the maximum adjournment was less than or equal to 10 business days (compared to 58% of transactions in the prior year).

Special Meeting Process (cont'd)

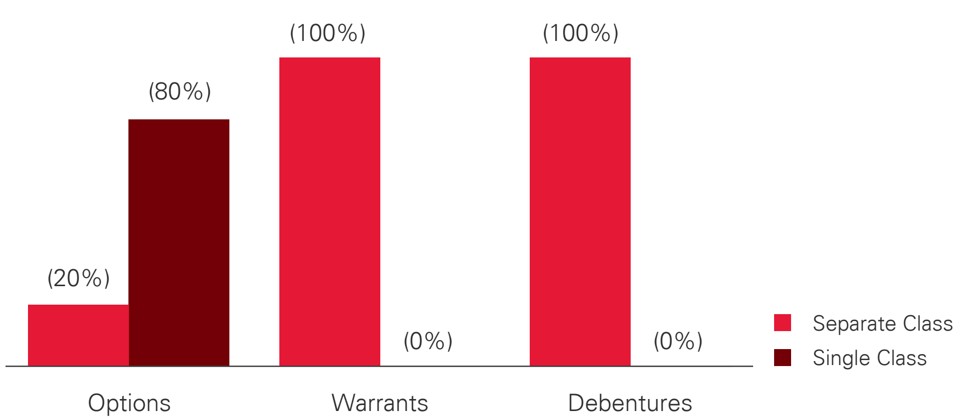
For shareholder-approved transactions, in what percentage of transactions could Buyer force a vote of Target's securityholders regardless of a Superior Proposal, assuming no termination of the transaction agreement by Target?



In what percentage of applicable transactions were holders of options, warrants and/or convertible debentures of Target entitled to vote at the special meeting of securityholders?

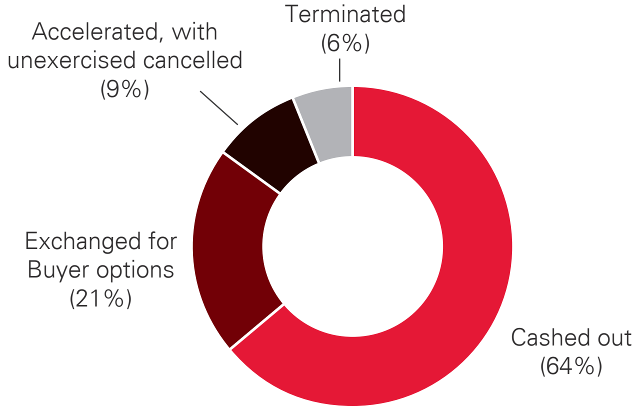


Where optionholders, warrantholders and/or debentureholders of Target were entitled to vote, did such holders vote together with holders of common shares or as a separate class?

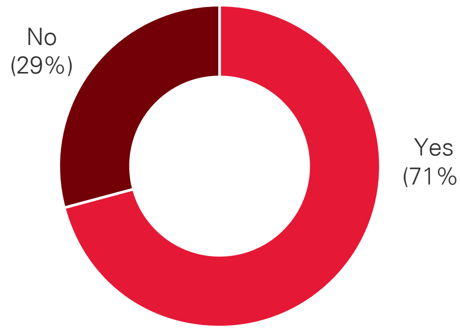


Treatment of Target Securities

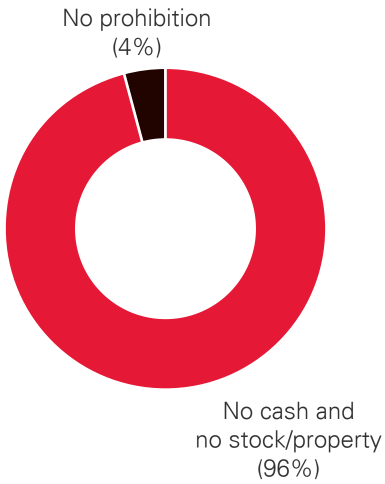
How were Target options treated under the acquisition agreement?



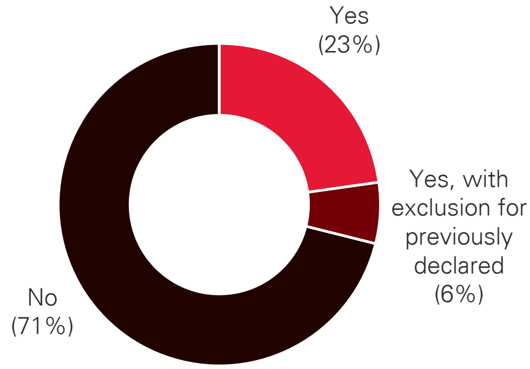
If cashed out, did Buyer agree to elect not to take the section 110(1)(d) tax deduction in connection with the transaction?



What prohibitions were imposed on extraordinary dividends and distributions by Target?

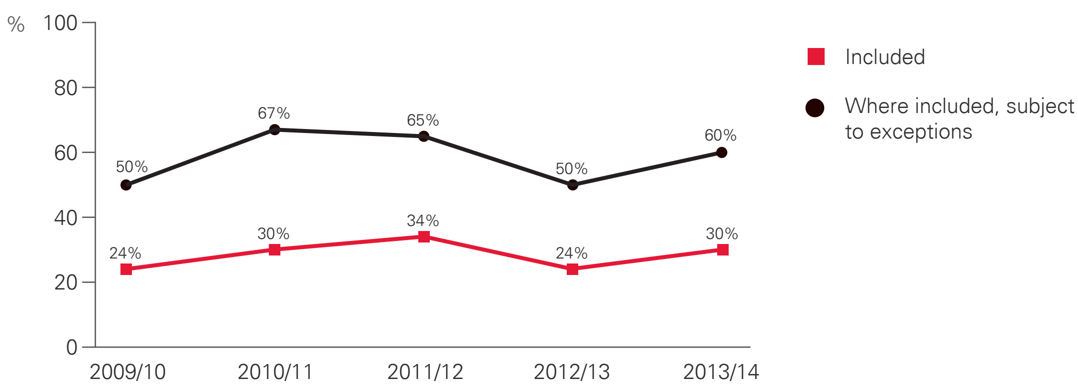


Did dividends or other distributions by Target, whether or not extraordinary, trigger a reduction in the purchase price under the transaction agreement?

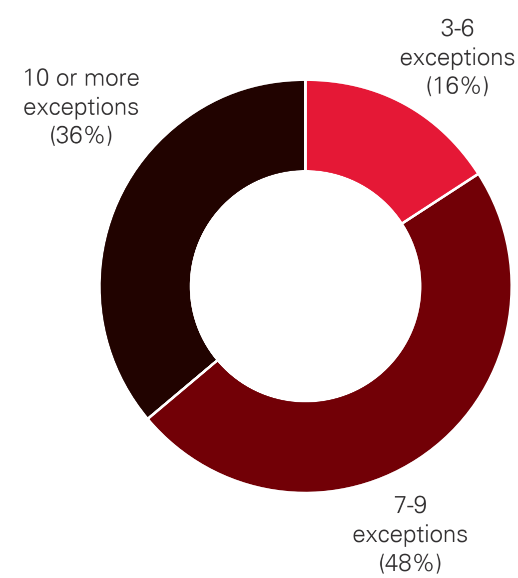


Material Adverse Effect

In what percentage of transactions did the Material Adverse Effect (MAE) definition include the effect on Target's ability to perform its obligations under the transaction agreement, and was it subject to the exceptions in the MAE definition?



How many specific exceptions were included in the MAE definition?

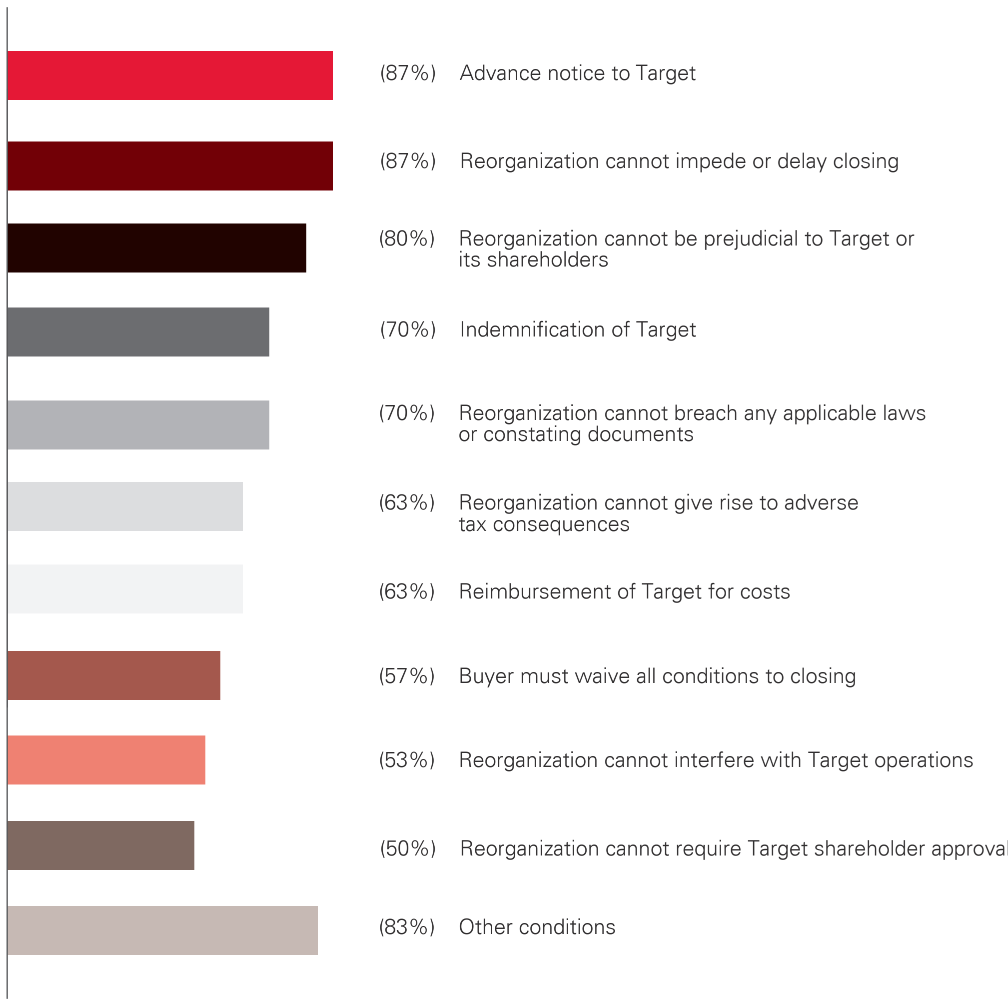


On average, the MAE definition included 9 exceptions.

Interim Period Covenants

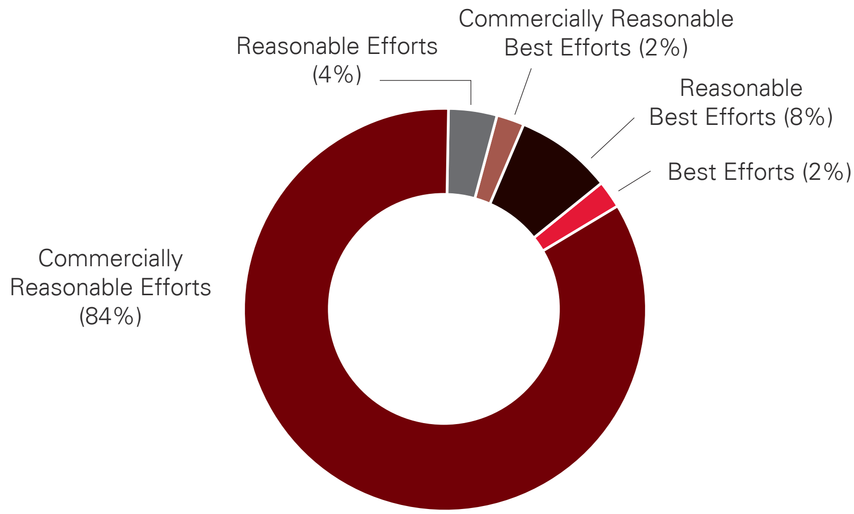
In what percentage of transactions was Target required to undertake a pre-closing reorganization at the request of Buyer?

If Target was required to undertake a pre-closing reorganization, what were the conditions imposed on Buyer?

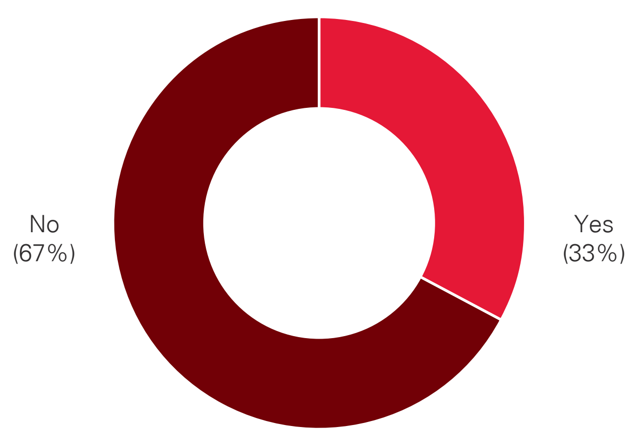


Interim Period Covenants (cont'd)

What was the standard for the parties to obtain regulatory approvals?

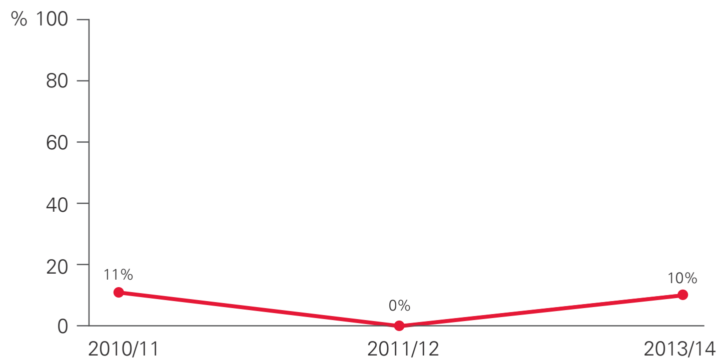


Where the closing of the transaction was subject to a condition related to the *Competition Act* (Canada), was Buyer explicitly not required to provide any remedies to satisfy the condition?

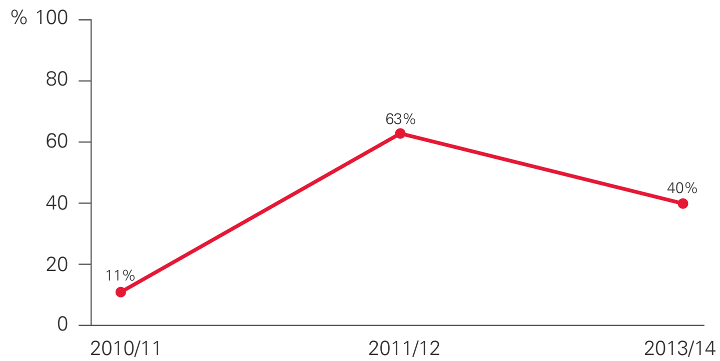


Interim Period Covenants (cont'd)

Where the closing of the transaction was subject to a condition related to the *Investment Canada Act* (ICA), in what percentage of transactions was Buyer required to offer all undertakings necessary to satisfy the condition?



In what percentage of transactions was Buyer explicity not required to provide undertakings that Buyer did not consider reasonable in order to satisfy the ICA condition?

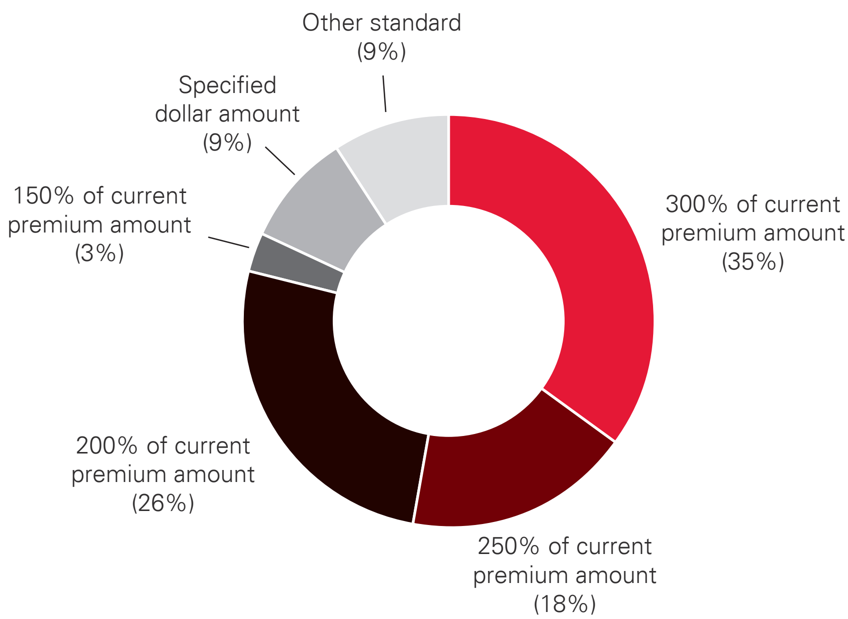


Interim Period Covenants (cont'd)

In 98% of transactions there was an obligation on Buyer or Target to ensure continued directors' and officers' insurance or to purchase run-off insurance for the Target directors and officers.

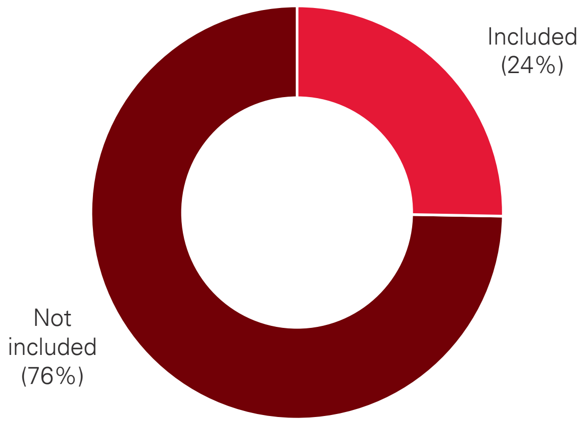
The average run-off period for such insurance policies was six years, the same average as transactions announced in all prior years of the Study.

In 73% of transactions, compared to 58% in the previous year, there was a maximum premium payable for the D&O insurance to be obtained. In such transactions, what was the limitation on premiums?

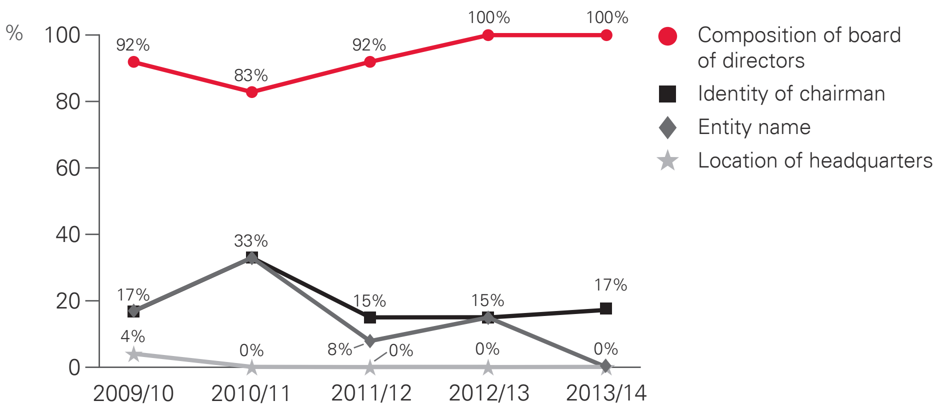


Post-Closing Governance

In what percentage of transactions did the transaction agreement include provisions setting forth the governance of Target following closing?

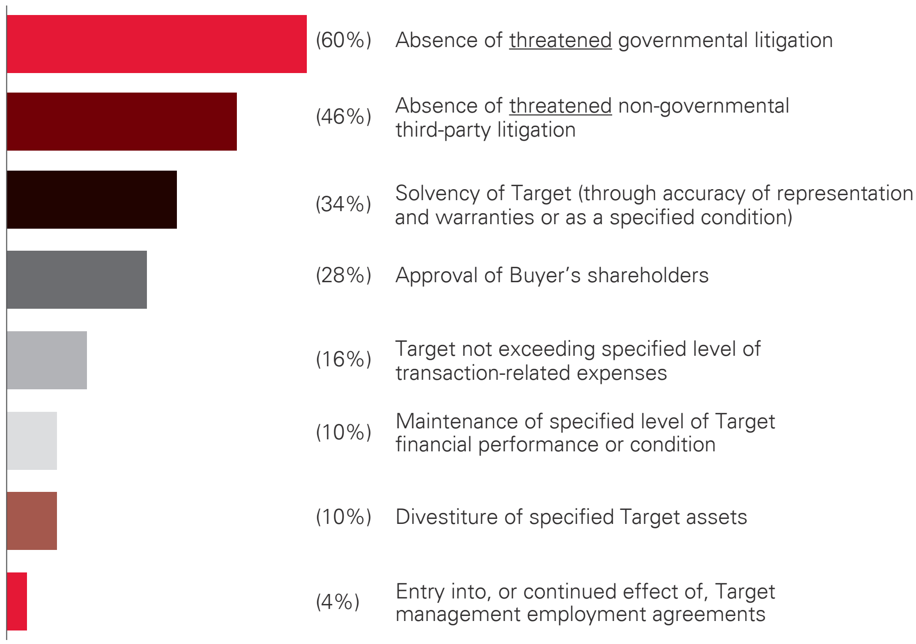


Where governance provisions were included, what aspects of post-closing governance were addressed by the transaction agreement?

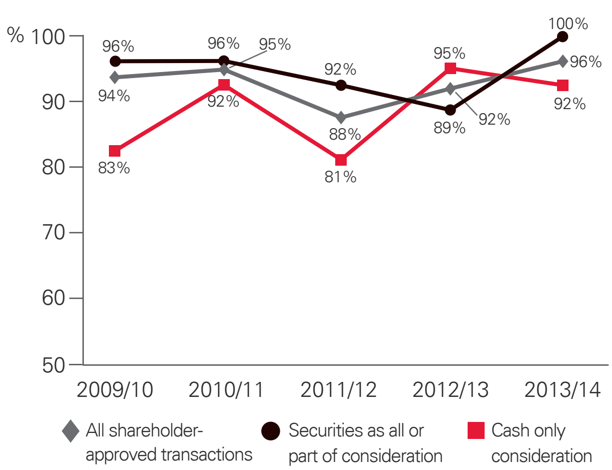


Conditions

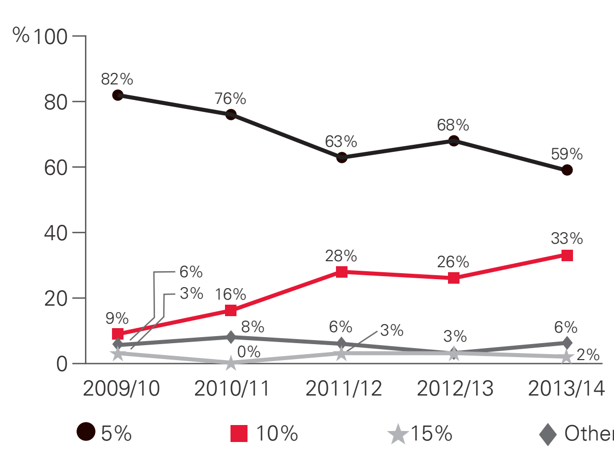
How common were the following conditions to the closing of the transaction in favour of Buyer?



For shareholder-approved transactions, in what percentage of transactions was there a level of dissent condition?

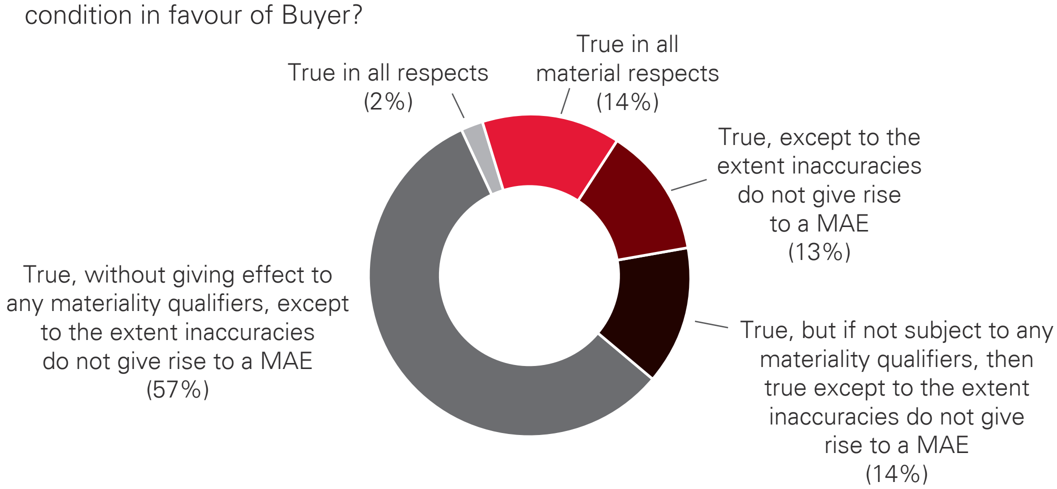


What was the threshold for the level of dissent condition?

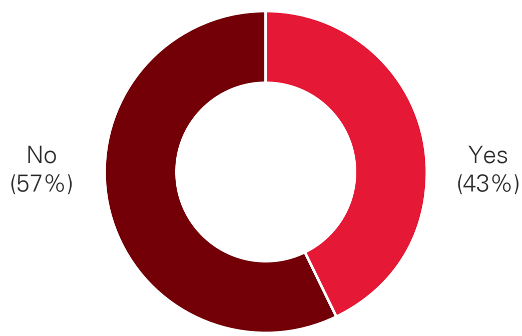


Conditions (cont'd)

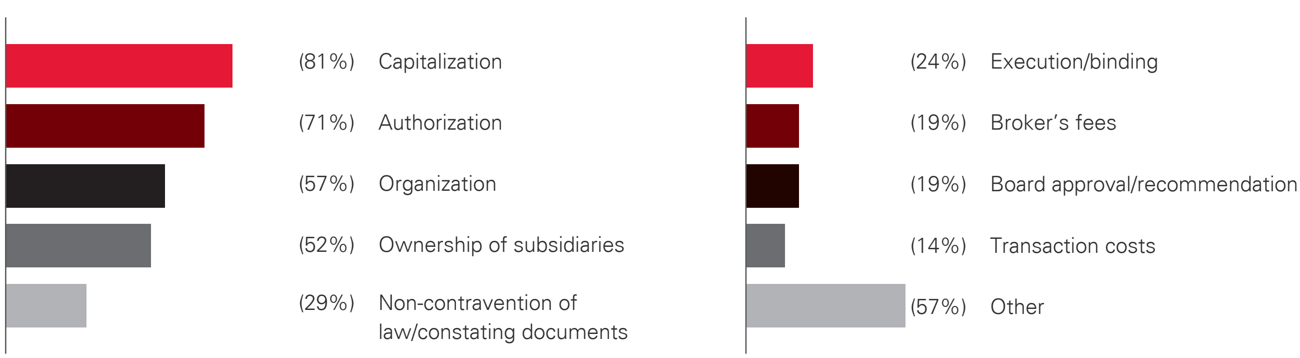
How accurate did Target's representations and warranties have to be as a closing condition in favour of Buyer?



Were any specific representations and warranties subject to a stricter standard (e.g., required to be true in all respects) as a closing condition in favour of Buyer?

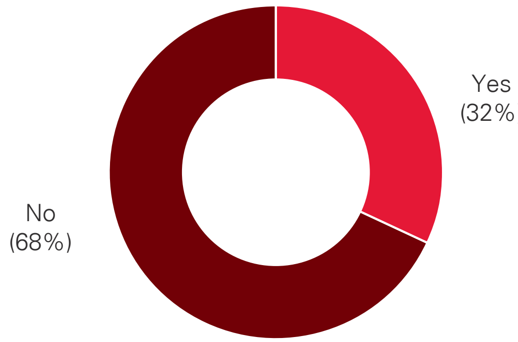


Where specific representations and warranties were required to be true in all respects, which ones were subject to this higher standard?

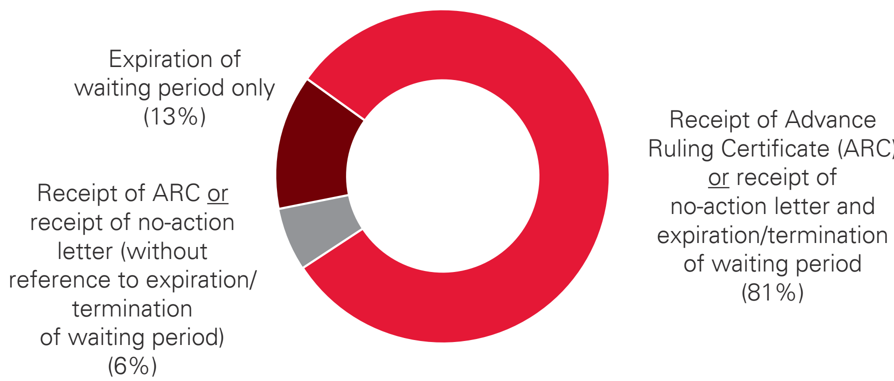


Conditions (cont'd)

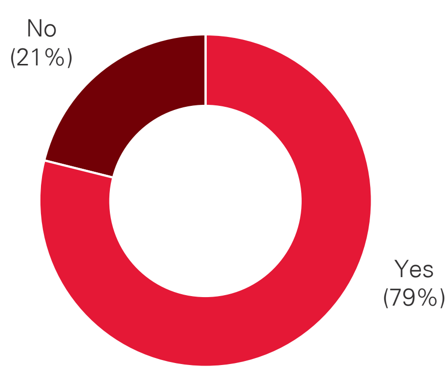
Was closing of the transaction conditional on *Competition Act* (Canada) clearance?



What was the nature of the *Competition Act* (Canada) condition?

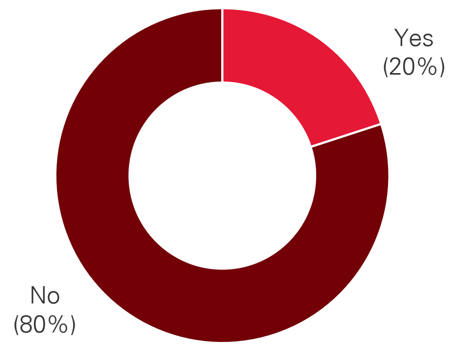


Where receipt of an ARC or no-action letter was a condition to closing, was it required to be on terms satisfactory to Buyer?



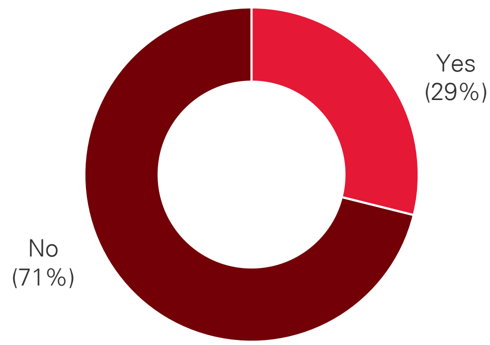
Conditions (cont'd)

Was closing of the transaction conditional on *Investment Canada Act* (ICA) clearance?



In 70% of transactions where closing was conditional on ICA matters, the condition expressly required receipt of notice that the applicable federal government Minister was satisfied that the transaction is likely to be of net benefit to Canada.

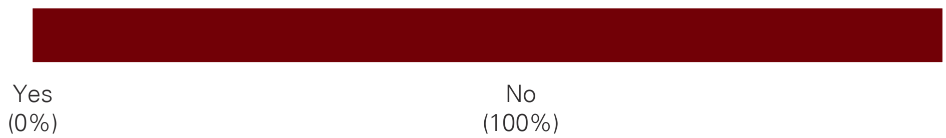
Where receipt of such Ministerial notice was a condition to closing, was it required to be on terms satisfactory to Buyer?



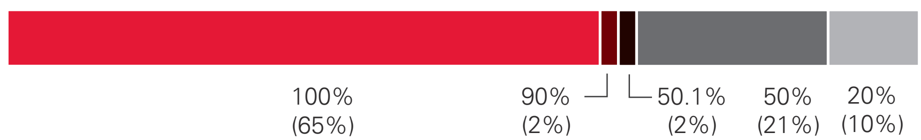
Non-Solicitation

What are the requirements for an acquisition proposal to qualify as a Superior Proposal?

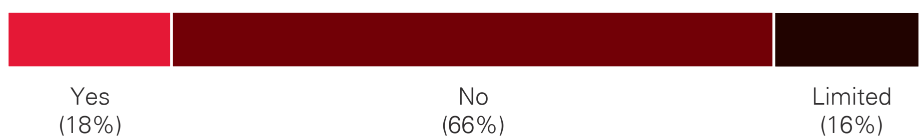
Same form of consideration as existing agreement?



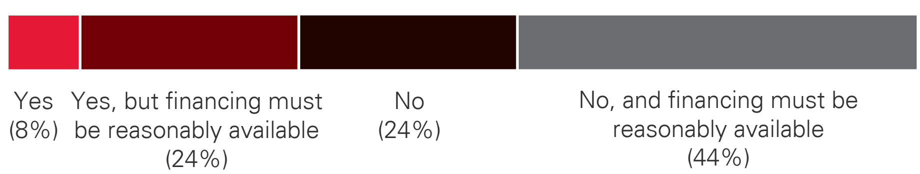
If specified, percentage of Target shares that must be subject to the proposal?



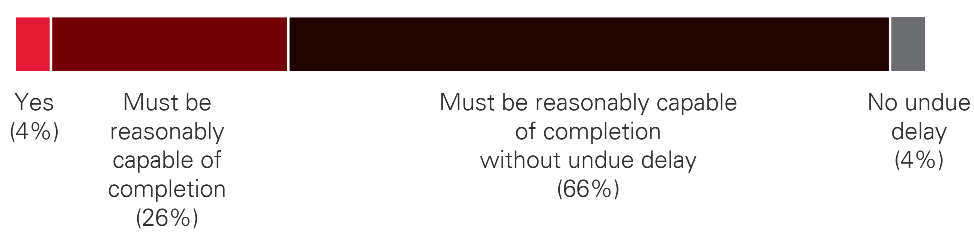
May be subject to a due diligence condition?



May be subject to a financing condition?

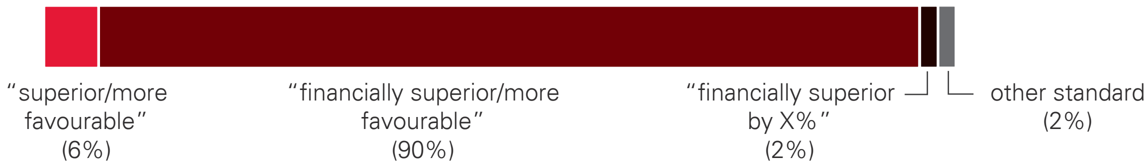


May be subject to delays in closing?



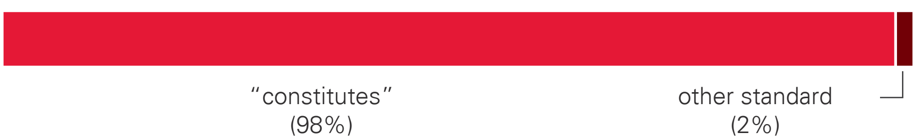
Non-Solicitation (cont'd)

What constituted a Superior Proposal?
If the acquisition proposal was ___________ to the existing proposal.

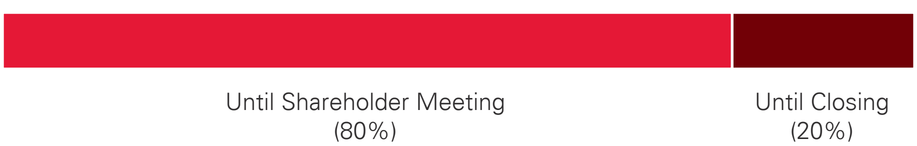


When could access to Target's confidential information be provided to a third party?
If the acquisition proposal ___________ a Superior proposal.

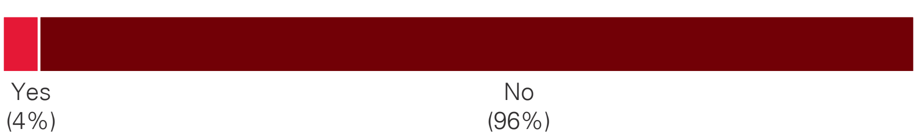
When could Target terminate the transaction agreement with Buyer?
If the acquisition proposal from the third party ___________ a Superior Proposal.



For shareholder-approved transactions, until what time could Target terminate the transaction agreement with Buyer to accept a Superior Proposal?



Was Target permitted to solicit acquisition proposals following execution of the transaction agreement (e.g., was a "go-shop" included)?



Non-Solicitation (cont'd)

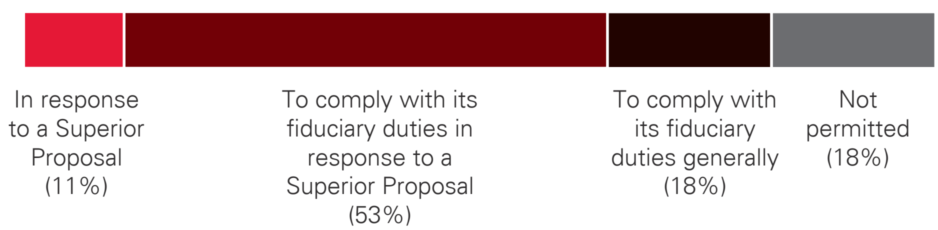
In what percentage of transactions was Target required to:

Not waive existing standstill provisions?	96%
Include standstill in confidentiality agreements with third parties?	86%
Actively prosecute and enforce existing standstill provisions?	71%
Not pay fees or expenses of an alternate bidder?	12%

Prior to providing access to a third-party bidder, in what percentage of transactions was Target required to provide Buyer with:

Copy of confidential documents provided to third party?	100%
Identity of third-party bidder?	96%
Summary of material terms of alternative proposal?	81%
Copy of alternative proposal and related documents?	81%

When was Target's board of directors permitted to change its recommendation?



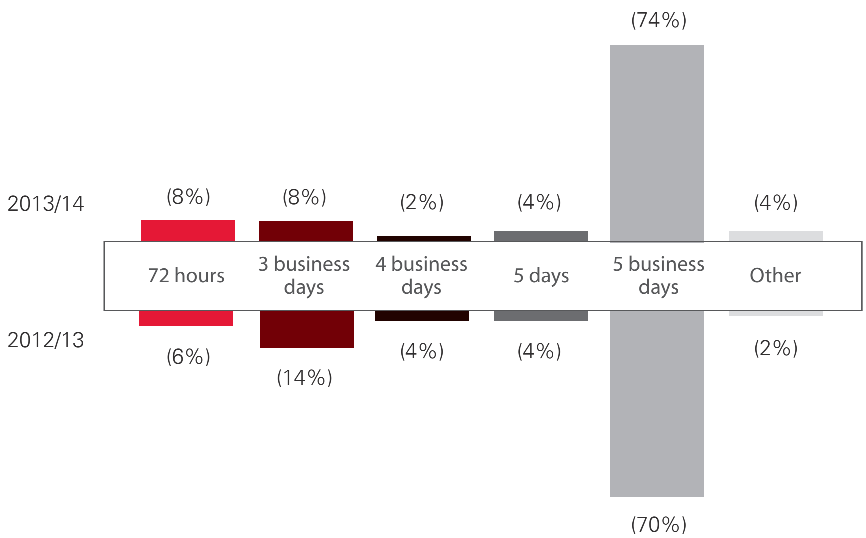
Did Target's board of directors have a general right to take any action and/or make any disclosure in order to comply with its fiduciary duties?

In 60% of such transactions, Target's board of directors had to obtain advice (written or otherwise) of outside legal counsel before taking any such action or making any such disclosure.

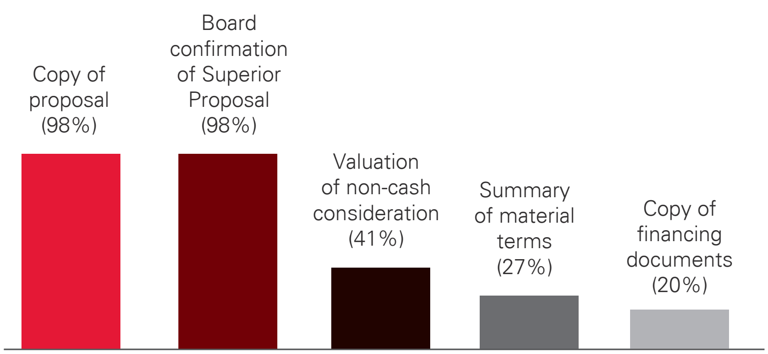
Right to Match

In 98% of transactions where Target was subject to non-solicitation provisions, Buyer had a right to match a Superior Proposal.

What was the matching period?

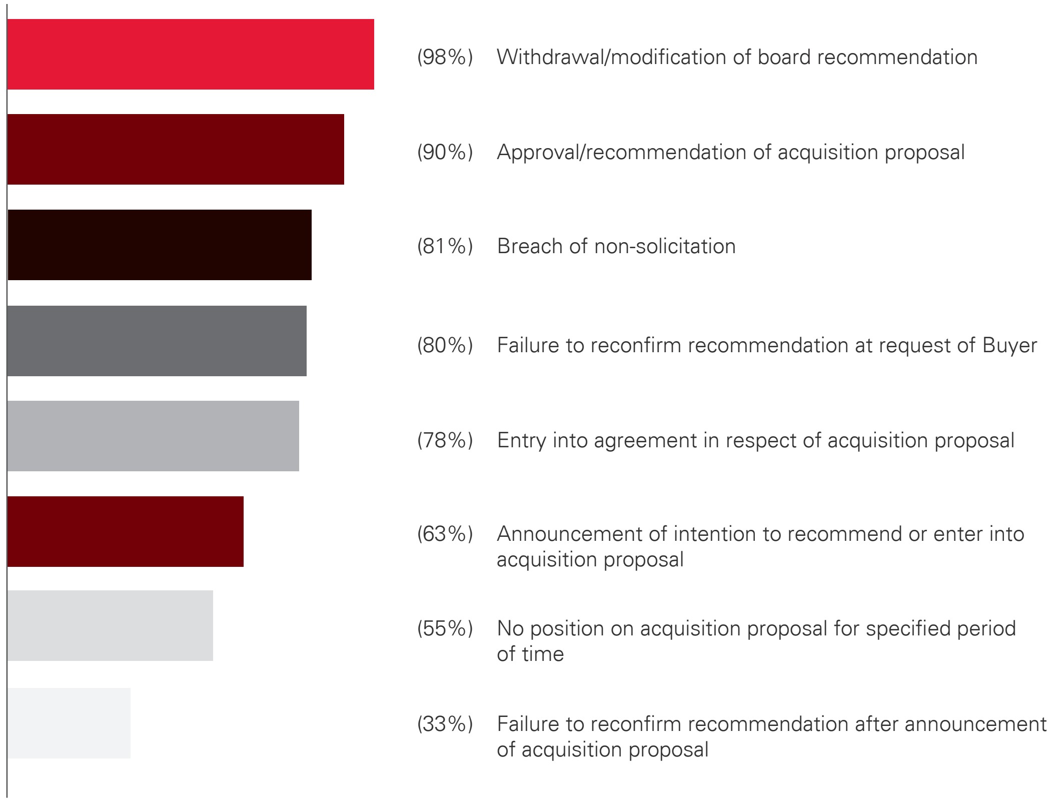


What information was Target required to provide to Buyer as part of the matching process?

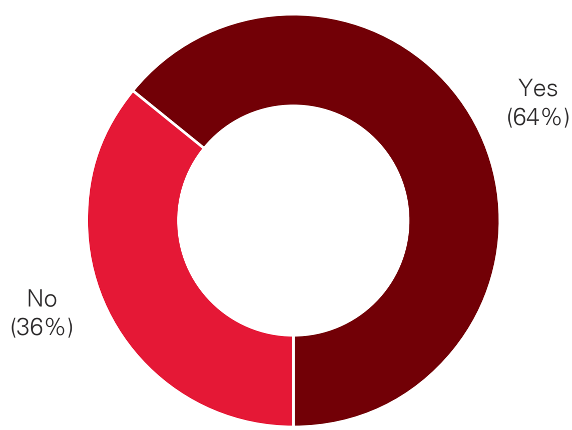


Termination Rights

What acts by Target in respect of a third-party acquisition proposal gave rise to a right of termination for Buyer?



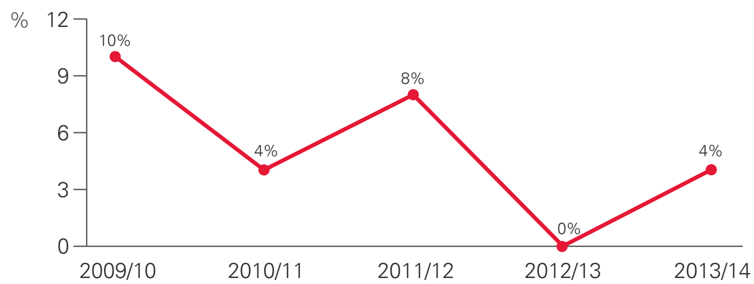
Where approval by Buyer's shareholders was a condition to closing, could Buyer terminate the acquisition agreement if it accepted a "superior proposal" in respect of Buyer or if Buyer changed its recommendation to shareholders?



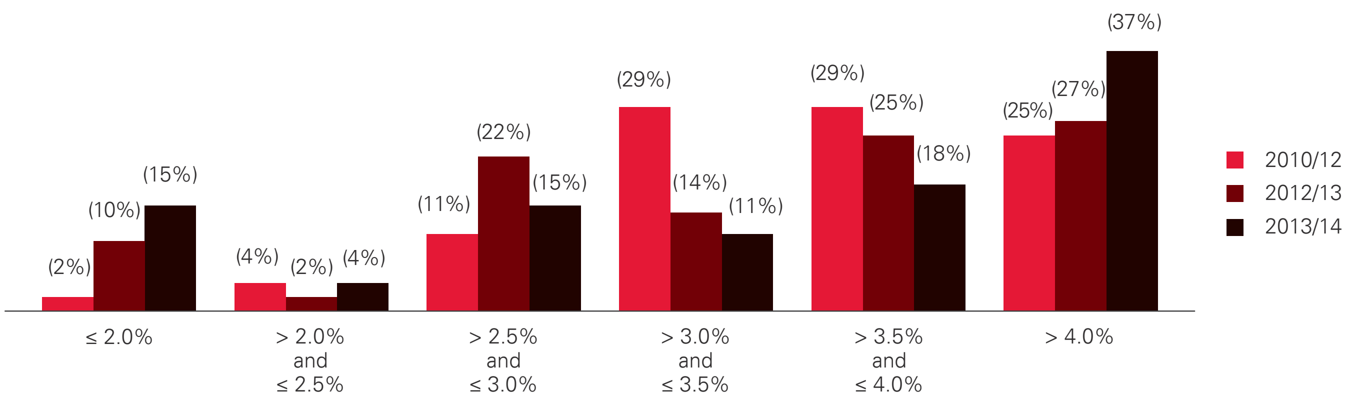
Break Fee

In 92% of the transactions, compared to 98% of transactions since 2007, a break fee was payable by Target.

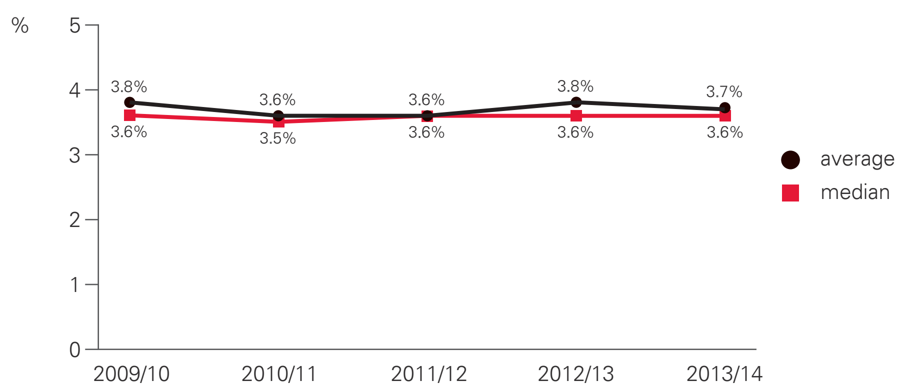
In what percentage of transactions was the break fee two-tiered?



What percentage of Target's undiluted equity value was the break fee?



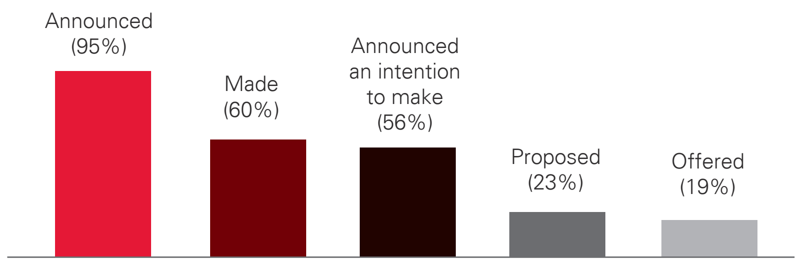
Where the transaction was subject to a break fee, what were the average and median fees (as a percentage of Target's undiluted equity value)?



Break Fee (cont'd)

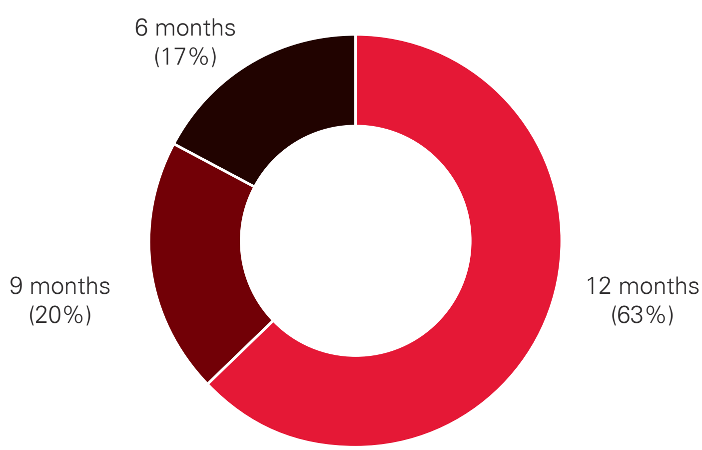
In 96% of the transactions that included a break fee, the break fee was payable in connection with an alternative acquisition transaction occurring post-termination (i.e., a "tail" trigger), compared to 94% in the previous year.

In connection with such a break fee trigger, a third party must have ___________ an alternative proposal prior to the special meeting of Target shareholders or the expiry of the take-over bid, as applicable.



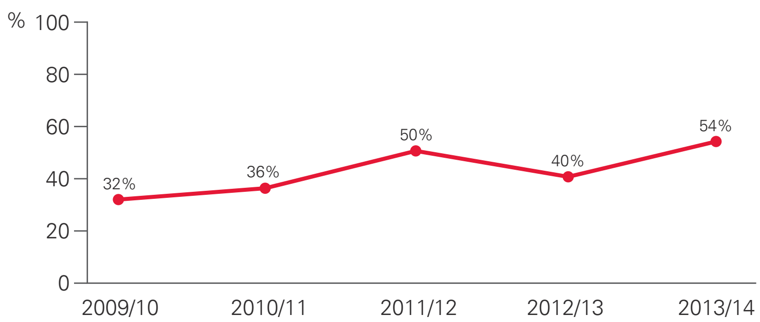
In 29% of transactions that included a tail trigger, the break fee was payable only in connection with "such" acquisition proposal, as opposed to 71% of such transactions where it was payable in connection with "any" post-termination acquisition transaction.

In connection with the tail trigger, what was the period within which the alternative acquisition transaction had to be signed/consummated following a specified date (being one of the date of the termination of the agreement with the Buyer (80%), the originally scheduled Target shareholder meeting (5%) or the first acquisition proposal by a third party (15%))?

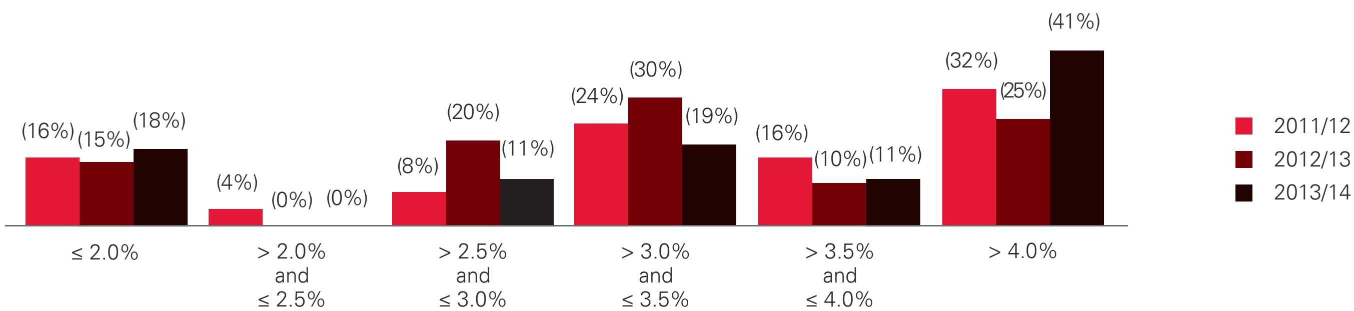


Reciprocal Break Fee

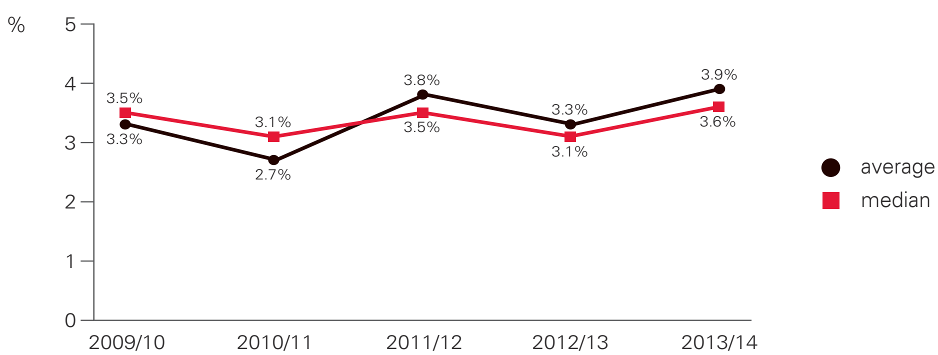
Was the transaction subject to a reciprocal break fee payable by Buyer?



What percentage of Target's undiluted equity value was the reciprocal break fee?

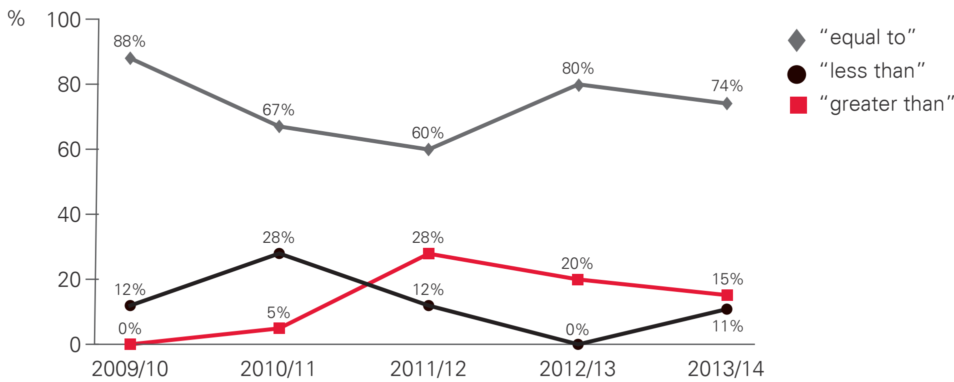


Where the transaction was subject to a reciprocal break fee, what were the average and median reciprocal break fees (as a percentage of Target's undiluted equity value)?

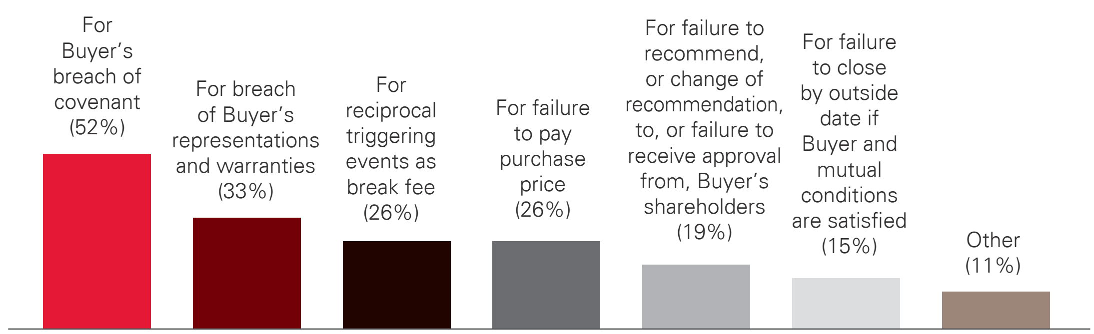


Reciprocal Break Fee (cont'd)

The reciprocal break fee was __________ the break fee.



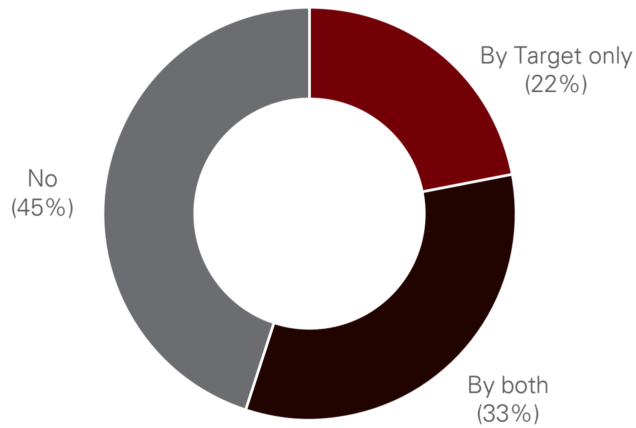
How common was it for the reciprocal break fee to be payable by Buyer for the following termination events?



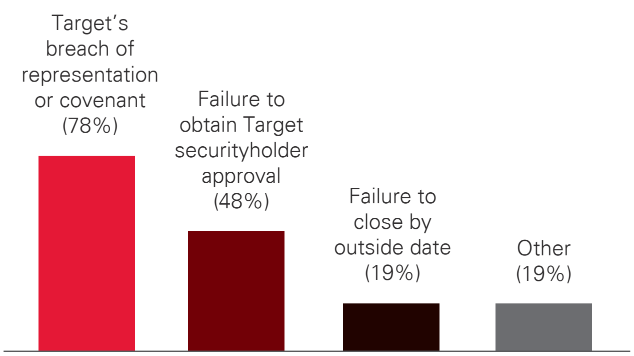
Where the closing of the transaction was subject to a condition related to the *Competition Act* (Canada), none of the transactions required Buyer to pay Target a fee for failure to satisfy such condition.

Expense Reimbursement

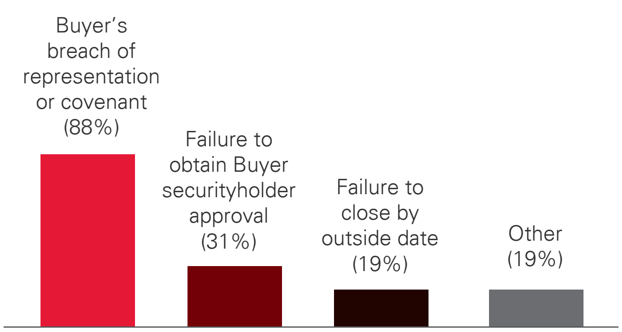
Was the transaction subject to expense reimbursement?



As a result of which termination events was expense reimbursement payable by Target?

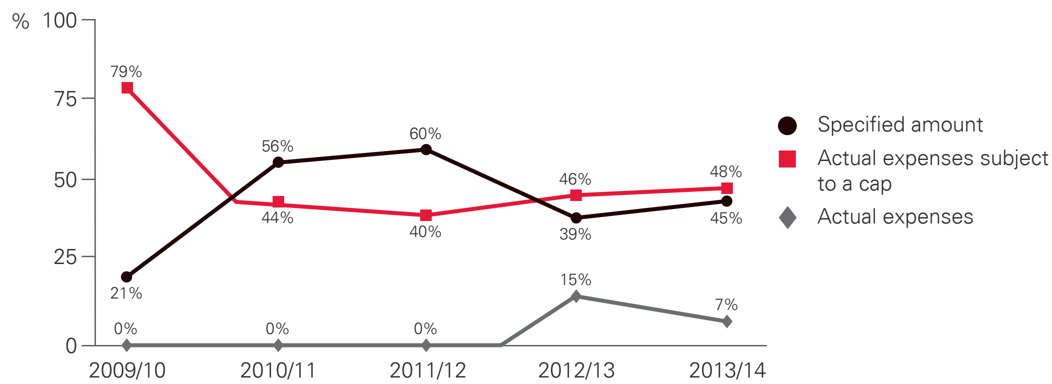


As a result of which termination events was expense reimbursement payable by Buyer?

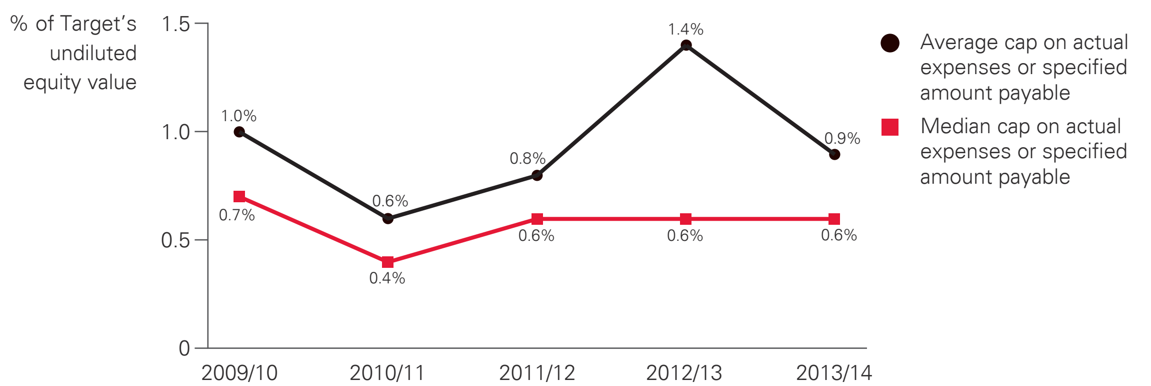


Expense Reimbursement (cont'd)

Where the transaction was subject to expense reimbursement, what was the amount of such reimbursement?

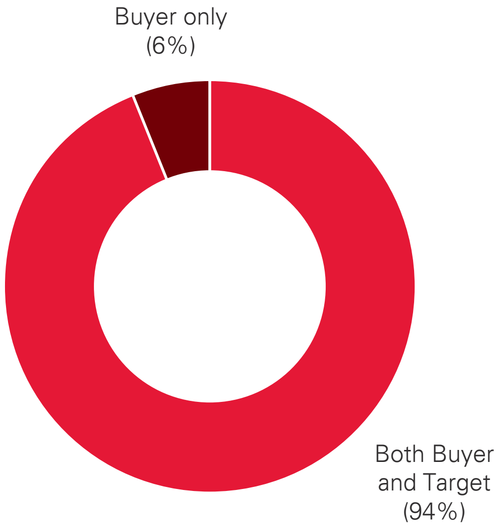


Where the transaction was subject to expense reimbursement, what were the average and median caps or specified amounts payable (as a percentage of Target's undiluted equity value)?

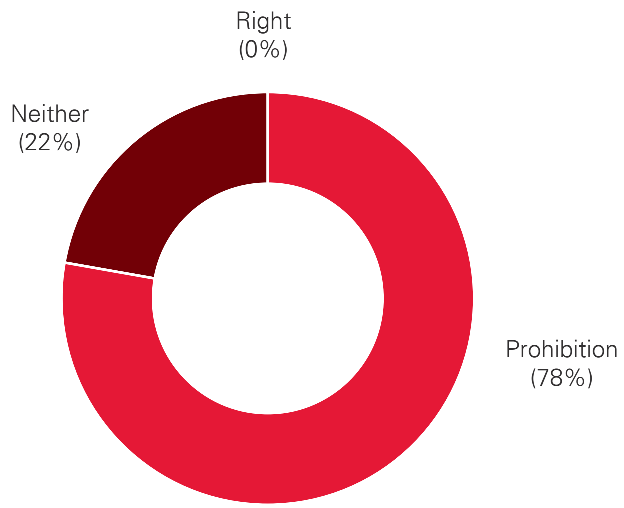


Remedies

In 98% of transactions, the transaction agreement did not explicitly preclude all parties from seeking specific performance. If not explicitly precluded, which parties were entitled to seek specific performance?



Did the transaction agreement include an express right or prohibition for Target shareholders to sue for breach of the agreement?



APPENDIX A: SURVEY METHOD

The seventh annual *Blakes Canadian Public M&A Deal Study* focuses on recurring and emerging issues in the structuring and negotiation of Target-supported public company acquisitions in Canada. The topics covered in the Study range from overall transaction structure and timing, such as the strategic review process and the formation of special committees, to specific contractual provisions, such as regulatory conditions, break and reciprocal break fees and non-solicitation provisions.

Blakes prepared the Study based on a review of the 50 largest Canadian Target-supported transactions announced between June 1, 2013 and May 31, 2014, excluding transactions initiated without Target support. Where noted, we have included data from prior Blakes studies, resulting in deal information taken from over 250 transactions. For a list of the transactions reviewed this year, see Appendix B.

In compiling the Study, Blakes reviewed acquisition agreements, management proxy circulars, take-over bid circulars, press releases and related publicly available documents filed on the System for Electronic Document Analysis and Retrieval (SEDAR) maintained on behalf of the Canadian securities regulatory authorities for use by reporting issuers.

The agreements and disclosure documents that form the basis of the Study each include specific drafting tailored to the particular transaction in question. The terms of many transactions are not directly comparable. Accordingly, Blakes has relied on its judgment and discretion in summarizing, categorizing and reflecting these provisions in the Study. In addition, the Study is based solely on publicly available information. Non-public information, such as information included in disclosure schedules or exhibits to an acquisition agreement not filed on SEDAR, may be relevant to the analysis but is not reflected in the Study.

The results of this Study do not reflect the views of Blakes. Whether a specific term of an acquisition should apply or not is highly dependent on the facts and circumstances of each particular transaction. Accordingly, the applicability of any aspect of the Study to a specific transaction merits close consideration based upon the facts and circumstances of that transaction.

TARGET	ACQUIROR(S) (PARENT)	ANNOUNCEMENT DATE
Shoppers Drug Mart Corp.	Loblaw Companies Limited	07/15/2013
Osisko Mining Corp.	Agnico Eagle Mines Ltd. and Yamana Gold Inc.	04/16/2014
Aurora Oil & Gas Ltd.	Baytex Energy Corp.	02/06/2014
Coastal Energy Co.	International Petroleum Investment Co. and Strategic Resources Global Ltd.	11/19/2013
Patheon Inc.	JLL Partners Inc. and Koninklijke DSM NV	11/19/2013
Canada Bread Co Ltd.	Grupo Bimbo SAB de CV	02/12/2014
Paladin Labs Inc.	Endo International PLC	11/05/2013
Petrominerales Ltd.	Pacific Rubiales Energy Corp.	09/29/2013
CML HealthCare Inc.	LifeLabs Medical Laboratory Services (OMERS)	06/25/2013
Ainsworth Lumber Co Ltd.	Louisiana-Pacific Corp.	09/04/2013
Atrium Innovations Inc.	Permira Holdings Ltd.	11/29/2013
TransGlobe Energy Corp.	Caracal Energy Inc.	03/16/2014
Renegade Petroleum Ltd.	Alexander Energy Ltd.	02/11/2014
Angle Energy Inc.	Bellatrix Exploration Ltd.	10/15/2013
Nordion Inc.	Sterigenics International Inc. (GTCR LLC)	03/28/2014
MEGA Brands Inc.	Mattel Inc.	02/28/2014
Coastal Contacts Inc.	Essilor International SA	02/27/2014
Longview Oil Corp.	Surge Energy Inc.	03/31/2014
Novus Energy Inc.	Yanchang Petroleum International Ltd.	09/03/2013
Brigus Gold Corp.	Primero Mining Corp.	12/16/2013
Sulliden Gold Corp Ltd.	Rio Alto Mining Ltd.	05/21/2014
Aastra Technologies Ltd.	Mitel Networks Corp.	11/11/2013
TriOil Resources Ltd.	Polski Koncern Naftowy Orlen S.A.	09/16/2013
International Minerals Corp.	Hochschild Mining PLC	10/02/2013
Equal Energy Ltd.	Petroflow Energy Ltd.	12/09/2013
Medicago Inc.	Mitsubishi Tanabe Pharma Corp.	07/12/2013
Cangene Corp.	Emergent Biosolutions Inc.	12/11/2013
PMI Gold Corp.	Asanko Gold Inc.	12/17/2013
Renewable Energy Developers Inc.	Capstone Infrastructure Corporation	07/03/2013
Alpha Minerals Inc.	Fission Uranium Corp.	08/26/2013
Santonia Energy Inc.	Tourmaline Oil Corp.	03/04/2014
Vitran Corporation Inc.	Manitoulin Transport Inc.	12/09/2013
Zedi Inc.	Management Group	12/19/2013
General Donlee Canada Inc.	Triumph Group Inc.	08/14/2013
Bonnett's Energy Corp.	Mill City Capital LP	09/24/2013
Jovian Capital Corp.	Industrial Alliance Insurance & Financial Services Inc.	07/16/2013
Sirocco Mining Inc.	Canada Lithium Corp.	12/04/2013
Suroco Energy Inc.	Petroamerica Oil Corp.	04/28/2014
PNI Digital Media Inc.	Staples Inc.	05/05/2014
Tuckamore Capital Management Inc.	Management Group and Birch Hill Equity Partners Management Inc.	05/05/2014
Sandstorm Metals & Energy Ltd.	Sandstorm Gold Ltd.	04/21/2014
Novik Inc.	Clearview Capital LLC	11/18/2013
Volta Resources Inc.	B2Gold Corp.	10/28/2013
360 VOX Corporation	Dundee Corporation	05/12/2014
Witwatersrand Consolidated Gold Resources Ltd.	Sibanye Gold Ltd.	12/11/2013
Sun-Rype Products Ltd.	Great Pacific Industries Inc. (Jim Pattison Group)	07/25/2013
Canada Fluorspar Inc.	Golden Gate Capital	04/02/2014
MGM Energy Corp.	Paramount Resources Ltd.	03/11/2014
Esperanza Resources Corp.	Alamos Gold Inc.	07/12/2013
Champion Iron Mines Ltd.	Mamba Minerals Limited	12/05/2013

* By announced transaction value

APPENDIX C: BLAKES MERGERS & ACQUISITIONS PRACTICE

Blakes has one of the largest and most active mergers and acquisitions practices in Canada, having been involved in more than 1,100 public and private M&A transactions, with an aggregate dollar value in excess of US$1-trillion, in the past seven years. According to Bloomberg, Blakes is the No. 1 Canadian law firm in both Canadian and global M&A deals by deal value and deal count for the years covered by the Blakes studies, 2008-2014.

Transactions on which we regularly advise range from negotiated acquisitions of private companies to the largest public company mergers and acquisitions completed by way of take-over bids, amalgamations and plans of arrangement. We advise clients on structuring considerations, related-party rules, special committee obligations, take-over defences and contested shareholder meetings.

As a known leader, our mergers and acquisitions practice is regularly recognized by the following publications:

- IFLR1000: *The Guide to the World's Leading Financial Law Firms*
- *The Legal 500 Canada*
- *The Best Lawyers in Canada*
- Chambers Global: *The World's Leading Lawyers for Business*
- *The Canadian Legal Lexpert Directory*
- *The Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada*
- Law Business Research's T*he International Who's Who of Business Lawyers*

For more information on our mergers and acquisitions practice, visit **www.blakes.com**.

Doing Business in Canada

Blakes
CANADIAN LAWYERS

A disciplined, team-driven approach focused squarely on the success of your business. Lawyers in offices across Canada, the United States, Europe, the Middle East and China — Montréal, Ottawa, Toronto, Calgary, Vancouver, New York, London, Bahrain, Beijing and associated offices in Al-Khobar and Shanghai. Among the world's most respected corporate law firms, with expertise in virtually every area of business law.

Blakes Means Business.

Blakes Guide to
Doing Business in Canada

Doing Business in Canada is intended as an introductory summary. Specific advice should be sought in connection with particular transactions. If you have any questions with respect to *Doing Business in Canada*, please contact our Firm Managing Partner, Rob Granatstein, in our Toronto office by telephone at 416-863-2748 or by email at robert.granatstein@blakes.com. Blake, Cassels & Graydon LLP produces regular reports and special publications on Canadian legal developments. For further information about these reports and publications, please contact our Chief Client Relations & Marketing Officer, Alison Jeffrey, in our Toronto office by telephone at 416-863-4152 or by email at alison.jeffrey@blakes.com.

Contents

Blakes Guide to Doing Business in Canada

I. Introduction

This Guide provides non-Canadians with an introduction to the laws and regulations that affect the conduct of business in Canada and, in particular, in the province of Ontario. In some cases, this Guide also identifies issues in the provinces of Alberta and British Columbia. Because of Canada's federal structure, the authority to make laws and regulations is divided between the federal and provincial governments by the Canadian Constitution although, in some areas of divided authority, both federal and provincial laws may apply.

For reasons rooted in history, Canada has two legal traditions, the civil law tradition of codified law in the province of Quebec, and the common law tradition of judge-made law in the other provinces of Canada. The province of Quebec, as Canada's only province whose majority population is French speaking, has also adopted *a Charter of the French Language* making French the official language of Quebec. Quebec also collects its own income taxes and has shared jurisdiction over immigration to Quebec with the federal government. A more detailed discussion of the laws of the province of Quebec is contained in Blakes *Doing Business in Quebec*.

The discussion under each heading in this Guide is intended to provide only general guidance and is not an exhaustive description of all provisions of federal, provincial and local law with which a business might be required to comply. Particular businesses or industries may also be subject to specific legal requirements not referred to in this Guide. For this reason, the reader should not rely solely upon this Guide in planning any specific transaction or undertaking, but should seek the advice of qualified counsel.

The law is stated as of September 1, 2014.

II. Government and Legal System

With a population of approximately 35 million people and second only to Russia in area, Canada is a land rich in natural resources and among the world's leading industrialized nations. Home to some of the globe's most innovative and largest businesses, Canada has a highly skilled workforce and is a world leader in a variety of sectors, including manufacturing, high technology, energy and natural resources.

While closely aligned in both commerce and culture to its southern neighbour, the United States, Canada has also enjoyed great success in forging strong trade ties with many countries in Asia, Europe, the Middle East, South America and other regions.

1. Canadian History in Brief

Canada is a relatively young country that gained independence from Britain in stages over the course of a century. It started on its path as a self-governing nation in 1867, when the British Parliament passed the *British North America Act*. This legislation formed Canada's written constitution until 1982, when Britain formally relinquished its authority over the Canadian constitution.

As its roots might suggest, Canada is a parliamentary democracy based closely on the British form of government. It has established two levels of government — a federal authority that governs matters of national interest, and the 10 provinces that govern matters of a more local interest. The Canadian Constitution also sets out the specific powers and jurisdictional limits for each level, with the intended result that each should have exclusive domain over certain aspects of government.

For example, the federal government has been allotted authority over the regulation of trade and commerce, banking, patents, copyright and taxation. The provinces have authority over property and civil rights and the administration of justice on a provincial level. As would be expected, there are areas of overlap. Indeed, the division of powers between the federal and provincial governments has been a long-standing source of contention among those who govern Canada.

The evolution of Canada's history has been greatly influenced by three world powers — Britain, France and the U.S. That said, while Canada's two official languages are English and French, the country is decidedly and increasingly multicultural, attracting talented new immigrants from all corners of the world.

2. Federal Government

Canada's federal government is based in Ottawa, Ontario. Similar to the U.S. federal government, the Parliament of Canada has two legislative bodies through which proposed bills must pass before becoming law: the House of Commons, which has elected representatives, and the Senate, which is comprised of appointees.

The Members of Parliament (MPs) are elected representatives from over 300 "ridings" or regions across Canada who sit in the House of Commons. The federal government itself is headed by a Prime Minister, who is usually the leader of the ruling political party in the House of Commons. The Prime Minister chooses members of the federal Cabinet from the elected Parliamentarians and these "Ministers" are responsible for overseeing individual federal departments.

Canada has four principal political parties — Liberal Party of Canada, Conservative Party of Canada, Bloc Québécois and New Democratic Party of Canada. The political party that controls the most seats in the House forms the ruling government of the day. The Official Opposition is the party that holds the second highest number of seats.

Canada's House of Commons is the only constitutionally authorized body to introduce legislation to raise or spend funds. Once a new law or amendments to existing laws are voted on and approved by the House of Commons, the proposed legislation must then be debated and voted upon by the Senate.

This Upper House of Parliament is made up of over 100 Senators appointed by the Governor General, on the advice of the Prime Minister. Senators, theoretically, provide a check against potential excesses of the governing party. If the Senate approves a law or its amendments, the bill is ready for royal assent. The timing of the royal assent ceremony is chosen by the ruling government and, unless the bill fixes a date on which it is to come into force, it comes into force on the date of royal assent. This time period can be mere days or many months, depending on the political timetable.

3. Provincial and Territorial Governments

Similar to the U.S. system of states, each Canadian province has its own elected Premier (similar to a U.S. governor), provincial Cabinet of Ministers, a Legislative Assembly (i.e., lawmakers), political parties and court system.

Municipalities and their governments are considered "creatures" of the provinces and derive their authority from provincial laws. Canada also has territories, which can be created by the Parliament of Canada under its constitutional authority. While not full-fledged provinces, territorial governments are often delegated powers within the federal domain and have government structures similar to provinces.

Some of the laws that provinces are responsible for include family law, health law, labour standards, education, social services and housing. Similar to Parliament, voters in provinces elect members to sit in the provincial legislature based on ridings.

These elected officials are Members of the Legislative Assembly (MLAs) or Members of Provincial Parliament (MPPs). The ruling government is the party that controls the most seats in the legislature. Today, Canada has 10 provinces and three territories.

Canada’s 10 Provinces	Capital
Alberta	Edmonton
British Columbia	Victoria
Manitoba	Winnipeg
New Brunswick	Fredericton
Newfoundland and Labrador	St. John's
Nova Scotia	Halifax
Ontario	Toronto
Prince Edward Island	Charlottetown
Quebec	Québec City
Saskatchewan	Regina
Canada’s Territories	**Capital**
Northwest Territories	Yellowknife
Nunavut	Iqaluit
Yukon	Whitehorse

4. Canada’s Legal System

Canadian courts are considered independent of the government. Elected politicians and bureaucrats cannot influence or dictate how the courts administer and enforce the law. In theory, federal and provincial governments make the laws, and courts interpret and enforce them. Increasingly, however, the line between who makes laws is blurring. In some cases, Canada’s courts end up making new laws by virtue of the way legislation is interpreted.

A significant driving force for legislative and judicial change in recent years has been Canada’s Charter of Rights and Freedoms, which imposes limits on government activity relating to Canadians’ fundamental rights and liberties. These include the right to liberty, equality, freedom of religion, freedom of expression, freedom to associate with a group, and to be presumed innocent until proven guilty by an independent and impartial tribunal. The Charter, however, does not generally govern interactions between private citizens or businesses.

Canada’s legal system is unique from many others in that the Quebec Act of 1774 created two systems of law — the “civil law” governing those in Quebec and a common law system in all other provinces. The common law system of justice, similar to that in the U.S., relies on the historical record of court interpretations of laws over the years. The civil law system in Quebec uses court decisions to interpret the intentions and allowable authority of lawmakers, but also relies on a written Civil Code that sets out standards of acceptable behaviour or conduct in private legal relationships.

Canada's court system itself is shaped like a pyramid. At the top, the Supreme Court of Canada is the ultimate court of appeal and has the final word on the interpretation of the law of the country. The Supreme Court of Canada can declare all or part of a law invalid. All lower courts in the land are required to follow its interpretations when dealing with similar matters. Only an Act of Parliament or a legislature, acting within their respective areas of authority, can change the effect of the top court's interpretation.

Next are the Courts of Appeal of each province. Decisions of a province's appellate court are binding on the lower courts in that province. In other provinces, some courts will seriously consider decisions of another province's appeal decisions, but there is no requirement to follow them until their own provincial appeal court agrees.

Below each province's appeal courts are trial and specialty courts, where most civil and criminal matters are decided.

III. Business Entities

A consideration of the different forms of business enterprises available under federal and provincial law will assist the investor in determining the most suitable arrangement for conducting business. Provincial law generally governs the forms of business organization although corporations may also be incorporated federally under the laws of Canada.

1. Corporations

A corporation with share capital is the most common form of business entity in Canada and enjoys advantages that make it the most practical form of business organization in most instances. Corporations may also be incorporated without share capital, generally for not-for-profit purposes.

1.1 What types of corporations are available in Canada?

1.1.1 Will the Canadian subsidiary be a private or public corporation?

Canadian legislation governing corporations distinguishes between non-offering corporations (commonly referred to as private or closely held corporations) and public offering corporations. Private corporations generally are subject to restrictions on the transfer of their shares, a maximum permitted number of shareholders, excluding certain classes of individuals such as employees, and prohibitions against the issue of securities to the public. Public corporations do not have these restrictions and have taken steps under applicable provincial securities laws and stock exchange rules to permit their securities to be offered to, and traded by, the public.

Because shareholders of private corporations often participate actively in the management of the corporation, they do not require the same statutory protections that are essential for shareholders of public corporations. Many rules that apply to public corporations with respect to directors, insider trading, proxy solicitation, filing of financial statements, appointment of auditors, take-over bids and public disclosure do not apply to private corporations. However, all shareholders have substantial rights with respect to fundamental changes affecting the corporation, including, in some cases, dissent and appraisal rights and a very broad oppression remedy.

1.1.2 Should the subsidiary be incorporated federally or provincially?

Corporations wishing to carry on business in more than one province or in foreign countries may prefer to incorporate under federal law. This permits the corporation to carry on business in every province in Canada without being licensed by the provinces, although registration may still be required. Also, federally incorporated corporations may be more widely recognized and accepted outside Canada, though there is no legal basis for this perception.

When a corporation incorporates in a province, it must register and may be required to obtain an extra-provincial licence in any other province where it carries on business.

There may be additional factors affecting the decision of whether to incorporate federally or provincially. For example, differences in residence requirements for directors may be relevant in some cases. As well, U.S. investors may be interested in the possibility of incorporating an "unlimited liability" corporation or company in British Columbia, Alberta or Nova Scotia to achieve certain U.S. tax objectives. The Canada–U.S. tax treaty contains some adverse provisions that need to be dealt with in the case of unlimited liability companies (see Section VII, "Tax").

1.1.3 What are the specific procedures and costs for incorporation? How long does the process take?

A corporation is formed in Canada by filing certain prescribed documents with the appropriate authorities under the *Canada Business Corporations Act* or the corporations act of one of the Canadian provinces (in Ontario, the *Business Corporations Act*).

The most important document under the *Canada Business Corporations Act* and similar statutes is the "articles of incorporation", which set out the name of the corporation, its share capital, any restrictions on share transfer, the number of directors and any restrictions on the business to be undertaken. In British Columbia, the "notice of articles" sets out the company's name, its authorized capital, whether a class of shares has any special rights or restrictions, names and addresses of the company's directors, and the "articles" govern the conduct of the company's internal affairs. In most other jurisdictions, matters in the "articles" of a British Columbia corporation are dealt with in bylaws passed by the directors and shareholders following incorporation. Under most statutes, corporations are given the capacity and rights of a natural person and it is not necessary to specify the objects for which the corporation is incorporated.

The name of the corporation is strictly regulated in all jurisdictions so as to avoid names that are too general or misleading. There is a government screening process in some jurisdictions and it is sometimes possible to pre-clear a name prior to application for incorporation. In addition, the Quebec Charter of the French Language requires that a corporation carrying on business in Quebec use a French version of its name.

Once the required documents are filed and fees paid, incorporation is automatic. The corporation comes into existence on the date of issue of a certificate of incorporation by the regulators.

The government cost of establishing a Canadian corporation is relatively modest in most jurisdictions. In Nova Scotia, however, the fee to incorporate an unlimited liability company is much higher than average, as is the annual fee. Modest registration fees may also be payable upon commencing business in various provinces.

1.2 Supervision and management of a corporation

1.2.1 Who is responsible for the corporation?

A Canadian corporation acts through its board of directors and officers. The directors are elected by the shareholders, and subject to any "unanimous shareholders agreement", manage the business and affairs of the corporation. Unanimous shareholder agreements are discussed in Section 1.2.2. Corporate statutes may require that a certain number of Canadian directors be present. Under the federal statute, at least 25% of the directors at a meeting must be resident Canadians or, if there are fewer than four directors, at least one must be a resident Canadian (other than for corporations engaged in certain prescribed business sectors, which require a majority of the directors present to be resident Canadians). There are a number of general rules governing the qualifications and number of directors, such as a requirement that each director be at least a specified age and not a bankrupt, but (unlike many other countries) there is no requirement that the director hold any shares in the corporation unless the incorporating documents provide otherwise. These rules apply equally to non-resident and resident directors. There are also additional rules that relate only to directors of public corporations. Under the Ontario statute, a private corporation must have at least one director, and a public corporation at least three.

Directors and officers have a duty to act honestly and in good faith with a view to the best interests of the corporation. They must exercise their powers with due care, diligence and skill, and must comply with the governing statutes, regulations, incorporating documents, and any unanimous shareholder agreements. They are also subject to conflict of interest rules. Where directors and officers neglect their duties, they may be subject to personal liability. They may also be subject to other liabilities, such as with respect to certain unpaid taxes and employee wages. A corporation may purchase and maintain insurance for the benefit of directors and officers for certain liabilities incurred in such capacity.

Directors appoint officers and delegate some of their powers to officers who conduct the day-to-day management of the corporation. It is rare for a Canadian corporation to have a "managing director", although such role is specifically recognized in some Canadian corporate statutes. The senior operating officer would generally be described as the "president", with the chief financial officer often being the "vice president, finance" or the "treasurer". There normally also is a secretary. One person may hold two or more offices, and officers need not be resident Canadians. As discussed in Section IX, Canadian immigration rules must be satisfied in respect of the transfer of non-resident employees to Canada to work for a Canadian subsidiary.

1.2.2 Residency requirements for directors or unanimous shareholder agreements

As noted in section 1.2.1, the federal and the Ontario corporate statutes include a Canadian residency requirement for directors of 25%, except where there are fewer than four directors, in which case at least one must be a resident Canadian. There are exceptions in the federal statute to this general rule for corporations in certain sectors. There are no residency requirements for officers. Some jurisdictions (e.g., British Columbia, Quebec, New Brunswick, Nova Scotia and the Yukon) do not impose residency requirements for directors.

A foreign parent corporation will generally deal with the residence requirement of directors in the following way. It may find Canadian individuals to represent it on the board of the subsidiary, either Canadian resident employees or professional advisers (who will generally seek indemnification from the parent for agreeing to act). In some cases, the foreign parent will take the further step of entering into a "unanimous shareholders agreement" with respect to the corporation. Many Canadian corporate statutes (including the federal and Ontario) provide for such agreements, under which the powers of the directors to manage the corporation's business and affairs may be transferred in whole or in part to its shareholders. To the extent that the directors' powers are restricted, their responsibilities and liabilities are correspondingly reduced and transferred to the shareholders.

1.3 How may a corporation be capitalized?

1.3.1 Shares

A share represents a portion of corporate capital and entitles the holder to a proportional right to corporate assets on dissolution. Shares must be fully paid before they can be issued (although calls on shares are permitted under Quebec law for certain pre-existing companies). Under the federal statute and the corporate statutes of most provinces, a corporation is prohibited from issuing shares having a par value.

There is no minimum or maximum amount of share capital that a corporation is allowed to issue, unless otherwise specified in its incorporating documents. “One shareholder” companies are permissible under Canadian law.

Canadian corporate law provides great flexibility in developing the appropriate capital structure for a corporation. The articles of incorporation specify the permitted classes of shares and their key terms. Shares may be voting or non-voting, or they may have limited voting or disproportionate voting rights. The incorporating documents may attach various conditions to the payment of dividends and will stipulate rights on dissolution of the corporation. Absent specific provision in the articles, under the Ontario and federal statutes, shareholders do not have any pre-emptive rights in respect of future share offerings.

Redemption or purchase of shares by a corporation and payment of dividends are subject to statutory solvency tests. Financial assistance by the corporation in favour of shareholders and other insiders is also regulated in some provinces but is no longer regulated under the federal or Ontario statutes.

1.3.2 Debt financing

Corporate capital may also be raised by borrowing. Directors may authorize borrowing unless the incorporating documents or a unanimous shareholders agreement restricts them. Restrictions upon corporate directors, however, will usually not protect the corporation against third parties in the case of unauthorized borrowing by directors. Corporations also have the power to grant security interests over their property and to give guarantees.

1.4 What are the basic procedures governing shareholder participation?

Shareholder meetings are usually held annually in a place determined by the directors or stipulated in the documents that govern the corporation. At the annual meeting the financial statements for the year will be presented to the shareholders and any necessary resolutions passed (such as for the election of directors). Some corporate statutes require meetings to be held in their jurisdiction unless the documents that govern the corporation provide otherwise or the shareholders agree to hold meetings elsewhere. However, shareholders may act by way of written resolution rather than at a meeting. The practice with respect to non-resident wholly owned subsidiaries is for all shareholder matters to be carried out through written resolutions.

Where a corporation has only one class of shares, each share entitles the holder to one vote at all shareholder meetings. Where there is more than one class of shares, the voting rights are set out in the articles of incorporation. Shareholders may vote personally or by proxy.

2. Corporations and Partnerships in Canada

A corporation is free to enter into partnerships in Canada. The relationship of the partners is established by contract and is also subject to applicable provincial laws. Some provinces require that partnerships be registered. A partnership may take one of two forms, a "general partnership" or a "limited partnership". Subject to the terms of their agreement, all partners in a general partnership are entitled to participate in ownership and management, and each assumes unlimited liability for the partnership's debts and liabilities. In a limited partnership, there is a separation between the partners who manage the business ("general partners") and those who contribute only capital ("limited partners"). A limited partnership must have at least one general partner, who will be subject to unlimited liability for the debts of the partnership. Limited partners are liable only to the extent of their capital contribution provided they do not participate in the management of the business.

A partnership would generally be entered into by a foreign corporation, directly or through a subsidiary, only if it wished to establish a joint venture arrangement with another person or corporation. The income or loss of the business will be calculated at the partnership level as if the partnership were a separate person, but the resulting net income or loss will then flow-through to the partners and be taxable in their hands. Partnerships themselves are not taxable entities for Canadian income tax purposes. Because of its flow-through nature, a partnership might be appropriate if a joint venture business is expected to generate disproportionately large expenses in its early years, as the partnership structure would allow the individual co-venturers to take advantage of the tax write-offs arising from these expenses. In the case of a limited partner, the amount of losses which may be available is limited by the amount which the limited partner is considered to have "at risk" in the partnership.

3. Joint Venture Structuring

Two or more parties may engage in a joint venture or syndicate where they collaborate in a business venture. There is no specific statutory definition or regulatory scheme for joint ventures, at either the provincial or federal level, although they are not uncommon in certain industries such as construction and natural resources.

To help avoid the presumption that a partnership has been formed, the joint venture agreement should declare that a partnership is not intended. The agreement should also set out the scope of the venture and the method of control and decision-making. It should stipulate the rights and obligations of the participants and provide mechanisms for the settlement of disputes. Unlike a corporation, a joint venture is not a distinct legal entity. It cannot sue or be sued. Such rights and liabilities are attached to the entities involved in the joint venture.

4. Alternative Methods of Carrying on Business

4.1 Branch office

Organizations with foreign ownership may conduct business in Canada through branch offices, so long as the *Investment Canada Act* and provincial registration and licensing requirements are complied with.

A branch office operates as an arm of the foreign business, which may enjoy tax advantages from such an arrangement. (See Section VII, “Tax”.) However, the foreign business’s liability for the debts and obligations incurred in its Canadian operations is not limited as it would be if the Canadian operations were conducted by a separate corporation (other than a British Columbia, Alberta or Nova Scotia unlimited liability corporation or company) of which the foreign business was the shareholder.

4.2 Agents and distributors

As an initial step, a foreign enterprise may wish to offer its products or services in Canada by means of an independent agent or distributor. An agent usually would be given limited authority to solicit orders for acceptance at the foreign head office, and would not normally take title to the goods or provide services to the customer. A distributor, on the other hand, usually takes title to the goods and offers them for resale, either directly to the customer or through dealers or retailers. In both cases, the foreign enterprise will likely seek to avoid establishing a permanent establishment in Canada for tax purposes. (See Section VII, “Tax”.)

The relationship with an agent or distributor should be established by contract. Although provincial law does not generally prohibit the termination of an agent or distributor, the courts will require reasonable notice to be given, or damages in place of notice, in the absence of an agreed contractual term for the relationship. The nature of the relationship should be reviewed to determine whether the arrangements are subject to franchise legislation.

IV. Trade and Investment Regulation

1. Competition Law

The *Competition Act* (Act) is Canada's antitrust legislation. It is legislation of general application and reflects classical economic theory regarding efficient markets and maximization of consumer welfare. It is administered and enforced by the Competition Bureau (Bureau), a federal investigative body headed by the Commissioner of Competition (Commissioner). The Act may be conveniently divided into two principal areas: criminal offences and civilly reviewable conduct (which includes merger regulation).

1.1 Criminal offences

1.1.1 What business practices are subject to criminal liability?

The main criminal offences in the *Competition Act* relate to conspiracy and bid-rigging.

The conspiracy provisions prohibit competitors (or persons who would be likely to compete) to: conspire or enter into an agreement or arrangement to fix prices; allocate sales, territories, customers and markets; or fix or control production or supply. Contravention of these provisions constitutes a per se offence (i.e., there is no need to show an effect on competition to secure a conviction). Prior to 2010, proof of an undue limiting, lessening or prevention of competition was required to establish the offence. The penalty upon conviction is imprisonment for up to 14 years and/or a fine not exceeding C$25-million per offence.

The bid-rigging provisions prohibit two or more bidders (in response to a call or request for bids or tender) to agree that one party will refrain from bidding, withdraw a submitted bid, or agree among themselves on bids submitted. The provisions do not apply when the parties clearly inform the party who issued the tender about the joint bidding agreement at or before the time they submit the bid. The penalty upon conviction is imprisonment for up to 14 years and/or a fine at the discretion of the court.

1.1.2 How are criminal offences prosecuted under the *Competition Act*?

The Commissioner, either on his own initiative or following a complaint from six resident Canadians, can initiate an investigation into a possible violation of the criminal provisions of the Act. At any time during his investigation, the Commissioner can refer the matter to the Director of Public Prosecutions (DPP). The DPP is the only person who may initiate criminal proceedings for contraventions of the Act. To obtain a conviction, the DPP must satisfy a court beyond a reasonable doubt that an offence has been committed.

It is important to note that, under the Act, a foreign competition authority that is a party to a mutual legal assistance treaty with Canada may request, subject to ministerial authorization, the assistance of the Commissioner to further its investigation – even where the conduct alleged as anticompetitive did not occur or have any effect in Canada. Evidence obtained by the Commissioner in a Canadian investigation may be provided to a foreign competition authority without the authorization of the party being investigated.

The Act also allows for a private right of action (as discussed in paragraph 1.3).

1.1.3 Recent enforcement action

Consistent with a global trend among competition authorities, the Commissioner has devoted substantial resources to enforcing the criminal conspiracy provisions of the Act, particularly so-called "hard core" cartels involving agreements between competitors to fix prices or allocate markets or customers between themselves. The single largest fine imposed thus far on a corporation is C$48-million for conspiracy and C$30-million for bid-rigging. Executives have also been fined and jail terms have been imposed for a period as long as one year.

1.2 What business practices may constitute civilly reviewable conduct and be subject to possible review before the Competition Tribunal?

Certain non-criminal conduct may be subject to investigation by the Bureau and review by the Tribunal. The Tribunal is a specialized body that is comprised of both judicial and lay members. Reviewable practices are not criminal and are not prohibited until made subject to an order of the Tribunal specific to the particular conduct and party. Matters reviewable by the Tribunal include, among other things, non-criminal competitor collaborations, anticompetitive refusals to deal, exclusive dealing, tied selling, market restrictions, price maintenance and abuse of dominant position.

If the Tribunal finds, on the civil standard of the balance of probabilities, that a person has engaged in the reviewable activity, it may, depending on the activity, order a person to do or cease doing a particular act in the future, and to otherwise take any other action necessary to fix the competitive harm. The Tribunal is also empowered to impose administrative monetary penalties of up to C$10-million (and, in the case of repeat offenders, C$15-million) under the abuse of dominance provisions. There are criminal penalties for failure to comply with an order once it has been made.

Private parties have the right to bring complaints directly to the Tribunal in relation to five areas: refusal to deal, exclusive dealing, tied selling, market restrictions and price maintenance. At one time, the Commissioner was the only person who could bring reviewable trade practices before the Tribunal.

1.3 What business practices will attract civil liability? What is the exposure to civil damages?

Section 36 of the Act establishes a private right of action for losses suffered as a result of another party's breach of any of the criminal provisions (set out in Part VI) of the Act, or failure to comply with an order made pursuant to the Act (such as, by the Tribunal in connection with civilly reviewable conduct). The constitutional validity of this provision has been upheld and increasing numbers of parties are seeking to enforce this right.

Unlike in the U.S., section 36 limits the recoverable damages to losses that can be proven to have resulted from the violation of the Act or the failure to comply with the order in question, plus costs. In addition to only allowing single damages, the relevant Canadian jurisprudence indicates that parties will not generally be able to recover other types of damages, such as punitive damages.

Section 36 provides that the "record of proceedings" in proceedings that resulted in either (i) a conviction of a criminal offence under the Act or (ii) a finding of a failure to comply with an order made under the Act, is *prima facie* proof of the alleged conduct in a civil action. Furthermore, any evidence given in the prior proceedings as to the effects of the conduct in question "is evidence thereof" in the civil action.

1.4 Merger regulation

1.4.1 Under what circumstances will pre-merger notification be required?

All mergers are subject to the Act, and thus to the substantive review provisions described in paragraph 1.4.3 and to the enforcement procedures set out in paragraph 1.4.4 (mergers fall under the civilly reviewable matters provisions of the Act). Additionally, mergers that satisfy certain prescribed thresholds must be notified to the Bureau, and certain statutory waiting periods must have expired (subject to certain exceptions), before a merger can be completed.

The thresholds applicable to merger transactions are as follows:

- **Size of parties test**: the parties to the transaction, together with their affiliates, must have assets in Canada, or gross revenues from sales in, from or into Canada, that exceed C$400-million

- **Size of transaction test**: in respect of the target, the value of the assets in Canada, or gross revenues from sales in or from Canada from such assets, must exceed C$82-million (this figure is adjusted annually). In the case of an acquisition of a corporation or an unincorporated entity, as well as in the case of the formation of an unincorporated entity (e.g., joint venture), the assets and gross revenues are those of the corporation or entity and its affiliates being acquired

- **Shareholding/interest test**: In addition to the above two threshold tests, the Act prescribes a shareholding/economic interest test that applies to the acquisition of an interest in a corporation or in an unincorporated entity. Regarding a corporation, there is an additional requirement that the acquirer and its affiliates must be acquiring more than 20% of the voting shares of a public corporation or more than 35% of the voting shares of a private corporation, or where the acquirer already owns such number of voting shares, it must acquire more than 50% of the voting shares of the corporation. In the case of an unincorporated entity, the test is similar to the above, except that the interest is based on the right to more than 35% of the profits or assets on dissolution, and if this level has already been exceeded, then more than 50%. Additional thresholds apply in the case of amalgamations, which would cover, for example, Delaware mergers

If all applicable thresholds are exceeded, the parties to the transaction are required to provide the Commissioner with prescribed information relating to the parties and their affiliates. The obligation to notify is on both parties to a transaction and the statutory waiting period (described below) does not commence until the parties have submitted their respective notifications. However, in the case of a hostile bid, a provision exists to allow the Commissioner to require the target to provide its portion of the notification within a prescribed period. Where this provision applies, the statutory waiting period begins when the bidding party submits its notification. A notification is subject to a filing fee of C$50,000.

1.4.2 What are the notification procedures?

The waiting period is 30 days following the day on which complete notifications were submitted to the Bureau.

The parties may close the transaction after the 30-day statutory waiting period has expired unless the Commissioner makes a request for additional information, known as a Supplementary Information Request (SIR). The scope of additional information that may be required is potentially quite broad; any information relevant to the Commissioner's assessment of the transaction can be requested. Subject to the Commissioner seeking an injunction, the merging parties may complete their merger 30 days after the information required by the SIR has been received by the Commissioner. In many cases, however, the parties will choose to wait until the Commissioner has completed his substantive assessment of the transaction (see paragraph 1.4.3).

In addition to, or in lieu of, filing a notification, the merging parties can request that the Commissioner issue an advance ruling certificate (ARC). An ARC can be issued, at the Commissioner's discretion, where he is satisfied that he does not have sufficient grounds upon which to challenge the merger before the Tribunal. In practice, an ARC is issued only in respect of mergers that do not raise any substantive concerns. The issuance of an ARC has two important benefits:

- It exempts the parties from having to file a notification (where the Commissioner does not issue an ARC, the parties can apply to have the requirement to file the notification waived as long as substantially the same information was supplied with the ARC request).

- It bars the Commissioner from later challenging the merger on the same facts upon which the ARC was issued.

A filing fee of C$50,000 applies to a request for an ARC. Only a single fee applies where both a request for an ARC and a notification have been submitted.

Where the Commissioner is not prepared to issue an ARC, but nevertheless determines that he does not have grounds upon which to initiate proceedings to challenge a proposed transaction, he will typically grant what is commonly referred to as a "no-action letter". A substantial number of transactions close on the basis of a no-action letter. However, where an ARC has not been granted, the Commissioner retains the jurisdiction to challenge a transaction for up to one year after it has been substantially completed.

1.4.3 What is the substantive test applicable to the review of mergers?

The substantive test applicable to a merger transaction is whether it will, or is likely to, substantially prevent or lessen competition in a relevant market. A market is defined on the basis of product and geographic dimensions. The Act provides that the factors relevant to assessing the competitive impact of a merger include the extent of foreign competition, whether the business being purchased has failed or is likely to fail, the extent to which acceptable substitutes are available, barriers to entry, whether effective competition would remain, whether a vigorous and effective competitor would be removed, the nature of change and innovation in a relevant market, and any other factor relevant to competition.

The Act also provides for an "efficiencies defence" under which a merger that prevents or lessens, or is likely to prevent or lessen, competition substantially in any market in Canada may proceed as long as the efficiency gains resulting from the merger will be greater than, and will offset, the anticipated anticompetitive effects.

1.4.4 What are the consequences if the Commissioner is concerned with a transaction?

If, in the course of reviewing a proposed merger, the Commissioner identifies areas in which he believes the transaction will substantially lessen or prevent competition, he will normally try to negotiate alterations to the transaction which address his concerns. These negotiations can be protracted. Prior to challenging a transaction before the Tribunal, the Commissioner may apply to the Tribunal for an order enjoining the parties from completing the transaction for a period not exceeding 30 days to permit the Commissioner to complete his inquiry. The Commissioner can apply for an extension of the period for an additional 30 days. If the Commissioner makes an application to the Tribunal challenging a proposed transaction, he may also apply for an interim order on such terms as the Tribunal deems appropriate.

Following the end of this period, the Commissioner can challenge the merger. There is precedent for the Bureau permitting the parties to take up shares and enter into a "hold separate" agreement until the Tribunal process has run its course. Following its review, the Tribunal can either allow the merger to proceed or, in the case of a completed merger, it can order a purchaser to dispose of all or some assets or shares or take such other action as is acceptable to the merging parties and to the Commissioner.

In practice, there have been very few contested proceedings. In most cases where the Commissioner has expressed concerns, the parties have been able to agree upon a set of commitments that are mutually satisfactory to the merging parties and to the Commissioner.

2. General Rules on Foreign Investments

2.1 Are there special rules governing foreign investment?

The *Investment Canada Act* is a federal statute of broad application regulating investments in Canadian businesses by non-Canadians. Except with respect to cultural businesses, the Investment Review Division of Industry Canada (Investment Canada) administers the *Investment Canada Act* under the direction of the Minister of Industry. The Minister of Heritage is responsible for cultural businesses (i.e., business activities relating to Canada's cultural heritage, such as publishing, film, video, music and broadcasting). In some cases investments are reviewed by both the Minister of Industry and Minister of Heritage where only part of the business activities of the Canadian business involve Canada's cultural heritage.

Investments by non-Canadians to acquire control over existing Canadian businesses or to establish new ones are either reviewable or notifiable under the *Investment Canada Act*. The rules relating to an acquisition of control and whether an investor is a "Canadian" are complex and comprehensive.

A "direct acquisition" for the purpose of the *Investment Canada Act* is the acquisition of a Canadian business by virtue of the acquisition of all or substantially all of its assets or a majority (or, in some cases, one-third or more) of the shares or voting interests of the entity carrying on the business in Canada. Subject to certain exceptions discussed below, a direct acquisition is reviewable where the value of the acquired assets is C$5-million or more.

An "indirect acquisition" for the purpose of *the Investment Canada Act* is the acquisition of control of a Canadian business by virtue of the acquisition of a non-Canadian parent entity. Subject to certain exceptions discussed below, an indirect acquisition is reviewable where (a) the value of the Canadian assets is less than or equal to 50% of the value of all the assets acquired in the transaction and the value of the Canadian assets is C$50-million or more, or (b) the value of the Canadian assets is greater than 50% of the value of all the assets acquired in the transaction and the value of the Canadian assets is C$5-million or more.

The acquisition of control of an existing Canadian business or the establishment of a new one may also be reviewable, regardless of asset values, if it falls within a prescribed business activity related to Canada's cultural heritage or relates to national security.

Special rules apply with respect to investments made by state-owned enterprises (SOEs):

- The Minister of Industry has the power to determine that an SOE has acquired "control in fact" of a Canadian business or that a Canadian business is "controlled in fact" by one or more SOEs (notwithstanding the control rules otherwise set out in the statute), with the potential result that certain investments may be subject to a Ministerial review and approval requirement where they otherwise would not have been.

- SOEs' investments in the Canadian oilsands are limited by a federal government policy introduced in December 2012. Specifically, reviewable acquisitions of control (including acquisitions of "control in fact") of oilsands businesses by SOEs will not receive approval from the Minister of Industry, except on an "exceptional basis."

The *Investment Canada Act* defines an SOE broadly as including foreign governments and their agencies and entities that are controlled or influenced, directly or indirectly, by such governments or agencies. It also includes "an individual who is acting under the direction of" or "who is acting under the influence of" such a government or agency. An SOE investor, as with any other investor, will also have to consider the potential application of the national security review regime to the proposed investment.

2.2 How are WTO members treated differently?

The *Investment Canada Act* reflects commitments made by Canada as a member of the World Trade Organization. In the case of a direct acquisition by or from a (non-Canadian) "WTO investor" (that is, an investor controlled by persons who are residents of WTO member countries), the threshold is significantly larger. For these transactions, the current threshold is C$354-million (this threshold is adjusted annually). However, the higher threshold applicable to WTO investors does not apply where the Canadian business is considered to be carrying on a "cultural business".

As a result of recent amendments to the *Investment Canada Act*, a new threshold based on the "enterprise value" of the acquired business will apply to future transactions. The criteria for determining "enterprise value" will be set out in regulations that have yet to be issued. Investment Canada officials have advised that, until such time as the regulations defining "enterprise value" are issued, the threshold for evaluating the reviewability of proposed transactions will continue to be C$5-million/C$354-million in the aggregate value of the assets being acquired, as described above. The new “enterprise value” will not apply to investments by SOEs.

An indirect acquisition of a Canadian business by a non-Canadian, where the purchaser qualifies as a WTO investor or the vendor is a non-Canadian that qualifies as a WTO investor, is not reviewable but only subject to a notification obligation, provided that the Canadian business is not considered to be carrying on a cultural business.

2.3 If a review is required, what is the process?

A reviewable transaction may not be completed unless the investment has been reviewed and the relevant Minister is satisfied that the investment is likely to be of “net benefit to Canada”. The non-Canadian proposing the investment must make an application to Investment Canada setting out particulars of the proposed transaction. There is then an initial waiting period of up to 45 days; the Minister may unilaterally extend the period for up to 30 days and then only with the consent of the investor (although in effect this can be an indefinite period since, with a few exceptions, the investor cannot acquire the Canadian business until it has received, or is deemed to have received, the Minister’s “net benefit to Canada” decision). If the waiting period is not renewed and the transaction is not expressly rejected, the Minister is deemed to be satisfied that the investment is likely to be of net benefit to Canada. Failure to comply with these rules opens the investor to enforcement proceedings that can result in fines of up to C$10,000 per day.

The principal practical negative effects of a review are the reality of delay and negotiation. It is often difficult to get the Minister’s approval before the expiration of the initial 45-day period. In addition, the Minister will usually seek undertakings (discussed in more detail in paragraph 2.4) as a condition of approval.

Special review requirements and timing considerations apply to transactions, whether already implemented or proposed, which potentially raise national security considerations. The term “national security” is not defined in the *Investment Canada Act*. Where the Minister has reasonable grounds to believe that an investment by a non-Canadian to acquire all or part of an entity (or to establish an entity) carrying on business in Canada could be injurious to national security, the Minister may notify the non-Canadian that the investment may be reviewed for potential national security concerns.

In such a case, the Minister shall, after consultation with the Minister of Public Safety and Emergency Preparedness, inform the non-Canadian investor whether a review of the investment on national security grounds will be required. If the parties are notified that no such review will be ordered, the transaction may proceed.

Where a national security review is required, the parties may be required to provide the Minister with any information considered necessary for the review. The Minister may then either:

- inform the parties that no further action will be taken, if the Minister is satisfied that the investment would not be injurious to national security (in which case the transaction may proceed); or

- refer the transaction to the Governor in Council (the Federal Cabinet), if the Minister is satisfied that the investment would be injurious to national security or the Minister is not able to make such a determination.

Where the transaction is referred to the Governor in Council, the Governor in Council may take any measures considered advisable to protect national security including blocking the transaction, authorizing the transaction on the basis of written undertakings or other terms and conditions or ordering a divestiture of the Canadian business.

2.4 What is required for an investment to be of "net benefit to Canada"?

The *Investment Canada Act* requires the relevant Minister to take these factors into account, where relevant, when determining if an investment is likely to be of "net benefit to Canada":

- The effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada
- The degree and significance of participation by Canadians in the Canadian business and in any industry or industries in Canada of which the Canadian business forms a part
- The effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada
- The effect of the investment on competition within any industry or industries in Canada
- The compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment
- The contribution of the investment to Canada's ability to compete in world markets

Typically, during the 45-day period, the investor will negotiate with Investment Canada and/or Canadian Heritage a suitable set of undertakings to be provided in connection with the Minister's approval of the transaction. These undertakings comprise commitments by the investor concerning its operation of the Canadian business following the completion of the transaction. With respect to SOEs, the government has issued guidelines whereby such enterprises may be subject to certain additional obligations designed to ensure that their governance is in line with Canadian standards and that the Canadian businesses that they acquire maintain a commercial orientation.

Commitments provided to the Minister by a foreign investor may, among other things, obligate the investor to keep the head office of the Canadian business in Canada, ensure that a majority of senior management of the Canadian business is comprised of Canadians, maintain certain employment levels, make specified capital expenditures and conduct research and development activities based on specified budgets, and make a certain level of charitable contributions, all over a period of usually three years. According to guidelines established by Investment Canada, these undertakings will be reviewed by Investment Canada or Canadian Heritage, as the case may be, on a 12- to 18-month basis for up to three to five years in the ordinary course to confirm the investor's performance.

2.5 Are there any requirements for investments that are not "reviewable"?

If the acquisition of an existing business or the establishment of a new business is not reviewable, the investment will be "notifiable". Notification requires the non-Canadian investor to provide limited information on the identity of the parties to the transaction, the number of employees of the business in question, and the value of its assets. Notification may be given to Investment Canada before or within 30 days after the closing of the transaction.

2.6 Are there other statutes that regulate foreign investments in particular sectors?

In addition to the *Investment Canada Act*, other federal statutes regulate and restrict foreign investment in specialized industries and sectors, such as telecommunications, broadcasting, rail and air transportation and financial institutions.

3. International Trade Agreements

3.1 Trade agreements as a constitution for international business regulation

The International Trade Agreements to which Canada is a party act like a constitution, placing limits on the laws, regulations, procedures, decisions, and actions that all levels of government and their agents may undertake. While these agreements do not automatically invalidate laws that breach their obligations, they all provide sanctions for non-compliance.

3.2 Key principles of trade agreements

The guiding principle of all trade agreements is non-discrimination. This general principle is enforced through a number of specific rules that appear in most trade agreements with varying degrees of force. The underlying rationale is that discriminating between the goods, investments, persons, or services of different countries distorts trade and results in a less efficient utilization of resources and comparative advantages, ultimately to the detriment of all.

The two most prevalent rules are most favoured nation and national treatment. Most favoured nation treatment prohibits discriminating in the treatment accorded to goods, persons, or companies, as the case may be, of other parties to the agreement. For instance, most favoured nation treatment requires that Canada must give as favourable a duty rate to imports from the European Union as from Brazil. National treatment prohibits giving more favourable treatment to domestic persons, investments, services or goods than is offered to persons, investments, services or goods from other countries. It does not require treating them the same as nationals, as long as the treatment is as favourable.

There are many more rules that address more subtle or specific forms of discriminatory and trade-distorting practices. Some of these are discussed below.

3.3 Using trade agreements as business tools

Historically, trade agreements focussed on reducing tariffs, which are the most obvious form of trade discrimination in which a country imposes a “tax” only on imported goods. As trade negotiations have succeeded in reducing tariffs other, often more subtle, trade barriers have grown in importance. These non-tariff barriers can include all manner of domestic regulation such as labelling, environmental, and even food safety requirements that directly or indirectly affect the import, export and sale of goods, foreign direct investment, and the ability of companies to move people across borders to provide a service.

Today, these domestic regulations, policies and programs can interfere significantly with business operations. Canada’s trade obligations under the various agreements to which it is a party offer the business community effective tools for responding to these obstacles. Some agreements, like the NAFTA, provide investors with a direct means of challenging barriers to establishing, acquiring or managing a Canadian company. All the agreements can be effectively used to respond to identified obstacles. This is particularly true in Canada, a strong advocate of multilateral trade rules that seeks to ensure that the development of new laws or the application of current regulations are consistent with international trade law obligations.

International trade agreements are a relatively new business tool. Identifying how trade obligations can be leveraged into the achievement of strategic business objectives is a subtle and specialized skill that can help realize the market opportunities available to those industry players who fully exploit these cutting-edge legal tools.

3.4 Canada’s trade agreements

Canada is a party to many trade agreements. The list of countries with which Canada enjoys trade agreements continues to expand through ongoing negotiations. We summarize them below.

3.4.1 WTO agreements

Canada is a member of the WTO and has committed to respect the rules of the Agreements adopted by WTO members, effective January 1, 1995. The WTO administers the rules governing trade among the organization’s 159 members.

The WTO Agreements encompass a structure with six principal parts: the Agreement Establishing the WTO; agreements on trade in goods; the General Agreement on Trade in Services (GATS); the Agreement on Trade-Related Aspects of Intellectual Property Rights; dispute settlement; and reviews of governments’ trade policies. These agreements lay down rules that governments must follow in regulating a wide range of business activities including procurement, investment, agriculture and industrial goods trade, and subsidies and antidumping decisions.

The current round of multilateral negotiations, commonly known as the Doha round and aimed at strengthening the rules of the WTO agreements, remains stalled largely as a result of differences between the Member states on measures relating to agricultural products. Nevertheless, the WTO Agreements continue to apply and impose rules governing the laws, regulations and practices of member countries that affect trade in goods or services.

The WTO Agreements place limits on actions that WTO member governments and their agents may undertake. If, for example, European, U.S. or Chinese laws, policies or practices adversely affect a business in Canada in contravention of the WTO rules, Canada may use the WTO dispute settlement process to ensure that a WTO member abides by its obligations under the WTO Agreements. While the WTO complaints mechanism is available only to sovereign states (or to a regional grouping of states, such as the EU), private companies confronting WTO unlawful barriers in their activities may request that their governments make use of the system.

3.4.2 NAFTA

The NAFTA is a regional free trade agreement between Canada, the U.S. and Mexico. The NAFTA has essentially eliminated duties on trade between the three countries. The preferential treatment granted to the other NAFTA parties' goods and services would violate Canada's most favoured nation obligations to other WTO Members under the WTO Agreements but for an exception for this type of agreement. The NAFTA also imposes similar, and in some cases, more comprehensive, rules to those found in the WTO Agreements. Aside from differences in tariffs, the biggest differences between the WTO and NAFTA agreements are in respect of investment and services rules.

3.4.2.1 NAFTA investment rules

NAFTA Chapter 11 provides rules relating to the treatment of investments and investors of other NAFTA Parties. These rules are more detailed than those provided for in the WTO's TRIMs Agreement. Most importantly, the NAFTA enables aggrieved foreign NAFTA investors to submit a claim for damages against the country complained of without any approval or involvement of the investor's government.

Claims can only be brought against the government of another NAFTA Party; an investor cannot complain of its own government's actions. Either party may seek judicial review of the arbitration panel's decision.

NAFTA Chapter 11 extends national and most favoured nation treatment to investors and investments of another NAFTA Party so that laws, regulations and government actions cannot discriminate between investors of any of the three countries. Chapter 11 also enables investors to make claims that government measures have effectively expropriated their investment. These claims may recoup the value of the expropriated investment, including lost profits.

To pursue a claim under NAFTA Chapter 11, the investor or company involved typically must be incorporated in one of the NAFTA countries. NAFTA investors may, however, bring claims for damages to their investment. Accordingly, for example, a U.S. investor in a European company operating in a NAFTA country may submit a claim for damages to the investment, i.e., the shares of the company. That damage would typically take the form of a drop in share price or the suppression of anticipated increases in share price. Such an investor could not stand in the shoes of the company itself unless the investor is a controlling shareholder, as the company would not be considered an investment of a NAFTA investor.

3.4.2.2 NAFTA services rules

Both the NAFTA and the WTO GATS discipline services, but they do so in different ways. Under the NAFTA, U.S. and Mexican service providers must be extended national treatment in all service sectors, except those specifically excluded (under the GATS, national treatment is extended only in those service sectors specifically included). This means that each country must accord to service providers of another NAFTA country treatment no less favourable than it accords to its own service providers. No local presence is required to provide a service cross-border. NAFTA countries must also ensure that licensing and regulations relate principally to competence or ability and do not have the purpose or effect of discriminating against nationals of another NAFTA country. NAFTA countries can maintain existing restrictions on cross-border services where such restrictions have been listed in an annex to the Agreement.

NAFTA also eases restrictions on the entry of “business persons” for the purposes of providing marketing, training, and before and after sales and service for their products and services. For details, see Section IX, “Immigration Law”.

3.4.3 Canada-U.S. agreement on procurement

Outside the context of NAFTA, Canada and the U.S. have entered into an agreement on government procurement which has the effect of liberalizing access to sub-central government procurements in both countries. In addition, the agreement provides for exemptions for Canada from Buy American provisions of the American Recovery and Reinvestment Act of 2009 in relation to certain programs in exchange for temporary Canadian procurement commitments for certain construction projects not included in the WTO Agreement on Government Procurement. Canada and the U.S. also committed to explore the scope of a long-term government procurement agreement to deepen, on a reciprocal basis, procurement commitments beyond those under the WTO and NAFTA.

3.4.4 Free Trade Agreements (FTAs)

FTAs generally provide for preferential tariff rates on imported goods and services and enhanced market access to goods and services of the member parties. Such agreements may also provide for protection such as most favoured nation and national treatment. FTAs may go beyond the scope and extent of coverage of the WTO Agreements. Moreover, FTAs may cover areas not addressed by WTO Agreements, such as protection of investments and investors. FTAs generally provide for dispute settlement mechanisms.

Canada has entered into FTAs with numerous countries apart from the U.S. and Mexico (the NAFTA countries), including: Colombia, Costa Rica, Chile, Israel, Jordan, Panama, Peru, and the European Free Trade Agreement (EFTA) countries (Iceland, Norway, Switzerland and Liechtenstein). In November 2013, negotiations for a Canada-Honduras FTA was signed, but it has not yet come into force. Negotiations of a Canada-South Korea FTA have also been concluded. Canada is in the process of negotiating FTAs with a number of other countries including: Singapore, Japan, the Dominican Republic, the Ukraine, Morocco, and the Caribbean Community countries. In May 2009, Canadian and European Union (EU) leaders announced an agreement to launch negotiations towards a comprehensive economic partnership agreement. Canada and the EU have since completed nine rounds of negotiations and an agreement in principle was signed in October 2013. In November 2010, Canada and India began the negotiation of a possible comprehensive economic partnership agreement, following the release of a joint study group report concerning key sectors of interest and the possible parameters of a comprehensive trade agreement between the two countries. Canada and India have since completed eight rounds of negotiations and discussions are ongoing.

In October 2012, Canada joined the Trans-Pacific Partnership (TPP). The TPP currently comprises Australia, Brunei Darussalam, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. Members are in the process of negotiating an agreement designed to promote free trade between Asia and the Americas. The 19th round of TPP negotiations was held in Bandar Seri Begawan, Brunei from August 23-30, 2013.

3.4.5 Foreign Investment Protection Agreements (FIPAs)

A Foreign Investment Promotion and Protection Agreement is a bilateral agreement aimed at protecting and promoting foreign investment through legally binding rights and obligations. FIPAs accomplish their objectives by setting out the respective rights and obligations of the countries that are signatories to the treaty with respect to the treatment of foreign investment.

Typically, there are agreed exceptions to the obligations. FIPAs seek to ensure that foreign investors will not be treated worse than similarly situated domestic investors or other foreign investors; they will not have their investments expropriated without prompt and adequate compensation; and, in any case, they will not be subject to treatment lower than the minimum standard established in customary international law.

As well, in most circumstances, investors should be free to invest capital and repatriate their investments and returns.

Canada began negotiating FIPAs in 1989 to secure investment liberalization and protection commitments on the basis of a model agreement developed under the auspices of the Organization for Economic Co-operation and Development (OECD). In 2003, Canada updated its FIPA model to reflect and incorporate the results of its experience with the implementation and operation of the investment chapter of the NAFTA. It provides for a high standard of investment protection and incorporates several key principles: treatment that is non-discriminatory and that meets a minimum standard; protection against expropriation without compensation and restraints on the transfer of funds; transparency of measures affecting investment; and dispute settlement procedures. The new model serves as a template for Canada in negotiations with investment partners on bilateral investment rules.

Currently, Canada has FIPAs with 27 countries including Russia, Poland, Venezuela, Argentina, Barbados, Benin, China, Costa Rica, Jordan, Kuwait, and Tanzania, and has concluded negotiations with a number of countries, including Bahrain, Cameroon, Madagascar, Mali, Nigeria, Senegal, and Zambia. In June 2007, Canada announced the conclusion of negotiations for a FIPA with India; however, in October 2009, India notified Canada that it had some concerns with the agreed text. Efforts to negotiate a resolution to these issues have been underway since that time. Canada has updated its FIPAs with Latvia, the Czech Republic, Slovakia, and Romania and is in the process of updating its FIPAs with Hungary and Poland to bring them into conformity with EU law.

3.4.6 Agreement on Internal Trade (AIT)

Although not an international agreement, the AIT is an agreement among the federal, provincial, and territorial governments designed to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investment within Canada and to establish an open, efficient, and stable domestic market. In this regard, the AIT seeks to reduce extra costs to Canadian businesses by making internal trade more efficient, increasing market access for Canadian companies and facilitating work mobility for tradespeople and professionals.

The AIT also features a formal dispute settlement mechanism to deal with complaints. The ability of foreign companies to initiate procurement complaints under the AIT is limited because the AIT is essentially a domestic free trade agreement. Only companies with an office in Canada have standing to bring an AIT complaint to the Canadian International Trade Tribunal (CITT). However, where a company is unable to meet the requirements for standing to bring a complaint before the CITT, it may still bring an application to the Federal Court for judicial review of a procurement decision. The AIT does not trump Canada's international agreements and does not create any obligations to foreign suppliers.

3.4.7 New West Partnership Trade Agreement (NWPTA)

While not an international agreement, the NWPTA, formerly known as the Trade, Investment and Labour Mobility Agreement, is an agreement designed to remove barriers to trade, investment and labour mobility between the signatory provinces. Originally signed by Alberta and British Columbia, and effective in 2007, Saskatchewan joined the agreement, effective July 1, 2010. Other provinces and territories of Canada, as well as the federal government, can join the NWPTA upon accepting its terms.

The NWPTA is seen as a step beyond the AIT and aims to remove barriers across all economic sectors. The NWPTA applies to all government measures (e.g., legislation, regulations, standards, policies, procedures, guidelines, etc.) affecting trade, investment and labour mobility. Certain special provisions have been established for some sectors, such as for investment, business subsidies, labour mobility, procurement, energy and transportation. There are also a limited number of sectors that have been excluded from the coverage of the NWPTA, such as water, taxation, social policy, and renewable and alternative energy.

The NWPTA requires the signatory governments to provide open and non-discriminatory access to procurements in excess of minimum thresholds by various government entities, including departments, ministries, agencies, Crown corporations, municipal governments, school boards and publicly funded academic, health and social service entities.

The dispute resolution provisions of the NWPTA are available to companies registered under the laws of one of the parties to the agreement. If a government measure is considered to be inconsistent with both the AIT and the NWPTA, the dispute resolution process under either agreement may be selected, but once chosen, there is no recourse to the other process in respect of the same issue. The maximum penalty is C$5-million and would only apply to the provincial governments that are parties to the NWPT.

3.5 Importing goods into Canada

The importation of goods into Canada is regulated by the federal government. The *Customs Tariff* imposes tariffs on imported goods, while the *Customs Act* sets out the procedures that importers must follow when importing goods, and specifies how customs duties payable on imported goods are to be calculated and remitted to the relevant governmental authority.

Under NAFTA, barriers to trade in goods between Canada, the U.S. and Mexico have largely been removed. Tariffs between Canada and the U.S. have generally been eliminated since January 1, 1998. In the case of Mexico, tariffs on most goods were eliminated by January 1, 2003.

In order for goods to be eligible to take advantage of NAFTA, they must satisfy "rules of origin" which require a certain level of North American value-added. These rules are sophisticated and are based on changes in tariff classification and/or regional value content, the latter being calculated by either transaction value or the net cost method. Goods not meeting these requirements will remain subject to Canadian, U.S. or Mexican tariffs. These rules do not depend on the ownership of the business, and thus foreign-owned Canadian companies can take full advantage of the liberalized rules. In the case of services, the provisions of NAFTA are generally open to enterprises of other NAFTA members, even if controlled by non-NAFTA nationals, as long as the enterprise has some substantive business activities (i.e., is not merely a shell).

Following is a more detailed discussion of the steps involved in importing goods and the relevant laws applicable.

3.5.1 Tariff classification

All goods imported into Canada are subject to the provisions of Canada's customs laws, including the provisions of the *Customs Act* and the *Customs Tariff*. To determine the rate of duty, if any, applicable on the imported goods, the goods must be classified among the various tariff items set out in the List of Tariff Provisions of the *Customs Tariff*. Canada is a signatory to the *Harmonized Commodity Description and Coding System*, to which the U.S. is also a party; therefore, tariff classifications up to the sixth digit should be identical between Canada and the U.S.

3.5.2 Tariff treatment

Once the tariff classification of imported goods is determined, the List of Tariff Provisions indicates opposite each tariff classification the various tariff treatments available in respect of the goods, depending on their country of origin. For instance, where no preferential tariff treatment is claimed, the most favoured nation tariff treatment applies.

However, as a result of Canada's participation in several bilateral, plurilateral and multilateral trade agreements in recent years, various preferential tariff treatments are available to goods from certain countries. For example, all customs duties on goods originating in the U.S. have been eliminated pursuant to NAFTA.

There are similar reductions in Canada's other FTAs. The General Preferential Tariff (GPT) treatment provides partial duty relief to goods originating in certain developing countries. To claim one of the preferential rates of duty, the importer must establish that the goods qualify for the claimed treatment pursuant to the relevant rules of origin and that proper proof of origin is obtained, usually from the exporter. The Canadian Department of Finance has recently removed GPT treatment from 72 countries, effective July 1, 2014, including India and China.

3.5.3 How are tariffs calculated?

The amount of customs duties payable on any importation is a function of the rate of duty (as determined above) and the valuation of the goods. This is because most of Canada's tariff rates are imposed on an *ad valorem* (or percentage) basis. In Canada, the primary method for customs valuation is the "transaction value" system, under which the value for duty is the price paid for the goods when sold for export to a purchaser in Canada, subject to specified adjustments. A non-resident may qualify as a "purchaser in Canada" where the non-resident imports goods for its own use and not for resale, or for resale if the non-resident has not entered into an agreement to sell the goods prior to its acquisition from the foreign seller. Otherwise, customs value will be based on the sale price charged by the non-resident seller to the customer who is resident, or who has a permanent establishment, in Canada. The transaction value method may not be available in certain other circumstances, such as where the buyer and seller do not deal at arm's length or where title to the goods passes to the buyer in Canada. In that event, other valuation methods will be considered in the following order: (1) transaction value of identical goods; (2) transaction value of similar goods; (3) deductive value; (4) computed value; and (5) residual method.

The transaction value method, if applicable, begins with the sale price charged to the purchaser in Canada. However, the customs value is determined by considering certain statutory additions, as well as permitted deductions. For instance, selling commissions, assists, royalties, and subsequent proceeds must be added to arrive at the customs value of the goods. The value of post-importation services may be deducted from the customs value of the goods.

If the importer's goods originate primarily from suppliers with whom the importer is related and the importer wishes to use the transaction value method of valuation, the importer is frequently requested to demonstrate that the relationship did not influence the transfer price between the importer and the vendor. In such a situation, documentation may be required to establish that the transfer price was acceptable as the transaction value.

3.5.4 How are tariffs assessed?

Canada has a self-assessment customs system. Importers and their authorized agents are responsible for declaring and paying customs duties on imported goods. In addition, importers are required to report any errors made in their declarations of tariff classification, valuation or origin when they have "reason to believe" that an error has been made. This obligation lasts for four years following the importation of any goods. The Act imposes severe penalties for non-compliance with this and other provisions, up to C$25,000 per occurrence.

3.5.5 What penalties are imposed for non-compliance with customs laws?

Where a person has failed to comply with the provisions of the *Customs Act*, the Canada Border Services Agency (the CBSA) is authorized to take several enforcement measures, including seizures, ascertained forfeitures, or the imposition of administrative monetary penalties under the Administrative Monetary Penalty System (AMPS).

Seizures and ascertained forfeitures are applied to the more serious offences under the *Customs Act*, such as intentional non-compliance, evasion of customs duties, and smuggling.

Importers may be liable for penalties of up to C$25,000 per contravention in accordance with the AMPS. The CBSA maintains a "compliance history" for each importer. The retention period for an individual contravention is either one or three years for penalty calculation purposes only. However, the contravention remains on the AMPS system for six years plus the current year. Repeat offenders may be subject to increased penalties.

3.5.6 Country of origin issues

Certain goods listed in regulations made pursuant to the *Customs Tariff* must be marked with their country of origin in order to be imported into Canada. In the case of goods imported from a NAFTA country, the relevant regulations base the determination of origin on the basis of tariff shift rules, which are in turn dependent on the tariff classification of components and the finished product. In the case of goods imported from any country other than a NAFTA country, the country of origin is the country in which the goods were "substantially manufactured".

3.5.7 Which products are subject to import controls?

Almost all goods may be imported into Canada, subject to compliance with certain conditions imposed by the federal and, sometimes, provincial government(s). Goods over which Canada imposes import controls and requires import permits are listed on the Import Control List. Other Canadian laws which must be complied with in relation to imports include: labelling laws for goods intended for retail sale; emission control standards for vehicles; health and sanitary conditions for food and agricultural imports; certain goods, for example, electrical appliances, which must be certified by a recognized certification body; and imports of liquor, wine and beer which may require prior authorization from the appropriate provincial liquor commission.

3.6 Domestic trade remedy actions

3.6.1 Antidumping and anti-subsidy investigations

The *Special Import Measures Act* (SIMA) contains measures designed to protect businesses in Canada from material injury due to unfair import competition. SIMA's provisions are based on Canada's rights and obligations set out in the WTO agreements.

The SIMA allows Canadian producers to file a complaint against unfairly traded imports and to request relief in the form of antidumping or countervailing duties where material injury or retardation results from: (1) imports that are "dumped" (i.e., sold at lower prices in Canada than in the exporter's home market); or (2) imports that are unfairly subsidized by the government of the exporter's country.

Canada's trade remedy regime establishes a bifurcated process under which the CBSA has jurisdiction over determinations of dumping and subsidization and the CITT enquires into and considers the issue of whether any dumping or subsidization is causing or is likely to cause material injury to the affected Canadian industry.

If the CITT makes a preliminary determination of injury, and the CBSA makes preliminary and final determinations of dumping or subsidization, the CITT goes on to consider whether there is "material injury". If the CITT makes a finding of material injury, an antidumping duty (equal to the margin of dumping found by the CBSA) or a countervailing duty (equal to the margin of subsidization found by the CBSA) will be imposed on all importations of the subject goods for a period of five years. During this time, the CBSA may initiate re-investigations to update the margin of dumping or subsidization, as the case may be, and the CITT may review its finding if the circumstances warrant. At the expiry of the five-year period, the CITT may review its finding and may rescind or continue the finding for an additional period of five years (with no limit on the number of continuation orders permissible).

A final determination of the CBSA or CITT is subject to judicial review by the Federal Court of Appeal. Where the dumping/subsidy investigation involves U.S. or Mexican goods, an aggrieved party may choose to request a review of the CBSA or CITT finding by a NAFTA ad hoc panel of trade law experts. A review of final antidumping or countervailing duty determinations with respect to U.S. or Mexican goods must be undertaken by an ad hoc NAFTA panel, as the NAFTA provides that there is no recourse to judicial review of final determinations.

3.6.2 Safeguard protection

The SIMA applies only in the case of unfairly traded (i.e., dumped or subsidized) imports that are causing material injury to a Canadian industry. However, the Canadian International *Trade Tribunal Act* and the *Customs Tariff* provide for a trade remedy in the case of fairly traded goods which nevertheless are causing or threatening to cause "serious injury" to a Canadian industry. These are called "safeguard" actions. In such cases, the CITT may hold an inquiry and may make recommendations to the Minister of Finance. The Minister of Finance is authorized, in appropriate cases, to take certain safeguard actions against such imports, including imposing surtaxes or quotas for a limited time.

3.7 Procurement (government contracts) review

The NAFTA, the AIT and the WTO Agreement on Government Procurement (AGP) require the signatories to the agreements to provide open access to government procurement for certain goods and services. These agreements also require signatory governments to maintain an independent bid challenge (complaint) authority to receive complaints. The CITT is the complaint authority for Canada.

Parliament has enacted legislation designed to ensure that the procurements covered by NAFTA, the AIT or the AGP are conducted in an open, fair and transparent manner and, wherever possible, in a way that maximizes competition. While there is considerable overlap in the scope and coverage of procurements covered by these international agreements, several areas have significant differences. The most notable differences are the goods and services that they include and the minimum monetary thresholds for goods, services and construction services contracts. These monetary thresholds are subject to periodic review.

The federal government has agreed to provide potential suppliers equal access to federal government procurement for contracts involving certain goods and services bought by approximately 100 government departments, agencies and Crown corporations. Still, on occasion, a potential domestic or foreign supplier may have reason to believe that a contract has been or is about to be awarded improperly or illegally, or that, in some way, the potential supplier has been wrongfully denied a contract or an opportunity to compete for one. The CITT provides an opportunity for redress for potential suppliers, both Canadian and foreign-based, concerned about the propriety of the procurement process relating to contracts covered by NAFTA, the AIT or the AGP.

As discussed above, the NWPTA requires the governments of Alberta, British Columbia and Saskatchewan to provide open and non-discriminatory access to procurements in excess of minimum thresholds.

3.8 Export controls, economic sanctions and industry-specific trade laws

3.8.1 Which products are subject to export controls?

Canada's export controls are based on several international agreements and arrangements, such as the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technology and the Treaty on the Non-Proliferation of Nuclear Weapons.

Canada's *Export Control List* identifies specific goods and technology which may only be exported from Canada to specified destinations if an export permit is obtained. The *Export Control List* is divided into seven groups of items: dual-use list, munitions list, nuclear non-proliferation list, nuclear-related dual-use list, miscellaneous goods and technology list, missile technology control regime list, and chemical and biological weapons non-proliferation list. Under the *Export and Import Permits Act* (EIPA), the Minister of Foreign Affairs may issue an export permit to a corporation having its head office in Canada or operating a branch office in Canada.

Some goods and technology on the *Export Control List* may be exempted from the permit requirement if they are being shipped to certain countries, such as the U.S. Goods or technology which have been manufactured in the U.S., imported into Canada, and are proposed for export without any value added in Canada require an export permit. Individual permits are required for the export of these U.S.-origin goods to Cuba, Iran, North Korea, Syria and countries on Canada's Export Control List, and general export permits are required for all other destinations. The U.S. government may also require the Canadian company to obtain explicit re-export authorization before exporting the items from Canada.

There is currently a ban on all imports and exports to Iran subject to certain exceptions that are primarily limited to humanitarian goods and communications tools.

The *Area Control List* restricts the export of all products to specified countries, currently Belarus and North Korea. The export of any goods or technology to countries on the Area Control List requires an export permit.

The *Export Act* restricts the export of certain articles. It allows Canada, in specified situations, to impose export duties on certain logs and pulpwood, ores, petroleum in its crude or partly manufactured state, and intoxicating liquors.

3.8.2 Economic sanctions

The export of certain types of goods and certain activities may be subject to United Nations trade sanctions or arms embargoes against particular countries or regions. The *United Nations Act* (UNA) empowers Canada to make such orders and regulations as are necessary to facilitate Canada's compliance with measures taken by the United Nations Security Council. Under the UNA, Canada has implemented regulations which adopt UN resolutions prohibiting certain exports, principally arms and related material, to countries including North Korea, Iran and Lebanon. In some cases, UNA sanctions prohibit dealing with listed persons and entities. Listed persons and entities are normally associated with the subject country's government. Therefore, exports and other transactions should be carefully reviewed so that UNA sanctions are not violated.

The *Special Economic Measures Act* (SEMA) empowers Canada to take unilateral action, including embargoes, against a country in specified circumstances. The SEMA provides authority for the Government of Canada to impose orders or regulations to restrict or prohibit persons in Canada, or Canadians outside Canada, from dealing in property of a foreign state (or its residents or nationals), from exporting, selling or shipping goods to a foreign state, from transferring technical data to a foreign state, from importing or acquiring goods from a foreign state or from providing or acquiring any financial or other services to or from a foreign state. Currently, Canada has imposed economic measures under the SEMA against North Korea, Iran, Syria, Burma, Libya, Zimbabwe, Ukraine and Russia. Canadian companies are prohibited from making new investments in some, but not all, countries subject to measures under the SEMA.

Where UNA or SEMA sanctions apply, it may be possible to obtain a permit allowing an otherwise prohibited transaction. While exports or provision of humanitarian assistance are often allowed, the Government of Canada may be willing to issue permits for certain types of non-humanitarian commercial transactions, depending on the government's specific priorities and policies in respect of the particular country subject to sanctions.

3.8.3 Sector-specific trade laws

Canada has certain trade laws that are specific to individual industries. For example, in the forestry industry, there are restrictions on the export of logs and softwood lumber from Canada. Similarly, permits are required for the export of steel. Steel, agricultural goods and textile products are examples of goods that are subject to import controls.

Moreover, numerous Canadian laws may directly or indirectly impose trade controls. Consumer product safety laws and environmental regulations, for example, impact sales of specified types of goods by prohibiting or restricting importation into Canada unless the goods first comply with applicable Canadian standards. In some cases, the manufacture or sale of goods may be subject to Canadian standards even where those goods are intended solely for export.

Other government departments may also control the export of goods, requiring additional permits even where an export permit has already been granted pursuant to the EIPA. Departments that may also exercise controls over exports include Canadian Heritage, Natural Resources Canada, Fisheries and Oceans, Health Canada, the Canadian Wheat Board, Agriculture and Agri-Food Canada, Environment Canada, and the Canadian Food Inspection Agency. The circumstances that require additional departmental approvals are frequently not intuitive and care must be taken to ensure compliance with all export controls.

3.8.4 International Traffic In Arms Regulations and the Canadian exemption

The U.S. *International Traffic in Arms Regulations* (ITARs) generally regulate the export and licensing of certain defence articles and services from the U.S. For exports of defence articles and services to Canada for end-use in Canada, the ITARs contain a very limited exemption for a "Canadian-registered person". For a Canadian business to qualify for exemption from the licensing requirements under the ITARs, it must be registered under the Canadian *Defence Production Act*. A list of registered businesses is maintained by the Canadian *Controlled Goods Directorate*. There is a process to extend this exemption to the employees of a registered business. However, this exemption may not be available to employees of a registered business who are dual citizens of a listed country if the employee has "substantive contacts" with the listed country. Employers are required to screen dual-citizen employees for such "substantive contacts". When such employees are identified, a risk of technology diversion is presumed and the employer may not give such employee access to the defence articles or information unless the U.S. Directorate of Defence Trade Controls grants a discretionary individual exemption.

The *Controlled Goods Regulations* made under the *Defence Production Act* set out the process for the registration of Canadian businesses in the *Controlled Goods Program*, described in greater detail in the following section.

3.9 Controlled Goods Program

The *Controlled Goods Program* is intended to safeguard potentially sensitive goods and technology and prevent them from falling into the wrong hands. The program requires companies dealing with specified civilian or military goods to register with the *Controlled Goods Directorate*, undergo security assessments, develop and implement a security plan, control access to the particular goods, report security breaches and maintain extensive records on all such goods for the duration of registration and for five years after registration expires.

Goods subject to the *Controlled Goods Program* are a subset of goods on Canada's *Export Control List*. These include goods listed in the following parts of the Export Control List: Group 2 (the "Munitions" List, with limited exceptions); Group 5 (specifically, item 5504, "strategic goods"); and Group 6 (the Missile Technology Control Regime, all items listed). The scope of these provisions is quite broad and captures many innocuous products that would not ordinarily be associated with military or missile applications. The inclusion of "technology" means that technical information such as documents or emails relating to these goods may also be captured.

The Regulations specify that in determining whether to register a business, the government must consider, on the basis of a security assessment, the risk that the applicant poses of transferring the controlled goods to someone not registered or exempt from registration.

While the procedures can be very onerous, penalties for non-compliance are severe. Companies that fail to comply can have their registration revoked and they, as well as individuals, may receive fines from C$25,000 to C$2-million or a term of imprisonment not exceeding 10 years, or both.

The breadth of the goods involved, coupled with the severity of the potential penalties, make it imperative that companies doing business in Canada ensure that they are not dealing with controlled goods or technology if they have not registered with the Controlled Goods Program.

3.10 *Foreign Extraterritorial Measures Act* (FEMA) and doing business with Cuba

The FEMA is largely an enabling statute to protect Canadian interests against foreign courts and governments wishing to apply their laws extraterritorially in Canada by authorizing the Attorney General to make orders relating to measures of foreign states or foreign tribunals affecting international trade or commerce. The Attorney General has issued such an order with respect to extraterritorial measures of the U.S. that adversely affect trade or commerce between Canada and Cuba. The order was originally issued in retaliation for certain amendments to the U.S. *Cuban Assets Control Regulations*, and was further amended in retaliation for the enactment of the U.S. *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act*, both of which aim to prohibit the activities of U.S.-controlled entities domiciled outside the U.S. (e.g., Canadian subsidiaries of U.S. companies) with Cuba.

The FEMA Order imposes two main obligations on Canadian corporations. First, the FEMA Order requires Canadian corporations (and their directors and officers) to give notice to the Attorney General of any directive or other communication relating to an extraterritorial measure of the U.S. in respect of any trade or commerce between Canada and Cuba that the

Canadian corporation has received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada. Second, the FEMA Order prohibits any Canadian corporation from complying with any such measure of the U.S. or with any directive or other communication relating to such a measure that the Canadian corporation has received from a person who is in a position to direct or influence the policies of the Canadian corporation in Canada.

This means that Canadian companies wishing to carry on business with or in Cuba, whose goods are regulated under the U.S. *Cuban Assets Control Regulations* for example, could be in conflict with U.S. law. On the other hand, if the Canadian company decided not to do business in Cuba because a U.S. extraterritorial measure prohibited such conduct, the company could be in violation of the Canadian FEMA. The conflict of U.S. and Canadian trade sanctions can result in legal liability for both individuals and corporations, not to mention public relations challenges.

3.11 Canadian anti-bribery legislation and international transactions

The domestic Canadian legislation relating to the bribery of foreign officials is the *Corruption of Foreign Public Officials Act* (CFPOA) which is based on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The CFPOA is broad legislation that applies to any business carried on in Canada or elsewhere. The CFPOA prohibits giving or offering any advantage or benefit of any kind, either directly or indirectly, to a foreign public official in order to obtain or retain an advantage in the course of business. The CFPOA also includes a "books and records" offence that makes it illegal to undertake improper accounting practices that serve the purpose of "bribing a foreign public official in order to obtain or retain an advantage in the course of business for the purpose of hiding that bribery".

The CFPOA defines a "foreign public official" as a person who holds a legislative, administrative or judicial position in a foreign state, a person who performs public duties or functions for a foreign state, or an official or agent of a public international organization. As a result of significant international pressure, the Royal Canadian Mounted Police has established a special unit dedicated to investigating international bribery and enforcing the CFPOA.

The U.S. equivalent to the CFPOA is the *Foreign Corrupt Practices Act* (FCPA). Both Acts give authorities jurisdiction to charge individuals as well as corporations; however, the FCPA has a longer jurisdictional reach than the CFPOA, applying to issuers in the U.S., domestic concerns and any person pursuing a bribery arrangement with a foreign official while within the territory of the U.S. Canada has generally restricted its jurisdiction to the prosecution of offences under the CFPOA where the offence is committed by a national or otherwise in whole or in part in Canada (a territorial nexus) or, if committed by a Canadian national outside Canada, there is a "real and substantial" link between the offence and Canada. For example, a Canadian corporation may be liable for the actions of an overseas subsidiary if there is a "real and substantial" connection between the offence that has occurred overseas and the Canadian corporation, such as the Canadian corporation directing a subsidiary to make illegal payments.

Under recent amendments to the CFPOA, any person who commits an offence under the CFPOA outside Canada is deemed to have committed that act in Canada if the person is a

Canadian citizen, a permanent resident or a corporation, society, company, firm or partnership that is incorporated or organized under the laws of Canada or a province. Recent prosecutions under the CFPOA and news of a number of ongoing investigations may indicate stronger enforcement of the CFPOA.

Canadian companies may also be held liable for the acts of agents or contractors if the agent or contractor plays an important role in managing the company's activities, or if an officer of the company knows about the conduct of the agent or contractor and does not take all reasonable measures to stop them.

The CFPOA contains several significant exceptions, rooted in the OECD Convention. The CFPOA permits payments to foreign public officials if the payment is permitted under the domestic law of the foreign state or if the payments are considered "reasonable expenses incurred in good faith" that are directly related to the promotion of products and services or the performance of a state contract.

Contravention of the CFPOA is a criminal offence and could result in significant prison sentences or a fine (with no maximum). The *Criminal Code* also prohibits the retention of the proceeds of crime; therefore, a convicted company may also be ordered to forfeit all proceeds – not just profits – obtained from the act of bribery.

4. Product Standards, Labelling and Advertising

4.1 How are product standards requirements created? Are Canadian product standards in line with international standards?

Canadian legislators and industry bodies are highly influenced by international standards, and so Canadian standards frequently reflect both U.S. and European influences. These standards may take several different forms, from mandatory legal requirements to voluntary industry codes.

Mandatory legal requirements may be imposed under federal and/or provincial legislation, particularly where health or safety issues are involved. These requirements may be written into the legislation itself or may be incorporated into legislation by reference (e.g., legislation may require compliance with the latest issue or edition of a voluntary standard).

The Standards Council of Canada (Council) is the national co-ordinating body for the development of voluntary standards through the National Standards System. The standards-developing organizations accredited by the Council are the Canadian General Standards Board (CGSB), the Canadian Standards Association (CSA Group), Underwriters Laboratories Inc., the Underwriters Laboratories of Canada (ULC Standards), le Bureau de normalisation du Québec, ASTM International and the Air-Conditioning, Heating and Refrigeration Institute (AHRI). The Council also accredits other organizations, including certification bodies, inspection bodies, and testing/calibration laboratories.

The concern that standards constitute non-tariff trade barriers has been a major international and free trade issue. The Council participates in a variety of international harmonization initiatives, including the International Electrotechnical Commission and the World Trade Organization's Committee on Technical Barriers to Trade, established under the WTO Agreement on *Technical Barriers to Trade*.

4.2 Consumer product safety legislation

The *Canada Consumer Product Safety Act* (CCPSA), which came into force on June 20, 2011, represents a radical change to consumer product regulation in Canada. In particular, the CCPSA requires mandatory incident reporting and record-keeping by manufacturers, importers and sellers, and gives the Minister broad powers to order recalls and product testing. These and other requirements bring Canada's regulation of consumer products more in line with the regulatory regime in the U.S. and can result in significant monetary penalties as well as class actions and other litigation.

The CCPSA applies to all consumer products except those specifically exempted from the Act. The term "consumer product" is defined broadly to include components, parts, accessories and packaging that may be obtained by an individual to be used for non-commercial purposes. The CCPSA does not apply to certain products regulated under other existing legislation, such as food, drugs (including natural health products), medical devices, cosmetics and pest control products. Nevertheless, the legislation still impacts otherwise exempt organizations (e.g., food or non-prescription drug companies) that distribute non-exempted products (e.g., in their packaging or via mail-in offers).

There are several key provisions in the CCPSA that manufacturers, importers and sellers of consumer products should be aware of.

4.2.1 General prohibition

There is a general prohibition in the CCPSA against the manufacture, importation, advertisement or sale of any consumer product that is a "danger to human health or safety" or is subject to a recall or certain other corrective measures. The term "danger to human health or safety" means any existing or potential unreasonable hazard posed by a consumer product during normal or foreseeable use that may reasonably be expected to cause death or an adverse effect on health.

In addition, the CCPSA prohibits any person from manufacturing, importing, advertising or selling a specific consumer product listed in Schedule 2. Regulations published under the CCPSA govern various aspects of certain prescribed products, including manufacturing standards, labelling requirements and prohibited components/substances.

4.2.2 Mandatory record-keeping and reporting

Manufacturers, importers, advertisers, sellers and testers of consumer products must maintain documentation that allows consumer products to be traced through the supply chain. Retailers must keep records of the name and address of the person from whom they obtained the product and all others must keep records of the name and address of the person from whom they obtained the product *and* to whom they sold it. These documents must be kept for six years at the Canadian place of business of the organization to which the provision applies.

Manufacturers, importers, advertisers and sellers of consumer products must notify the Minister and the person from whom they received a consumer product within *two days* of an "incident" related to the product. An incident is defined to include:

- An occurrence that resulted or may reasonably have been expected to result in an individual's death or serious adverse health effects

- A defect or characteristic that may reasonably be expected to result in an individual's death or serious adverse health effects

- Incorrect or insufficient labelling or instruction that may reasonably be expected to result in an individual's death or serious adverse health effects, or

- A recall or other measure initiated by a foreign entity, provincial government, public body or aboriginal government.

The manufacturer or importer must provide a written report of the incident within 10 days of the incident.

4.2.3 Powers of the Minister

The Minister is granted broad powers under the CCPSA in several areas. The Minister has the authority to order manufacturers and importers of consumer products to conduct tests or studies on a product and to compile information to verify compliance with the CCPSA and regulations and to provide the Minister with that information within the time and in the manner the Minister specifies.

If the Minister believes on reasonable grounds that a consumer product is a danger to human health or safety, the Minister may order a manufacturer, importer or seller to recall the product or to implement other specified corrective measures. If a recall or corrective measure order issued by the Minister is not complied with, the Minister may carry out the recall at the expense of the non-compliant manufacturer, importer or seller. A review of the recall, if requested in writing by a manufacturer, importer or seller, must be completed within 30 days (or as extended by the review officer). The order of the Minister remains in effect while the review is ongoing.

The Minister also has broad powers to disclose personal and business information without consent to a person or government that carries out functions relating to the protection of health and safety.

Further, under the CCPSA and its regulations, every person who contravenes an order to take specified measures with respect to a consumer product, such as an order to recall a product, commits a violation under the Act and is liable to pay an administrative monetary penalty.

4.3 What are the sources of labelling requirements? Must or should all labels be bilingual?

Product labelling is regulated at both the federal and provincial levels through statutes of general application and statutes applicable to specific products. The *Consumer Packaging and Labelling Act* (CPLA) is the major federal statute affecting pre-packaged products sold to consumers. The CPLA and the associated *Consumer Packaging and Labelling Regulations* require pre-packaged consumer product labels to state the common or generic name of the product, the net quantity and the manufacturer's or distributor's name and address. Detailed rules are set out as to placement, type size, exemptions and special rules for some imported products.

The CPLA and associated regulations, like most federal legislation, require mandatory information on labels to be in both English and French. There are exceptions – most notably that the manufacturer's name and address can be in either English or French. While non-mandatory information is not *generally* required to be presented bilingually under federal law, most Canadian packaging is nevertheless fully bilingual for marketing and liability reasons. Moreover, labelling on products that are to be sold in Quebec is effectively required to be fully bilingual because the Quebec *Charter of the French Language* requires that most product labelling and accompanying materials, such as warranties, be in French. Labelling in Quebec can contain another language or languages, provided the French text has equal or greater prominence as compared to any other language.

Marking of the country of origin is required for certain products listed in regulations issued pursuant to the *Customs Tariff*, as further described in Section IV, 3.5.6.

Many federal statutes, such as the *Food and Drugs Act* and the *Textile Labelling Act*, mandate labelling and language requirements for specific products and/or claims.

4.4 Food

All food products are regulated under the *Food and Drugs Act* and *Food and Drug Regulations*. In addition to labelling requirements common to other pre-packaged products, foods must also, with a very few exceptions, contain a list of ingredients in English and French. A "best before" date (in a particular Canadian format) is required for foods with a shelf life of less than 90 days. Nutrition labelling, with limited exceptions, is mandatory. Only a few very closely defined health claims are permitted. Specialized federal legislation such as the *Canada Agricultural Products Act*, the *Meat Inspection Act* and the *Fish Inspection Act* applies to certain categories of food. Canadian food legislation regulates claims, sets standards for specific food products and mandates standards of purity and quality.

Canada is currently undergoing a modernization of food inspection legislation. The *Safe Food for Canadians Act* (SFCA) received Royal Assent in 2012, but will not come into force until early 2015, after supporting regulations have been developed. The Act, which is intended to align Canadian requirements more closely with trade requirements under the U.S. *Food Safety Modernization Act*, will replace the *Canada Agricultural Products Act*, the *Meat Inspection Act*, the *Fish Inspection Act* and the food-related provisions of the *Consumer Packaging and Labelling Act*. In the interim, the Canadian government has proposed and/or launched consultations for a number of food safety initiatives, including changes to Canada's food inspection model and nutrition labelling rules.

4.5 Drugs

Drugs are also regulated in Canada under the federal *Food and Drugs Act* and the *Food and Drug Regulations*. Prescription and non-prescription drugs require prior market authorization identified by a Drug Identification Number (DIN) which must appear on the product packaging. In the case of "new drugs", a notice of compliance is also required which is issued following an assessment of the drug's safety and efficacy. The location of sale of drugs and the professions involved in the prescribing and sale of drugs, such as physicians and pharmacists, are regulated under provincial legislation and frequently by self-regulatory professional organizations.

"Natural health products" such as vitamins and minerals, herbal remedies, homeopathic medicines and traditional medicines (such as traditional Chinese medicines) are regulated by the *Natural Health Products Regulations*. Natural health products require prior market authorization (product licence) identified by a product registration number (NPN) or, in the case of a homeopathic medicine, by the letters DIN-HM, which must appear on the product packaging. Canadian sites that manufacture, package, label and import these products must have a site licence. These requirements are quite different than in the U.S., where similar types of products are considered "dietary supplements" and are not subject to the same level of regulatory oversight as natural health products.

On December 6, 2013, the government introduced proposed amendments to the *Food and Drugs Act* under Bill C-17, the *Protecting Canadians from Unsafe Drugs Act*. Bill C-17 proposes granting the Minister substantial new powers, including the ability to conduct recalls, order modifications to labels/packaging, and require the submission of health and safety data post-approval. In addition, Bill C-17 was amended in June 2014 to permit disclosure of confidential business information relating to drugs and medical devices under certain circumstances. Bill C-17 has passed third reading in the House of Commons but has yet to be passed by the Senate.

4.6 Weights and measures

The *Weights and Measures Act* mandates that the metric system of measurement is the primary system of measurement in Canada. While a metric declaration of measure is required, in most cases it is also possible to have a non-metric declaration in appropriate form.

4.7 Advertising regulations and enforcement

4.7.1 Federal law

Product advertising and marketing claims are primarily regulated by the *Competition Act* (Canada), which has a dual civil and criminal track for advertising matters. The *Competition Act* includes a general prohibition against making any misleading representation to the public for the purpose of promoting a product or business interest that is false or misleading in a material respect. It is not necessary to establish that any person was actually deceived or misled by the representation. Making a false or misleading representation is a criminal offence if done knowingly or recklessly. In the absence of knowledge or recklessness, the *Competition Act* provides for civil sanctions including cease and desist orders, mandatory publication of information notices and administrative monetary penalties.

Ordinary price or sale claims that do not meet time or volume tests set out in the *Competition Act* are also prohibited. The Competition Bureau has been particularly active in bringing enforcement actions against such claims. Performance, efficacy or length of life claims for products must be supported by adequate and proper testing conducted before the claims are made. The *Competition Act*'s telemarketing provisions require disclosure of certain information during telemarketing calls and render failures to disclose and certain deceptive practices criminal offences.

The *Competition Act* also requires disclosure of key details of promotional contests, such as the number and approximate value of prizes and factors affecting the chances of winning. It is prohibited to send a deceptive notice that gives the recipient the general impression that a prize will be or has been won and that asks or gives the recipient the option to pay money or incur a cost. Because of anti-lottery provisions in the *Criminal Code*, most Canadian contests offer consumers a "no purchase" method of entry and require selected entrants to answer a skill-testing question before being confirmed as winners.

The *Competition Act* provides a civil right of action to those suffering damage as a result of conduct contrary to the criminal provisions of the Act, including the criminal false or misleading advertising provisions. While no similar right of action exists with respect to civilly reviewable conduct, recourse may be sought through common law tort and trade-mark routes.

Monetary penalties for civilly reviewable false or misleading representations can be significant. The maximum civil penalty under the *Competition Act* is C$15-million for a second order against a corporation. Courts may also order advertisers who engage in misleading advertising to disgorge the proceeds to persons to whom the products were sold (excluding retailers, wholesalers and distributors to the extent that they have resold or distributed the products). Courts are given broad authority to specify terms for the administration of such funds, including how to deal with unclaimed or undistributed funds.

On July 1, 2014, the false or misleading advertising provisions of the *Competition Act* were amended by Canada's new Anti-Spam Legislation. The amendments, which were introduced to give the Competition Bureau greater oversight of online activity, prohibit any representation in an electronic message that is false or misleading in a material respect. In addition, the amendments prohibit any false or misleading representation, regardless of materiality, in the sender description or subject line of an electronic message, or in a "locator" (e.g., metadata or URL). Prohibited representations will constitute criminal offences if performed knowingly or recklessly; in the absence of knowledge or recklessness, the representations will be considered civilly reviewable under the *Competition Act*. For more information on Canada's Anti-Spam Legislation, see Section XII, "Information Technology".

4.7.2 Provincial law

Provincial legislation, particularly consumer protection and business practices legislation, also impacts advertising. For example, *the Consumer Protection Act*, *2002* (Ontario) renders it an "unfair practice" to make false, misleading or deceptive consumer representations, including with respect to sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or quantities that the products do not have, and even goes so far as to create, as an unfair practice, certain "unconscionable" representations. Businesses that make unconscionable consumer representations face exemplary or punitive damages. Other remedies include rescission or having to refund that portion of the purchase price which exceeds the "fair value" of the goods or services in question. Non-residents should pay particular attention to the Ontario *Consumer Protection Act, 2002* as it applies if the consumer is located in Ontario, even if the supplier is not.

Promotional contests run in Quebec must comply with contest legislation in that province, including notice, duty, security and filing requirements. Moreover, Quebec's *Charter of the French Language* generally requires commercial advertising in Quebec to be displayed in French, although, depending on the location of the advertisement, it may be accompanied by a version in one or more other languages provided that the French version is at least as prominent or, in some situations, markedly predominant. Depending on the circumstances, exceptions may apply. For instance, a "recognized" trade-mark within the meaning of the *Trade-marks Act* may appear exclusively in a language other than French on commercial advertising, posters or public signage unless a French version of that trade-mark is registered. This application of this exception with respect to displays of trade-marks on storefront signage has recently been confirmed by the Superior Court of Québec; however, that decision is currently under appeal.

5. Product Liability – Ontario Law

5.1 How broad is the potential for liability in a contractual claim?

A party to a purchase or supply contract is entitled to sue for damages for breach of the contract if the quality, fitness or performance of the product does not comply with express or implied contractual terms. Implied terms may be found by reference to trade practice or common usage. In addition, provincial sales of goods legislation will generally imply, as part of any agreement for the sale of goods, terms and conditions regarding the fitness and quality of the products sold. Legislation commonly prohibits exclusion of these statutory warranties and conditions from contracts for the sale of products to consumers. In a few provinces, legislation implies statutory warranties in favour of consumers by manufacturers and others in the distribution chain in certain circumstances, even in the absence of contractual privity.

5.2 How broad is the potential for liability in a negligence claim?

Where a purchaser or user of a defective product does not have a contractual relationship with the proposed defendant and statutory warranties are not implied, the purchaser or user will have to prove negligence; that is, failure to exercise reasonable care in the preparation or putting up of the product which results in injury to the foreseeable user or the user's property. Product liability claims under common law can be made for negligently manufacturing a product, negligently designing it or failing to warn foreseeable users of the product of dangers inherent therein. Although negligence must be proven in each case, manufacturers will, as a practical matter, be held strictly liable if a product has a manufacturing defect (i.e., it was built in a way that was not intended by the manufacturer), because the court will assume there was negligence in the manufacturer's production process or by its employees and will not require the consumer to establish which it was.

In addition to product liability claims, a product vendor, manufacturer or distributor who recklessly or carelessly makes false statements regarding its safety or utility may be held liable for any losses arising from reasonable reliance on such statements. To establish liability for such negligent misrepresentation, the court must find that there existed a "special relationship" between the person making the statement and the recipient of the statement, actual or constructive knowledge on the part of the maker that the recipient intended to rely on the accuracy of the statement, and proof that such reliance was reasonable and caused the loss. Provincial consumer protection legislation may provide consumers with additional remedies for "false," "misleading" or "deceptive" representations, and is increasingly being relied upon in product liability class actions.

All parties in the distribution chain are potentially liable for product liability claims if negligence can be established. Examples would include failure to detect any product defect that they knew or ought to have known existed through reasonable inspection, or failing to provide warnings to potential users of dangers they knew or ought to have known were associated with use of the product.

Under provincial negligence legislation, joint tortfeasors are jointly and severally liable for a plaintiff's loss in most cases. The court may determine the degree of fault or negligence of various persons whose collective "fault" or neglect caused injury to a plaintiff and apportion it among those persons. However, the plaintiff can recover all damages from a defendant found even partly at fault, and it will then be up to that defendant to seek contribution from other tortfeasors.

5.3 What is the extent of a person's liability?

A plaintiff's damage recovery may be reduced to reflect any fault or negligence on the plaintiff's part that contributed to the injury or loss. The recovery of damages for negligence, negligent misrepresentation, breach of the duty to warn and breach of contract are limited to losses reasonably foreseeable to the parties and not considered "remote". Damages for personal injury and property damage are intended to be compensatory. General damages for pain and suffering are presently capped at about C$347,500. Canadian law is unsettled in some respects regarding the extent to which economic loss arising from a product defect may be recovered in a negligence action where the defect does not cause personal injury or property damage other than to the product itself, or the risk of such loss. However, several Canadian courts have expressed doubt that these types of economic losses are recoverable, and a recent appellate decision (that was denied leave to appeal to the Supreme Court of Canada) held that diminution in value caused by a non-dangerous defect is not recoverable in negligence. Economic losses are recoverable in claims respecting breach of contract, negligent misrepresentation and breach of the duty to warn.

5.4 Other litigation risk: class actions, juries and punitive damages

Historically, Canadians have been less litigious than Americans and damage awards have been much lower. Jury trials are much less common than judge-alone trials; there is no constitutional right to a jury trial in a civil case. Punitive damages are available in Canada in certain circumstances, though such awards have historically been very rare in product liability cases and, in most cases, fairly modest when made. Outside the class action context, there has been some recent support for higher punitive damage awards, though still in very limited circumstances. (Also, see Section XVIII, "Dispute Resolution".)

In recent years, however, class action legislation in Canadian provinces has changed the Canadian litigation landscape, resulting in a number of multimillion-dollar settlements in the product liability area. The threshold for class certification is generally considered to be lower in Canada than the U.S. and product liability class actions for personal injury damages, medical monitoring costs, refunds and disgorgement of revenues from the sales of the product have been certified despite vigorous opposition from defendants. The latter claims for disgorgement are based on a novel theory of liability called "waiver of tort". The exact nature and scope of this doctrine remain a subject of debate. However, courts in some provinces have recently declined to certify issues relating to waiver of tort in class actions.

To date, relatively few class actions have proceeded to trial in Canada (outside of Quebec), though this number has increased in recent years. It remains to be seen whether the availability of class actions will result in more frequent jury trials, larger punitive damage awards or other changes in substantive laws.)

V. Procurement

Organizations that are either conducting competitive procurement processes in Canada or seeking business opportunities by participating in competitive procurement processes need to understand some basic principles about how procurement law in Canada differs from other jurisdictions.

The following is a summary of the law of procurement as it applies to all of the common law provinces and territories of Canada, that is, all of the provinces and territories other than Quebec. While some of the common law principles are applicable in Quebec, there are also specific statutory rules with respect to conducting competitive procurement processes and contracting with government. For more information, please consult our *Doing Business in Quebec* publication.

1. Procurement Law Framework

The law in Canada with respect to competitive procurement/tendering has been in development since 1981 and is based entirely on common law, in other words, there is no single piece of legislation that governs competitive bidding. What is somewhat unique to Canadian law is that competitive procurement processes create two contracts: (i) the bidding contract which sets out the “rules” that apply up until the completion of the competitive procurement process, and (ii) the substantive contract entered into between the procuring authority and successful bidders. This contractual framework applies to both the public and private sector when issuing or responding to competitive procurement processes.

For the public sector, layered on top of this contractual legal framework is a collection of trade agreements and government guidelines that regulate procurement practices of government and quasi-government entities. These agreements and guidelines generally set out when a public-sector entity is required to conduct an open, competitive procurement process for the acquisition of goods and services, as well as establish certain principles that apply to the procurement processes. A more detailed discussion of these governance obligations is set out below.

1.1 Case law

There are a number of seminal Supreme Court of Canada (SCC) cases which presently inform the law of competitive procurement in Canada:

- The first, and seminal, case is *The Queen (Ont.) v. Ron Engineering & Eastern Construction (Eastern) Ltd*., where the SCC first articulated the “Contract A”/”Contract B” analysis. Contract A is the contract that is made when a bidder submits a bid in response to an invitation to tender, or similar document. Contract B is the agreement that will be formed between the procuring authority and the winning bidder. This case established the legal framework for the development of procurement law in Canada.

- In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Limited*, the SCC clarified that Contract A can only be formed between a procuring authority and compliant bidders; that is, a procuring authority is contractually obliged through Contract A to accept only compliant bids, and only compliant bidders have legal remedies arising from the procurement process as against a procurement authority. At the same time, the SCC recognized and accepted that procuring authorities are entitled to consider "nuanced" views of price and are therefore not bound as a matter of principle to accept only the lowest of compliant bids.

- The third case, *Martel Building Ltd. v. Canada*, affirms that there is a duty owed to treat all compliant bidders fairly and equally, but always with regard to the terms of Contract A as set out in the competitive procurement documents, in this case, a tender call. At the same time, the SCC held that competitive procurement requirements where Contract A is created are not negotiable; that procuring authorities have the right to reserve privileges and impose stipulations; and that there is no duty of care owed in respect of the preparation of competitive procurement documents.

- The last and most recent seminal case is the 2010 decision in *Tercon Contractors Ltd. v. British Columbia* in which the SCC refused to enforce a waiver clause with respect to damages arising out of a breach of Contract A. This case required the SCC to face the competing tension between the implied obligation of "fairness" in procurement and the principle that courts should enforce valid contractual terms. It appears that in a conceptual battle between the right to contract and public policy to protect the integrity of fairness in competitive procurement processes, the fairness obligation has prevailed. There were two other important issues dealt with or alluded to in *Tercon*. First, the SCC left the door open for negotiation within a competitive procurement process, subject to disclosure and a prohibition against changing the fundamental nature of Contract B. Second, the SCC made a brief reference to other administrative law remedies available to a disgruntled bidder, thereby reinforcing the idea that judicial review was an available course of action to challenge public-sector procurement processes.

Two other key cases have been decided by the SCC recently and are worth mentioning. In *Design Services Ltd. v. Canada*, the SCC refused to recognize a new cause of action for "negligent procurement" and, in *Double N Earthmovers Ltd. v. Edmonton*, the SCC held that a procuring authority is permitted to renegotiate a contract on which a competitive procurement process was based after Contract B is signed.

The case law has clearly drawn a distinction between competitive procurement processes that are binding (where Contract A is created) and those that are not intended to be binding (where no Contract A is created). Courts have emphasized that a procuring authority must be clear in its competitive procurement documents as to its intention to create Contract A.

1.2 Procurement governance

1.2.1 Understanding an organization's procurement regulatory framework

A public-sector organization, or an entity that receives the majority of its funding from government, must be conscious of the "procurement regulatory framework" within which it is obliged to function. Each public-sector organization has a unique procurement governance framework and to understand the procurement governance framework of an organization, the following issues should be considered:

- Are there any procurement statutes that apply to the organization? For example, in Ontario, the *Broader Public Sector Accountability Act* prescribes a procurement governance framework for public-sector entities.

- What is the legal status of the organization and does it impact the applicable procurement regulatory framework? For example, in Ontario, is the organization an “agency”, a “Ministry”, a “broader public-sector organization”, a “publicly funded organization”, a “designated broader public-sector organization” or a “local board”?

- Does the organization have a funding agreement or memorandum of understanding with the provincial or federal government? Does that funding agreement or memorandum of understanding specify procurement obligations?

- Does the organization have internal procurement policies that it is obliged to follow?

- Are there any trade agreements that apply to the organization? For example, is the organization “listed” as an organization subject to the Agreement on International Trade or the North American Free Trade Agreement?

- How do the various applicable “regulatory schemes” function as a whole to regulate the organization?

An organization’s procurement governance framework dictates when an open, competitive procurement process is to be used; the circumstances under which an open, competitive procurement process is not required; the principles to be applied to a competitive process undertaken by the organization; and how disputes in relation to the competitive process are to be resolved.

1.2.2 Procurement obligations in trade agreements

An expanding and important factor in the Canadian procurement context is the requirements imposed by various domestic and international trade treaties. The connection between trade treaties and procurement is a relatively straightforward one: since regulating public-sector and quasi-public-sector purchasing is an important way to encourage the elimination or management of trade barriers, procurement rules to ensure fair and open access to government contracts are a natural consequence. Therefore, all government and public-sector entities must be very certain to understand which international and domestic trade treaties, and embedded procurement process requirements, apply to them.

A more detailed discussion of trade agreements is set out in Chapter IV, Section 3.

1.2.3 Federal government procurement

The specific requirements relating to federal government procurement are established and implemented by Public Works and Government Services Canada (PWGSC), which publishes standardized procurement and contract documents for use by various federal government departments and agencies. The *PWGSC Supply Manual* is the federal government’s procurement policy and contains provisions with respect to when the government will conduct an open, competitive procurement process and when it will not; how a procurement process will be conducted; the terms and conditions of a typical procurement process; and how disputes with the federal government are to be resolved.

A separate body of case law arising out of decisions of the Canadian International Trade Tribunal (the CITT) is dominant in the regulation of federal government procurement processes. It is important to note that the CITT cases and the federal court cases arising out of appeals from CITT decisions form a second body or “stream” of case law which sets out the legal context within which federal government procurements are to proceed. A bidder's rights in relation to disputes arising from federal procurement processes will be largely determined by this stream of case law and bidders have the ability to appeal federal government procurement decisions to the CITT, rather than as a civil proceeding.

1.2.4 Comprehensive Economic and Trade Agreement (CETA)

On October 18, 2013, an agreement in principle was signed between Canada and the European Union to approve the Comprehensive Economic and Trade Agreement (CETA). As Canada's biggest bilateral initiative since the North American Free Trade Agreement, CETA will have important implications for procurement. Notably, CETA will expand the ability of businesses to compete in the national, provincial and municipal procurement markets, provided the contracts are above designated threshold values, with some exclusions for certain sectors. Ratification is expected to occur in 2015.

1.2.5 Defence Procurement Strategy

The Department of National Defence and Public Works and Government Services launched a new Defence Procurement Strategy (DPS) in early 2014. The DPS represents a fundamental change to the government's approach to defence procurement. In particular, a key component of the DPS is the rating and weighing of "Value Propositions" as part of the bid evaluation process, depending on the value of the procurement.

2. Issues for Organizations Participating in Canadian Procurement Processes

For organizations participating in Canadian procurement processes, there are three fundamental questions to consider when determining the extent and scope of their legal rights and risks in a competitive procurement.

2.1 What is the procurement governance regime that governs the procuring authority?

This issue is only applicable to public-sector and quasi-public-sector entities, that is, entities that receive the majority or a substantial portion of their funding from public sources.

The answer to this question will determine what procurement obligations the procuring authority is bound by, such as whether the procuring authority is required to conduct an open, fair and transparent process and under what circumstances an entity may obtain goods or services without a competitive process, such as through a single source or sole source.

This will also determine what options are available to a bidder to challenge the procuring authority's competitive procurement process, its decision about whether or not to conduct a competitive procurement process, or other issues related to the procurement process.

2.2 Is the competitive procurement process a binding or non-binding process?

Each procurement process, irrespective of the label given to it, is assessed from a Canadian procurement law perspective on whether or not Contract A, the procurement contract, has been validly created. Therefore, the label given to a competitive procurement process is not as important as whether the competitive procurement documents contain the "hallmarks" of the existence of Contract A. The creation of Contract A creates a binding legal agreement between the procuring authority and the bidder, and is referred to as a "binding" procurement process.

The following have been identified in the case law as hallmarks of Contract A:

- Submissions/bids are irrevocable for a defined period of time.
- Bidders provide bid security.
- Restriction on a bidder's ability to change its proposal after the submission deadline.
- Fully formed contract for goods and/or services is attached to the procurement documents and the successful bidder is required to execute the contract in substantially the same form.
- Pricing, once submitted, is fixed and non-negotiable.

2.3 What are a bidder's rights in a binding procurement process?

If the procurement process is a binding process, that is, Contract A is validly formed, then there are certain rights and obligations on the part of both the procuring authority and the bidder which become effective.

2.3.1 Duty of full disclosure

A procuring authority has the duty to disclose to all bidders the nature of the work, all preferences and biases, evaluation criteria, and the terms and conditions of the tendered contract.

This means that a procuring authority is obligated to disclose information about the tendered contract that could impact a bidder's decision to bid and pricing.

A procuring authority is required to disclose all evaluation criteria that will be used to evaluate bids, including the relative weighting of each criterion.

2.3.2 Duty of fairness and good faith

Canadian courts have consistently imposed an implied duty of fairness based on the principle that the integrity of competitive procurement processes must be protected by the courts. This principle applies equally to the public and private sectors.

From a practical perspective, this means that:

- All bidders are entitled to equal access to information during a procurement process, which means that a procuring authority cannot selectively withhold information from some bidders.

- A procuring authority must conduct a transparent evaluation process that follows the rules that were pre-established in the procurement documents.

- A procuring authority must avoid conflicts of interest, unfair advantage or the operation of bias throughout the process.

- A procuring authority must reject non-compliant submissions, that is, bids that do not materially comply with the requirements of the procurement documents.

- A procuring authority must award the contract to the winning submission, that is, the highest-scored/lowest-priced, compliant proponent.

2.4 Compliance with federal government integrity provisions

Organizations interested in selling goods and services to the federal government or those with existing contracts with the federal government should be aware of recent developments related to “integrity” in procurement. The federal government’s procurement policy includes provisions to ensure that the federal government does business only with businesses and individuals that act with integrity. The relevant provisions are largely contained in the “Code of Conduct and Certifications” section of the *Standard Acquisition Clauses and Conditions Manual*. These provisions have become known as the “integrity provisions” and apply to all procurement and real property transactions that the federal government undertakes. Businesses or individuals that are bidding on federal government contracts must be aware of the disclosure requirements set out in the integrity provisions or risk having a bid declared unresponsive or having a contract terminated.

A bidder responding to a federal government procurement process must make certain certifications about itself and its “affiliates”, which are broadly defined to include a wide range of related entities and individuals. Bidders must provide certifications relating to certain criminal convictions and lobbying activities of bidders, affiliates and, in some instances, employees of bidders. In addition, bidders, including directors of corporate bidders, must consent to a criminal record check. Disclosure or evidence of certain convictions, particularly relating to fraud or bribery, may preclude a bidder from winning a federal government contract.

The integrity provisions have been subject to review and modification over recent years. These revisions resulted in more stringent disclosure requirements reflecting the federal government’s uncompromising position against corruption in government business.

3. Issues for Organizations Conducting Competitive Procurement Processes in Canada

As an organization conducting a procurement process in Canada, there are three fundamental questions to be answered prior to launching a procurement process:

3.1 What are the organization’s internal procurement obligations?

For public-sector and quasi-public-sector entities, understanding the organization’s procurement obligations means understanding the applicable procurement governance framework as described in Section 2 above. The procurement governance framework will determine what procurement obligations the procuring authority is bound by, including whether the procuring authority is required to conduct an open, fair and transparent process and under what circumstances an entity may obtain goods or services without a competitive process, such as through a single source or sole source.

For private-sector entities, understanding the organization's procurement obligations means understanding any internal policies or guidelines with respect to when open, competitive procurement processes are required, or recommended, and with respect to any procedural requirements with respect to the process itself.

3.2 Does the organization wish to conduct a binding or non-binding competitive procurement process?

As described in Section 2.2 above, each procurement process is assessed from a Canadian procurement law perspective on whether or not Contract A, the procurement contract, has been validly created. Since the creation of Contract A creates a binding legal agreement between the procuring authority and the bidder, a procuring authority should determine in advance of issuing procurement documents whether it intends to create a binding process or not.

3.3 What are a procuring authority's requirements in a binding procurement process?

In a binding procurement process, Canadian courts will imply a set of terms and conditions into the procurement process which procuring authorities, whether they are public-sector or private-sector entities, must be aware of and which must be followed:

- Procuring authorities must at all times adhere to the terms and conditions of Contract A and they cannot accept any non-compliant bids, no matter how attractive they may be.

- Procuring authorities must treat all compliant bidders fairly and in good faith, particularly during the evaluation of any bidder's submission.

- Procuring authorities cannot make their ultimate decisions to award or reject submissions based on criteria that are not disclosed in the terms and conditions of the procurement documents.

- The law permits procuring authorities to create the terms and conditions of Contract A, or the bidding contract, as they see fit. Thus, privilege clauses that provide the procuring authority with discretionary rights are recognized as fully enforceable and, if properly drafted, allow procuring authorities to reserve to themselves the rights to award contracts to bids that may not be for the lowest price, or not to award contracts at all.

VI. Acquiring a Canadian Business

1. General Considerations

The threshold question in any acquisition is whether to purchase shares or assets. This will be dictated by a variety of factors, including timing, ease of implementation and tax considerations. A share purchase is generally simpler and quicker to complete than an asset acquisition, as it avoids many of the practical problems associated with the transfer of particular assets and the common requirement to obtain consents of third parties. A share purchase may also have tax advantages from the perspective of the vendor, as it generally permits the vendor to obtain capital gains treatment with respect to any gain on the sale of the shares, thereby reducing overall tax liability.

A sale of assets will generally be less favourable for the vendor, as a result of potential income inclusions in areas such as the recapture of depreciation on the assets being sold. On the other hand, from the perspective of the purchaser, asset acquisitions may have some advantages, particularly where the purchaser wishes to exclude certain parts of the business or its liabilities from the transaction or to step up the tax cost of depreciable assets.

In either case, the purchaser will be concerned about the condition of the underlying business, the title of the vendor to its assets, the status of contracts with third parties and compliance with environmental and other laws. The purchaser will seek to protect itself by conducting a due diligence review of the vendor's business and obtaining appropriate representations, warranties and covenants in the purchase agreement.

2. Share Acquisitions

2.1 What approvals are required for an acquisition of shares of a Canadian company by a non-resident?

The securities rules applicable to a purchase of shares depend on whether the purchase is of a private or a public company, and are discussed under Subsection 2.4 below. In the case of large acquisitions, pre-clearance under the Canadian competition laws is required (see Section IV, 1.4). Apart from this, the principal authorization that might be required is approval under the *Investment Canada Act*. This is discussed in Section IV, 2.

2.2 What are the tax consequences of a share purchase?

There are no stamp duties or similar taxes payable in Canada upon an acquisition of shares. The vendor of the shares may be subject to payment of capital gains tax. To ensure that non-residents of Canada pay any taxes owing in respect of a sale of "taxable Canadian property", which can include some shares (e.g., if the shares derive their value principally from Canadian real property), the *Income Tax Act* requires the purchaser of taxable Canadian property to undertake a "reasonable inquiry" and satisfy itself as to the vendor's Canadian resident status (normally through representations in the purchase agreement). If the vendor is a non-resident, it might need to provide the purchaser with a certificate issued by the tax authorities, which will be granted when appropriate arrangements are made to ensure payment of any tax liability. If the certificate is not provided, the purchaser might need to withhold and remit to the tax authorities 25% of the purchase price, whether or not any tax would be payable by the vendor on the sale. Shares that are listed on a prescribed stock exchange can be "taxable Canadian property" in certain circumstances; however, it is not necessary to obtain a certificate with respect to the sale of such shares.

2.3 Can one freely dismiss directors and officers of the acquired Canadian company?

Directors may be removed at any time by resolution of the shareholders, which would enable a non-resident purchaser to replace the board of directors of the acquired company.

Officers and other employees of the target may be dismissed, subject to the provisions of Canadian law and any employment contracts or collective agreements. Specifically, unless their employment contracts set out their entitlements upon termination of employment, at common law and under the *Civil Code of Québec*, officers and employees whose employment is terminated without cause would be entitled to a reasonable notice of termination or pay in lieu of notice. Depending on the employee's length of service, position, compensation, age, and availability of similar employment, the required notice of termination (or pay in lieu of notice) could range between one month and 24 months or more.

A typical condition of closing may require the board and designated officers to resign their corporate offices and directorships and provide releases.

See Section VIII, "Employment and Labour Law", which discusses employees' rights in general.

2.4 Are there any special rules that apply to the acquisition of shares of public companies?

The acquisition of shares of a public company could trigger the application of the "take-over bid" requirements of Canadian corporate and securities legislation. In Canada, the rules governing take-over bids are now harmonized across all provincial jurisdictions. Negotiated public company acquisitions in Canada are typically commenced by a non-binding letter of intent from the offeror indicating an interest in purchasing the outstanding securities of the target, and a confidentiality and standstill agreement between the parties, followed by the negotiation of a comprehensive support agreement.

2.4.1 Regulation of take-over bids

The threshold for a take-over bid is generally 20% of the issued voting shares or "equity" shares (essentially non-voting common shares) of any class or series of the issuer. This threshold applies regardless of whether the offeror will obtain effective control of the company. Under existing rules, disclosure of the acquisition of 10% or more of the voting or equity shares of a company (or securities convertible into voting or equity securities), and subsequent acquisitions of 2% or more within the 10%-20% range, is required under the "early warning" rules of Canadian securities legislation. In March 2013, the Canadian Securities Administrators proposed certain amendments to the early warning disclosure obligations, including a reduction of the 10% threshold to 5% and the requirement to disclose any subsequent dispositions of 2% or more within the 5% to 20% range.

The offeror may determine the number of shares for which it wishes to bid. On a partial bid, shares must be taken up *pro rata*. Conditions may be attached to the bid (other than a “financing” condition). It is common to make a purchase conditional upon attaining a minimum level of acceptance, frequently two-thirds (the threshold for approval of certain fundamental corporate transactions in most jurisdictions) or 90% (the level which gives the offeror the right to acquire the balance of the shares outstanding).

Unless an exemption applies, a take-over bid must be made to all shareholders pursuant to a disclosure document (comprising a take-over bid offer and a circular). The circular must set out prescribed information about the offer and the parties, including shareholdings and past dealings by the bidder and related parties in shares of the target. If the target company has Quebec shareholders, which will often be the case, then unless a *de minimis* exemption applies, the circular must also be prepared in the French language for the purposes of mailings to such Quebec holders. The circular must be delivered to the target company and filed with the securities commissions, but is not subject to any pre-clearance review. The offeror is generally free to determine the price at which it chooses to bid and the consideration may be either cash or securities (or a combination of cash and securities).

Where the purchase price consists of securities of the offeror, the circular must contain prospectus-level disclosure regarding the offeror’s business and financial results and *pro forma* financial statements assuming completion of the offer. For companies in the resource sector, technical reports on the offeror’s properties or oil and gas resources may be required. Issuing securities will make the offeror a “reporting issuer”, subjecting the offeror to certain ongoing disclosure requirements.

The directors of the target company must deliver their own circular to shareholders in response to the bid. There are a number of corporate rules and securities commission policies which affect the ability of the target company to undertake defensive measures in response to a bid. A bid subject to full regulation under provincial legislation must be made in accordance with certain timing and other procedural rules, including a compulsory minimum offer period (35 days).

2.4.2 Exempt take-over bids

Exemption from the statutory take-over bid rules is available in certain circumstances. As noted above, purchases of private companies are generally exempt from the take-over rules.

One of the most important exemptions relating to public companies is the “private agreement” exemption. Purchases may be made by way of private agreements with a small number of vendors without complying with the take-over bid rules (which would otherwise require the offer to be made to all shareholders). However, the rules exempt such purchases *only* if they are made with not more than five persons in the aggregate (including persons located outside Canada) and the purchase price (including brokerage fees and commissions) does not exceed 115% of the average closing price of the shares during the 20 days preceding the date of the bid.

2.4.3 Arrangements

Friendly acquisitions are often effected in Canada by way of a plan of arrangement. An arrangement is a court-approved transaction governed by corporate legislation and requires shareholder approval (generally 66-2/3%) by the companies involved. The parties enter into an arrangement agreement setting out the basis for the combination, following which an application is made to the court for approval of the process. The court order will require the calling of shareholders’ meetings and specify the approval thresholds and (in most cases) dissent rights. A detailed circular will be sent to shareholders that provides broadly equivalent disclosure to that which would be provided by a take-over bid circular.

Arrangements have a number of advantages. In particular, they can: facilitate dealing with multiple securities (particularly convertible instruments); provide for acquisition of 100% of the target company without the need for a follow-up offer or second-stage transaction; and, if securities are to be offered to shareholders of the target company, provide an exemption under U.S. securities laws from the requirement to file a registration statement. On the negative side, arrangements tend to be more time-consuming, leave control of the process in the hands of the target company and can provide opportunities for interested parties to intervene in the court proceedings.

2.4.4 Amalgamations

Acquisitions are sometimes affected by “amalgamations”. An amalgamation is akin to a merger under U.S. law, however, the amalgamated corporation is considered to be the successor of both amalgamating entities and the amalgamated entity succeeds to the assets and liabilities of the amalgamated entities. Similar to negotiated take-over bids, amalgamations are typically commenced by the execution of a non-binding letter of intent from the offeror indicating an interest in amalgamating with the target company, and a confidentiality and standstill agreement between the parties, followed by the negotiation of a comprehensive amalgamation agreement.

Generally, all securityholders whose legal rights are affected by a proposed amalgamation will be entitled to vote on the transaction. The approval thresholds are usually 66-2/3% of the securities represented by class at the meeting of securityholders. The information to be provided to those entitled to vote on the amalgamation must be sufficient to allow them to form a reasoned judgment as to whether to support or vote against the proposal. Proxy circulars are not subject to regulatory review in Canada. Securityholders have the right to dissent from an amalgamation transaction and to be paid “fair value” for their securities. Subject to regulatory approvals, the amalgamation process typically takes 60 to 90 days. Subject to the availability of financial information and related preparation time, preparation of securityholder meeting documentation may take three to four weeks.

A statutory amalgamation provides certainty in an acquisition transaction that the acquirer will obtain 100% of the shares of the target. However, completion time is often longer than if the transaction were undertaken by a take-over bid. Amalgamations are used less often than arrangements as the time and documentation required is virtually identical but amalgamations do not provide the structuring flexibility afforded by an arrangement or the benefit of a court decision as to the fairness of the transaction.

2.5 What rights of compulsory acquisition of the minority are available after a successful take-over bid?

An offeror that acquires substantially all of a class of shares of a company (generally 90% of the shares of the class not held by the offeror and its associates at the time of the bid) may generally buy out the remaining shareholders of the class at the offer price or, if the shareholder objects, at a court-determined “fair value”. If an offeror intends to exercise its right of compulsory acquisition, it must state its intent to do so in the circular and follow certain steps within a fixed period (generally 180 days) after the bid.

There are other ways by which a minority can be removed from a company, such as amalgamation, arrangement or consolidation which results in the shareholder losing his participating interest in the business. Securities and corporate laws provide protection for minority shareholders in these circumstances, but if an offeror acquires 66-2/3% of the shares under a bid, it will generally be able to eliminate the minority.

3. Asset Acquisitions

3.1.1 What approvals are required in the case of a purchase of assets of a Canadian business by a non-resident or by its Canadian subsidiary?

The review mechanisms of the *Investment Canada Act*, which are discussed under Section IV, 2, also apply to the purchase of “all or substantially all of the assets used in carrying on a Canadian business”. Competition laws which might apply to an acquisition of assets are discussed in Section IV, 1.4.

In addition to the statutory approvals, consents of landlords, equipment owners, creditors and shareholders may be necessary. Under most Canadian corporate statutes, if a sale involves the disposition of all or substantially all of a corporation’s assets, shareholders must approve the transaction by special resolution.

3.1.2 What are the tax consequences of an asset purchase?

Two different sets of tax rules must be examined in this context: liability with respect to income tax, and the application of federal and provincial sales taxes. If real property is involved, land transfer taxes may also be payable.

3.1.2.1 Canadian income tax issues

Capital assets used by a vendor in a Canadian business will generally be “taxable Canadian property”. As discussed in Section VII, “Tax”, the purchaser should protect itself from possible tax liability by making “reasonable inquiries” to confirm that the vendor is a Canadian resident. For this purpose, an appropriate representation will generally be obtained in the purchase agreement. If the vendor is a non-resident, a certificate from the tax authorities will be required.

The allocation of the purchase price among the various assets being acquired will also have Canadian tax implications. The allocation is a matter of negotiation between the parties, and they should agree that they will file their income tax returns in a manner consistent with such allocation, to minimize the risk that the Canadian tax authorities will re-allocate the purchase price in a manner which may be disadvantageous to the parties.

Accumulated tax losses and credits in connection with a business are not available to the purchaser on an asset transaction.

3.1.2.2 Sales tax

Both federal and provincial governments impose sales taxes, the province at the retail level and the federal government through the Goods and Services Tax/Harmonized Sales Tax discussed in Section VII, 6.1.

In a sale of the assets of a business, an election may be available so that no federal GST/HST or QST will apply to the transaction. The election is available when the subject of the sale is all or substantially all of the assets that are reasonably considered to be necessary to operate a business. Where the election applies, the sale of the assets of a business may be made free of GST/HST and QST, the rationale being that the recipient would in any event be able to claim a full input tax credit or refund for the tax otherwise payable.

There are two principal conditions that must be met before the election is available. The assets being sold must constitute a “business or part of a business” that was established, carried on, or acquired by the seller. In addition, the recipient must be acquiring at least 90% of the assets reasonably necessary to carry on the business. An indication of the sale of a qualifying business is the existence of an agreement which deals with issues that are normally found in acquisition arrangements, such as the sale of goodwill and intellectual property, dealings with employees, etc., in addition to the sale of equipment and inventory.

Provincial sales tax exposure (if any) will depend on the province in which the assets are located. For example, currently Manitoba, Saskatchewan and British Columbia impose tax at the rates of 8%, 5% and 7% (respectively) upon taxable transfers of tangible personal property. There is a wide range of exemptions, particularly for transfers of inventory, provided the goods are purchased for resale or further manufacture. If the purchaser is acquiring assets of a business, it may also be liable for the vendor’s accrued sales tax exposure unless clearance certificates are obtained from the retail sales tax authorities indicating that all taxes have been collected and paid to date.

3.1.3 What are the obligations of the purchaser with regard to third parties?

Canadian law provides protection for creditors of a business that might affect an acquisition of assets. To begin with, creditors who have a security interest over real or personal property will continue to have priority with respect to the relevant assets as against the purchaser. There are security registration statutes in Canada and searches can be conducted to determine the existence of such security interests. Unless the purchaser is to acquire the assets subject to existing security interests (which might be the case with respect to real property and major items of financed personal property), the vendor’s obligations should be paid and the security interests discharged at the time of the purchase. Because of time lags in the registration systems, it may be necessary to withhold a portion of the purchase price until confirming searches have been conducted.

In Ontario, unsecured creditors of the vendor may be protected by bulk sales legislation. The *Bulk Sales Act* (Ontario) is typical and is designed to protect trade creditors where the tangible assets of a business are sold in bulk. A sale of substantially all of the assets of a Canadian company or a division would be a sale in bulk subject to the Act. The Act provides for a number of specific alternative procedures to ensure that creditors are paid, such as obtaining a list of creditors and paying them off, obtaining consents from the creditors, or obtaining a court order exempting the transaction from the requirements of the legislation.

A court order is unlikely to be forthcoming if the assets to be purchased constitute all or substantially all of the vendor’s assets. Unless the *Bulk Sales Act* has been complied with, any creditor can have the sale declared void and the purchaser will be liable to the seller’s creditors for the value of any property received. The manner in which this issue is usually dealt with depends on the size of the acquisition and the creditworthiness of the vendor. It is not uncommon for the purchaser to waive compliance with bulk sales legislation, subject to holding a portion of the sale proceeds in escrow or obtaining an indemnity from the vendor.

4. Employee Considerations

The rights of employees in the case of an acquisition depend on the nature of the acquisition, and the labour relations and employment laws of the jurisdiction that apply to the employees. The Ontario rules may be taken by way of illustration.

In the case of a share acquisition, unless otherwise provided in an employment contract, there are no changes to the employment relationship as the purchaser essentially becomes the employer for all employment purposes. Accordingly, there is no termination of employment as a result of the purchase of shares, and existing employment contracts remain in place, unless otherwise provided in an employment contract.

In the case of an asset purchase, at common law the sale often results in a termination of employment with the vendor company. That is, if an employee is not offered employment by the purchaser or chooses not to accept such an offer, an asset sale often results in the constructive dismissal of the vendor's employees at the time of the sale. After all, as a practical matter, once the vendor's assets have been sold, there will no longer be any work for the employees to perform. In most instances, the vendor will *actually* terminate the employment of employees who are not offered or who do not accept offers of employment from the purchaser. In order to minimize termination liabilities, a vendor may insist on provisions in the purchase agreement that require the purchaser to make offers of employment to all of its employees on terms and conditions that are substantially similar to their current terms and conditions in order to induce the employees to accept those offers. In the event that an employee does not accept such an offer of employment, this will also reduce vendor termination costs as a result of the failure of the employee to mitigate common law wrongful dismissal damages by accepting the offer made by the purchaser.

For provincially regulated businesses in Ontario, where some of the employees are unionized, the *Labour Relations Act*, 1995 provides that the purchaser of the "business" acquired is placed in the role of employer for the purposes of the union's bargaining rights and any collective agreement. The effect of this provision is to require the purchaser to comply with the requirements of the collective agreement and to continue to recognize the bargaining rights of the collective bargaining agent. A "business" is defined to include a "part or parts thereof" and the transfer of any portion of a business as a going-concern would be caught.

In addition, the Ontario *Employment Standards Act, 2000* (ESA) establishes certain minimum obligations in respect of both union and non-union employees. More beneficial terms of employment, whether express (as, for example, in a collective agreement or a written contract of employment) or implied (as, for example, by the common law of wrongful dismissal), will take precedence over the minimum requirements of the employment standards legislation.

To avert a situation where companies buy and sell assets in order to avoid employment-related liabilities, the ESA stipulates that employees of a vendor who are hired by the purchaser following an asset sale carry forward their prior service for any subsequent calculation of the employees' service or length of employment, such as establishing entitlement to severance pay and notice of termination by the purchaser. The ESA also sets out minimum notice and severance pay requirements that apply in the event of the termination of employees, including, in the case of mass terminations of 50 employees or more within a period of four weeks or less. Employees who have five or more years of service at the time of their dismissal are also entitled to severance pay if their employer has a payroll in Ontario of $C2.5-million or more, or if the dismissal is part of a discontinuance of all or part of a business involving the termination of 50 or more employees in a period of six months or less. Mass terminations also oblige the employer to give notice to the Ministry of Labour. If employees are terminated prior to the transfer of the business, the vendor, as terminating employer will be responsible for the termination costs. See Section VIII, 1.1.5.

VII. Tax

1. Typical Organizational Structures

A number of forms of organization could theoretically be used by a U.S. entity in establishing a Canadian business enterprise.

Of these, however, the three most commonly considered are:

1. Sales representatives based in Canada
2. Canadian branch of the U.S. entity
3. Canadian subsidiary corporation

While there are some similarities in the basic rules for the computation of income subject to taxation under these possible forms of organization, it is most common for a substantial business undertaking to be organized using a Canadian-incorporated subsidiary.

In some cases, a British Columbia, Alberta or Nova Scotia “unlimited liability company” might be chosen to achieve U.S. tax objectives. The decision will, of course, depend on the circumstances of each case and consultation with both Canadian and U.S. tax counsel is essential, particularly if the U.S. entity has a special U.S. tax status. The Canada–U.S. Tax Convention (the Convention), however, contains rules that adversely affect the tax treatment of some structures involving unlimited liability companies.

If the U.S. entity is a “limited liability company” or “LLC” not treated as a corporation for U.S. tax purposes, there have been special problems with entitlement to benefits under the Convention, so it is sometimes not desirable for such an LLC to hold an investment in Canada or carry on activities in Canada. The Convention now contains relieving provisions that should allow qualifying U.S. resident members of an LLC to obtain treaty benefits on a “look-through” basis in some cases, but not always, where an LLC is the shareholder of an unlimited liability company.

1.1 Limitation on benefits of treaty

The Convention includes “Limitation on Benefits” rules. To qualify for benefits under the Convention, a U.S. entity must be both a resident of the U.S. for purposes of the Convention, and also be a qualifying person or otherwise entitled to the particular benefits under the Limitation on Benefits rules.

1.2 Sales representatives based in Canada

1.2.1 Are entities with representatives exempt from tax if activities are limited?

It is possible for a U.S. entity to extend the scope of its business to Canada without becoming subject to Canadian tax on its business profits if the types of activities carried on in Canada are sufficiently limited.

Under the Canadian *Income Tax Act* (ITA) every non-resident person, as defined by the ITA, who carries on a business in Canada is required to file a Canadian tax return and to pay an income tax computed in accordance with the ITA on the taxable income earned in Canada by such non-resident person for the year.

However, the provisions of the ITA relating to income tax on Canadian source business profits (but not the requirement to file a Canadian return) are overridden, in the case of a U.S. enterprise qualifying for benefits under the Convention, by Article VII of the Convention, which provides as follows:

“The business profits of a resident of a Contracting State shall be taxable only in that State unless the resident carries on business in the other Contracting State through a permanent establishment situated therein. If the resident carries on, or has carried on, business as aforesaid, the business profits of the resident may be taxed in the other State but only so much of them as is attributable to that permanent establishment.”

1.2.2 How is a “permanent establishment” defined? Does an office or a sales agent create this status? What about a storage facility?

The term “permanent establishment” is defined in Article V of the Convention to mean a “fixed place of business through which the business of a resident of a Contracting State is wholly or partly carried on”, and there is also a concept of a deemed permanent establishment that can result from performing services in Canada.

The Convention goes on to specifically include the following in the definition of permanent establishment: any place of management, a branch, an office, a factory, a workshop and a mine, an oil or gas well, a quarry or any other place of extraction of natural resources or the presence in Canada of any non-independent agent who has the authority to contractually bind the non-resident corporation. The Convention then goes on to specifically exclude the following from the definition of “permanent establishment”:

1. Facilities for the purpose of storage, display or delivery of goods or merchandise belonging to the resident (i.e., the U.S. entity).

2. The maintenance of a stock of goods or merchandise belonging to the resident for the purposes of storage, display or delivery.

3. The maintenance of a stock of goods or merchandise belonging to the resident for the purpose of processing by another person.

4. A purchase of goods or merchandise, or the collection of information, for the resident.

5. Advertising, the supply of information, scientific research or similar activities which have a preparatory or auxiliary character, for the resident.

Therefore, a U.S. entity will not have a permanent establishment in Canada by reason only of having sales representatives in Canada to offer products for sale, provided that these agents (i) do not have the authority to conclude contracts on behalf of the U.S. entity or (ii) are independent and acting in the ordinary course of their business.

If the U.S. entity contemplates establishing a fixed centre for its Canadian operations, care should be taken to ensure that the centre is not a permanent establishment. For example, it could be limited to functioning as a warehouse for the storage of goods awaiting delivery or processing, or as a display area. Any significant presence the U.S. entity will have at a Canadian location needs to be reviewed to determine whether it amounts to a permanent establishment. A building site or construction or installation project is a permanent establishment if, but only if, it lasts more than 12 months. The provision of other types of services in Canada for 183 days or more may result in a permanent establishment. If the U.S. entity has a permanent establishment in Canada, it will be subject to Canadian tax on business profits attributable to the permanent establishment.

1.3 Canadian branch

If it is undesirable for the U.S. entity to restrict its Canadian business in the manner described above to avoid having a permanent establishment in Canada, an alternative would be to establish and operate a Canadian branch out of office premises situate in Canada.

1.3.1 Advantage of a branch operation

One advantage to the use of a branch operation would normally arise when it is anticipated that the branch will incur substantial losses in the first several years of operation. In this case, organization through a branch might enable such losses to be included in the consolidated tax return of the parent corporation and deducted against income from other sources. In general, a branch may be useful where a “flow-through” structure is desirable from the U.S. tax perspective.

An alternative would be to consider incorporation of an entity which might be treated as a branch for U.S. tax purposes, such as a British Columbia, Alberta or Nova Scotia unlimited liability company. The use of such entities, however, may be adversely affected in some cases as a result of “anti-hybrid” rules in the Convention.

If a Canadian subsidiary (other than an unlimited liability company) is used, we understand that in the usual case such losses may not be consolidated with income from other sources for U.S. tax purposes. In Canada, the losses can be carried forward within the Canadian corporation for a maximum of 20 taxation years (10 taxation years for losses that arose in taxation years prior to the 2006 taxation year) and used as a deduction in computing taxable income during that time.

1.3.2 What are the disadvantages? How would a branch be taxed as between the U.S. and Canada?

It is clear that if a U.S. enterprise were to establish a divisional branch in Canada, it would have a “permanent establishment” within the meaning of the Convention, and would be required, pursuant to the ITA, the Convention and Canadian provincial tax legislation, to pay Canadian income tax on taxable income earned in Canada which is attributable to the branch. Any employees resident in Canada and, subject to certain exemptions in the Convention, branch employees not resident in Canada, would be required to pay Canadian income tax, and the U.S. enterprise would be required to deduct and remit to the Receiver General amounts from the wages and salaries of such persons.

Despite potential tax savings, our experience has been that there are, in some cases, a number of practical difficulties with a branch operation. The most important has been the problem of preparing financial statements for the branch which determine its income earned in Canada in a manner satisfactory to both the Canada Revenue Agency (CRA) and the U.S. Internal Revenue Service.

Particularly difficult is the allocation of head office charges, executive compensation and other common costs. In addition, in a branch situation, the CRA may conduct an audit of the U.S. corporation's books of account to satisfy itself as to Canadian-source income. The tax compliance obligations of a Canadian branch are sometimes more onerous than for a Canadian subsidiary in other respects. For example, if the branch disposes of capital assets used in the Canadian business, it must obtain a tax clearance certificate, and if it receives amounts of the type normally subject to non-resident tax withholding (such as service fees, rentals or royalties), the branch may need to apply for a waiver of withholding.

Finally, Canada imposes a branch tax on the after-tax income of the branch operation of a U.S. corporation, subject to a lifetime exemption, which the U.S. corporation may qualify for under the Convention for the first C$500,000 of Canadian income. The branch tax rate under the ITA is 25%, but this rate is reduced under the Convention to 5% for qualifying U.S. residents. The branch tax is effectively the equivalent of the 5% non-resident withholding tax which would be applicable under the Convention if the U.S. corporation carried on business in Canada through a subsidiary corporation and had the subsidiary repatriate its retained earnings to the parent by means of a dividend.

1.3.3 If a branch turns profitable, how can it become a subsidiary corporation?

It would be possible, if a branch were initially used, to transfer the Canadian business to a subsidiary corporation after it becomes profitable. There are, however, several difficulties in accomplishing this result and, in particular, there may be U.S. tax consequences. In addition, the complexity of a sale of assets, assignment of contracts and transfer of employees to a new corporation after a significant business has been established may be considerable.

A non-resident may transfer real property, interests in real property and most other assets used in the business of a Canadian branch to a Canadian corporation, as part of the incorporation of the branch, on a Canadian income tax deferred basis. However, the transfer by a U.S. entity to a Canadian corporation of real property or interests in real property not used in the business of a Canadian branch would have to take place at fair market value, giving rise to a potential recapture of capital cost allowance (i.e., depreciation) and/or capital gain.

In summary, therefore, unless there are important U.S. tax reasons to the contrary, it may be advisable to organize the Canadian business through a subsidiary corporation. We note again that the choice of organizational form depends on individual circumstances and that consultation with U.S. and Canadian tax counsel is advised.

1.4 Canadian subsidiary corporation

If the Canadian business enterprise is carried on through a corporation incorporated in Canada (including a British Columbia, Alberta or Nova Scotia unlimited liability company), the corporation will be a "resident" within the meaning of the ITA and will be required to pay Canadian income tax on its world income each taxation year. Canadian provincial income taxes will also apply. Where dividends are paid by the subsidiary corporation to a qualifying U.S. resident parent corporation that owns 10% or more of the voting stock, the Canadian withholding tax rate applicable to the dividends under the Convention is 5% (except in some cases where the subsidiary corporation is an unlimited liability company). The following comments address several of the most important provisions of the ITA, which would apply to the new corporation.

2. Computation of Income

The computation of income from business for Canadian tax purposes starts with a computation of the profit from the business. A number of rules must then be applied to adjust the computation of profit to arrive at taxable income. The main provisions in this regard are set out below.

2.1 How is depreciable property amortized?

2.1.1 Capital cost allowance

The system in the ITA for amortizing the cost of depreciable property is known as capital cost allowance. All tangible depreciable assets, patent rights and certain intangible property with a limited life must be included in one of the classes prescribed by Regulation. Each class is given a maximum rate, which may or may not be based on the useful life of the assets in the class. The rate for a class is applied to the total capital cost of the assets in that class to calculate the maximum deduction that may be claimed in each year. The actual deduction taken in a year may be any amount that is equal to or less than the maximum deduction available. As the deduction is usually calculated on a diminishing balance basis, the capital cost of a class is reduced by the amount of the actual deduction taken with respect to that class each year. Therefore, unused deductions are effectively carried forward as they do not reduce the capital cost of the class. There are also provisions as to the recapture of capital cost allowance from the disposition of capital assets that have been depreciated for tax purposes below their realizable value.

2.1.2 Can the cost of leasing property be amortized?

The ITA imposes substantial restrictions on capital cost allowance available to lessors of most tangible property. In effect, the lessor is treated for income tax purposes as if the lease payments were blended payments of principal and interest on a loan. The lessee of such property is not entitled to capital cost allowance unless it elects with the lessor to treat the lease as a purchase by the lessee at fair market value financed by a loan from the lessor. If such election is made, the lessee claims full capital cost allowance and a deemed interest deduction calculated by treating the lease payments as blended payments of principal and interest. Otherwise, the lease retains its character for purposes of the tax treatment of the lessee.

2.1.3 How are intangible capital assets amortized?

A similar system to that described above is prescribed in respect of the cost to a taxpayer of intangible capital property not eligible for capital cost allowance such as trade-marks, licences for an unlimited period or goodwill. Only three-quarters of the cost of such assets may be included in the appropriate class and a deduction may be taken in computing income at the rate of 7% per annum on a declining balance basis.

2.2 Licensing fees, royalties, dividends and interest

2.2.1 Transfer pricing rules for related corporations

Particular scrutiny is normally given by the CRA to licensing fees, royalties, interest, management charges and other amounts of a like nature paid to non-residents with whom the Canadian taxpayer does not deal at arm's length. For this purpose, if a U.S. entity controls a Canadian company, either by owning a majority of the voting shares or by having sufficient direct or indirect influence to result in control, the two entities will be considered not to deal at arm's length. The first concern of the tax authorities will be to determine whether the amount paid by the Canadian corporation should be allowed as a deduction in computing income.

Canadian transfer pricing rules require that, for tax purposes, non-arm's-length parties conduct their transactions under terms and conditions that would have prevailed if the parties had been dealing at arm's length. The rules also require contemporaneous documentation of such transactions to provide the CRA with the relevant information supporting the transfer prices. The rules provide that taxpayers may be liable to pay penalties where the transfer pricing adjustments under the rules exceed a certain threshold and the taxpayer did not make reasonable efforts (including contemporaneous documentation) to use appropriate transfer prices.

2.2.2 What are the withholding tax rules?

Under the Convention, the Canadian entity must withhold 10% of some "royalties" paid to U.S. residents. The Convention provides exemptions from withholding tax on "royalties" paid to qualifying U.S. residents which are payments for the use of or the right to use (i) computer software or (ii) any patent or any information concerning industrial, commercial or scientific experience (but not including information provided in connection with a rental or franchise agreement).

Reasonable management fees for services rendered outside Canada are not subject to withholding tax as the CRA regards these as business profits of the U.S. entity and therefore not taxable under Article VII of the Convention. The CRA will allow a management fee to include a mark-up over the U.S. entity's costs only in limited circumstances.

Under the Convention, the rate of withholding tax on dividends is 15%, although the lower rate of 5% applies if the shareholder is a qualifying U.S. resident company that owns 10% or more of the voting stock (except in some cases where the payer is an unlimited liability company).

There is no Canadian withholding tax on arm's-length (unrelated party) interest payments, other than certain types of participating interest. Withholding tax on interest paid by a Canadian resident to a related U.S. resident qualifying for the benefits of the Convention is eliminated by the Convention (except in some cases where the payer is an unlimited liability company).

2.3 What are the limits on thin capitalization?

A statutory thin capitalization provision limits the amount of interest-bearing debt which may be owed by a Canadian corporation to a non-resident creditor who is either a 25% shareholder of the corporation or does not deal at arm's length with such a shareholder. The limit is set by requiring the Canadian company to have a debt-to-equity ratio of not more than 1.5:1 where debt and equity have particular definitions. In making the necessary calculation, equity includes the paid-up capital of a corporation as well as retained earnings and other surplus accounts.

Debt includes only interest-bearing debt held by non-resident shareholders who, alone or together with affiliates, own shares of the capital stock of the corporation representing 25% or more by votes or fair market value of all shares of the corporation or their affiliates. There are special timing rules regarding when the different debt and equity elements are determined.

Not included as debt are amounts owed to residents of Canada or amounts owed to non-residents who are neither shareholders nor related to shareholders (unless they are part of a "back-to-back" arrangement whereby the non-resident shareholder or related party lends to a third party on the condition that it make an advance to the Canadian corporation). Also excluded from the definition of debt for this purpose are amounts loaned to the Canadian corporation by arm's-length entities where the loans are guaranteed by a shareholder.

The sanction for exceeding the maximum ratio is that interest on the amount of debt in excess of the permitted limit is not allowed as a deduction in computing the income of the Canadian corporation. In addition, the excess interest is treated as a dividend for Canadian withholding tax purposes.

2.4 How can operating losses be used?

Operating losses from a particular source can be used by the taxpayer to offset income from other sources. In addition, if an operating loss is realized for a particular year, it may be carried back three fiscal years and carried forward 20 taxation years (10 taxation years for losses that arose in taxation years prior to the 2006 taxation year) as a deduction in computing taxable income of those other years. If the loss is not used within this statutory period, it expires and can no longer be used in computing taxable income. Special rules restrict the availability of these losses following an acquisition of control of the corporation.

2.5 Capital gains and losses

One-half of any capital gain realized by a Canadian taxpayer (referred to as a "taxable capital gain") is included in the taxpayer's income and is subject to tax at normal rates. One-half of any capital loss may be deducted in computing income, but only against taxable capital gains. Capital losses, which cannot be used as a deduction in the year in which they are incurred, may be carried back three years and carried forward indefinitely, but again such losses may only be deducted against taxable capital gains. Capital losses of a corporation are extinguished on an acquisition of control of that corporation.

2.6 Should a single subsidiary be used when there are several lines of business?

Under the Canadian tax system, it is not possible under any circumstances for two or more corporations to file a consolidated tax return. As a result, the profits of one corporation in a related group cannot be offset by losses in another. It is generally desirable, therefore, unless there are compelling reasons to the contrary, to carry on as many businesses as possible within a single corporate entity. As well, non-residents establishing a corporate group in Canada should consider planning to minimize Canadian provincial income tax.

2.7 How is income taxed among the different provinces?

The taxable income of a corporation with operations in more than one province is allocated for provincial income tax purposes among those provinces in which the corporation has a permanent establishment. The allocation is achieved by means of formulae that are generally based on the salaries and wages paid to employees associated with each permanent establishment and gross revenues attributable to each permanent establishment.

3. Rates of Taxation

Corporate income tax is levied in Canada by both the federal and provincial governments. The effective rate of federal tax is currently 15%, after taking into account a reduction in rate that partially offsets the impact of provincial taxation.

Provincial tax rates can vary substantially depending on the province and the type of income earned by the corporation. For example, the general rate imposed by the province of Ontario is currently 11.5%. In some cases, Canadian provincial income tax liabilities may be substantially reduced by inter-provincial tax planning appropriate to the proposed Canadian operations.

Several reductions in federal and provincial rates are possible depending on the circumstances of the particular case. The most substantial of these reductions relates to active business income earned in Canada by a small "Canadian controlled private corporation" (CCPC).

However, a corporation will not be a CCPC if it is "controlled, directly or indirectly, in any manner whatever, by one or more non-resident persons". The phrase "controlled, directly or indirectly, in any manner whatever" is defined for the purposes of the ITA to include any direct or indirect influence that, if exercised, would result in control in fact of the corporation.

An exception is made where the corporation and the non-resident person are dealing at arm's length and the influence is derived solely from a franchise, licence, lease, distribution, supply or management agreement or other similar agreement, the main purpose of which is to govern the relationship between the parties. In addition, this preferential tax rate is not available for large private corporations.

Another reduction in the rate of tax occurs if a corporation carries on a manufacturing or processing business, as it may be entitled to provincial tax reductions.

4. Other Income Tax Considerations

4.1 Are tax credits available for research and development?

An "investment tax credit" against income tax otherwise payable is provided under the ITA in respect of certain expenditures on qualifying scientific research and experimental development carried out in Canada. An enhanced credit is available to CCPCs.

4.2 How are distributions treated?

A corporation may generally return to a shareholder the shareholder's investment in "paid-up capital" of the corporation (other than a public corporation) as a Canadian tax-free receipt.

The ITA provides that all other distributions to shareholders of a corporation resident in Canada (including share redemptions and liquidating dividends) are treated as dividends to the extent that funds paid out of the company on a reorganization, share reduction or liquidation exceed the paid-up capital of the shares. Such distributions are treated as dividends regardless of the type of surplus or profits from which they are paid and regardless of whether the company has any undistributed income.

Dividends paid by a Canadian corporation to its non-resident shareholders are subject to withholding tax under the ITA. The withholding tax rate under the Convention is 5% for dividends paid to a qualifying U.S. parent corporation (except in some cases where the payer is an unlimited liability company). Stock dividends are equivalent to cash dividends and are generally valued at the related increase in the corporation's paid-up capital.

The ITA contains other rules for dividends paid to Canadian residents that are beyond the scope of this paper. Dividends between affiliated Canadian companies are generally tax-free.

4.3 Loans to shareholders

A loan made by a corporation to any of its shareholders or to persons connected with such shareholders (other than corporations resident in Canada) which is not repaid by the end of the taxation year following the year in which such loan was made is, with limited exceptions, (including a possible election out of this rule), considered to be income received in the hands of the shareholder.

More stringent rules apply to indebtedness of a non-resident to a Canadian affiliate arising under a "running account" between the two companies. Amounts deemed to be paid to non-resident shareholders as income are subject to non-resident withholding tax as though the amounts were dividends. There is, however, a refund of withholding tax to a non-resident if the debt is subsequently repaid, subject to certain limitations.

A loan which is not included in income as described above may give rise to imputed interest income for the Canadian corporation at prescribed rates and a taxable benefit in the hands of the shareholder or connected person (other than a corporation resident in Canada) if the rate of interest paid on the loan is less than the market rate applicable at the time of the loan. Some loans that rely on a special exception from the shareholder loan rules will result in imputed interest income for the Canadian corporation at higher prescribed rates.

5. Capital and Payroll Taxes

5.1 Capital taxes

Federal and provincial corporate capital taxes are now imposed only on financial institutions.

A non-resident corporation with no "permanent establishment", as defined in the capital tax legislation, will not be subject to capital tax.

5.2 Payroll taxes

Employers are generally required to make contributions on behalf of their Canadian employees to the Canada or Quebec Pension Plan and to the federal Employment Insurance plan. Certain provinces also impose employer health taxes or premiums. Contributions to provincial Workers' Compensation Boards are also obligatory for most businesses.

6. Commodity Tax and Customs Tariffs

6.1 Federal sales and excise tax

The federal Goods and Services Tax (GST) is a form of value-added tax that applies to most goods and services at the rate of 5%. Unlike income tax, the GST is a tax on consumption rather than profits.

6.1.1 How is the GST collected?

Generally speaking, each registered supplier of taxable goods and services collects the applicable tax from its purchasers at the time of sale. The supplier must collect the GST as agent for the government, while the purchaser is legally responsible for the payment of the tax. Suppliers deduct from their collections any GST they have paid on their own purchases (called "input tax credits") and remit the difference to the federal government. If the supplier paid more tax than was collected, the supplier is entitled to a refund of the difference. The result is that the tax is imposed on the value added to the product at each stage of production and distribution and the final consumer ultimately bears the full amount of the tax. In Ontario and British Columbia, certain types of registrants are subject to restricted input tax credits for specified types of purchases. These rules, which claw back the input tax credits otherwise available, are temporary measures that are scheduled to be eliminated gradually after eight years.

Currently, five provinces (Ontario, Prince Edward Island, New Brunswick, Nova Scotia, and Newfoundland and Labrador) have harmonized their individual provincial sales tax bases with that of the GST and the combined tax is called the Harmonized Sales Tax (HST), imposed at rates ranging from 13% to 15%; therefore, most of the discussion that follows applies equally to the HST. Quebec has also largely harmonized its provincial sales tax base with that of the GST; however, unlike the HST provinces, the Quebec Sales Tax or QST is imposed pursuant to a separate Quebec statute at the rate of 9.75%.

6.1.2 Who is exempt from registration requirements?

Generally speaking, most persons who carry on business in Canada must register to collect and remit GST. By way of exception, small suppliers with sales of less than C$30,000 per year are generally not required to register for GST purposes and cannot claim input tax credits. In determining whether this threshold has been met, sales of associated corporations are included.

Non-residents who in Canada solicit orders or offer for sale prescribed goods (such as books, newspapers or magazines) to be sent to persons in Canada by mail or courier are deemed to carry on business in Canada. Accordingly, they must register to collect and remit GST on their sales.

Non-residents who do not carry on business in Canada, or small suppliers with sales of less than C$30,000 per year, are permitted to voluntarily register to collect and remit tax if, among other activities, they regularly solicit orders for the supply of goods for delivery in Canada. Non-residents may wish to register in such cases to obtain input tax credits in respect of GST paid on purchases in Canada.

6.1.3 Zero-rated supplies

Certain supplies, defined as “zero-rated supplies”, are effectively tax-free supplies and taxed at a zero rate. These supplies include basic groceries, prescription drugs, most medical devices and, generally speaking, goods which are sold for export. Services of an agent on behalf of a non-resident are also tax-free in some cases as are legal and consulting services supplied to assist a non-resident in taking up residence or setting up a business in Canada. Suppliers of tax-free goods and services do not charge tax on their sales, but are entitled to input tax credits for the GST paid on purchases used in supplying taxable and tax-free goods.

6.1.4 Exempt supplies

The legislation also provides for a class of goods known as “exempt supplies”. No tax is charged on exempt supplies. However, unlike zero-rated supplies, suppliers of exempt goods and services do not receive input tax credits for the GST paid on their purchases to the extent they are used in making the exempt supplies. Examples of exempt supplies include resales of residential property, long-term residential leases, many health and dental services, educational services, domestic financial services and daycare services.

6.1.5 Special rules for non-residents

To encourage non-residents to do business in Canada, the legislation provides relief from the GST in connection with certain transactions.

6.1.5.1 What if goods are imported by the non-resident and delivered in Canada?

A non-resident who sells goods to a Canadian customer on a “delivered” basis and also acts as importer of record will be required to pay GST on the importation of the goods. Where the non-resident is not a GST registrant, the non-resident will not be able to obtain an input tax credit (i.e., refund) of the GST. In effect, the GST legislation would increase the non-resident supplier’s costs and the price to the Canadian customer would include GST.

This is contrary to the intent of the GST legislation. As a result, the Canadian customer is permitted to claim an input tax credit in respect of the GST paid at the border by the non-resident supplier, where the customer obtains proof of payment of the GST from the non-resident. Therefore, its customer will reimburse the non-resident for the GST paid at the border, and the customer will claim the GST input tax credit as if the goods were purchased from a Canadian supplier. This levels the playing field between Canadian customers who deal with non-resident suppliers and those who deal with Canadian suppliers. This is referred to as the “flow-through” mechanism.

6.1.5.2 Will the non-resident have to collect GST from its customer?

A second relieving provision is referred to as the “non-resident override rule”. This rule applies to a supply of personal property or a service in Canada made by a non-resident, and deems it to be made outside Canada and therefore beyond the scope of the GST. This provision applies where the non-resident supplier does not carry on business in Canada and is not registered for GST purposes. The “non-resident override rule” relieves the non-resident from any obligation to register and charge and collect GST on supplies that otherwise would be considered to be made in Canada. However, the Canadian customer may be required to self-assess GST on such supplies, in certain circumstances.

6.1.5.3 What if goods are sold by a non-resident, but sourced from and delivered by a resident third party?

A third relieving provision is referred to as the "drop shipment" rule. In general, this rule applies where a non-resident sells goods to a Canadian customer, sources those goods from a Canadian supplier, and arranges for delivery by the Canadian supplier directly to the Canadian customer. In these circumstances, the Canadian supplier to the non-resident seller must collect GST on the sale to the non-resident, and if the sale is to an individual consumer, the GST will be collected on the non-resident's re-sale price to the consumer. The drop shipment rule applies to deem the sale by the Canadian supplier to the non-resident re-seller to be made outside Canada and therefore not subject to GST, where the non-resident's customer provides a "drop shipment certificate" to the Canadian supplier. This places the Canadian customer in the same position as if the goods were purchased directly from a Canadian supplier.

6.1.6 GST on imports

GST is generally exigible on imported goods based upon their duty paid value. GST is generally not exigible on imported services and intangible property (such as patents and trade-marks), provided they are used exclusively in taxable commercial activities of the purchaser. Purchasers must self-assess tax on imported services and intangible property if such services and property are not used exclusively in taxable activities. It should be noted that, although customs duties on U.S.-origin and Mexico-origin goods have been eliminated under NAFTA, GST must still be paid on U.S. or Mexican goods imported into Canada.

6.1.7 Other federal excise taxes

In addition to GST, a limited range of goods is subject to excise duties or taxes at various rates based on the manufacturer's selling price. Examples of items subject to the *Excise Act*, 2001 include certain types of alcohol and tobacco. Examples of items subject to the *Excise Tax Act* include certain insurance premiums, air conditioners for motor vehicles, certain gasoline and other petroleum products.

6.2 Provincial sales and commodity taxes

6.2.1 When does provincial sales tax apply?

As set out above, five provinces (Ontario, Prince Edward Island, New Brunswick, Nova Scotia, and Newfoundland and Labrador) have harmonized their individual provincial sales tax bases with that of the GST, and the combined tax is called the Harmonized Sales Tax or HST, imposed at rates ranging from 13% to 15%. Quebec has also largely harmonized its provincial sales tax base with that of the GST; however, unlike the HST provinces, the Quebec Sales Tax or QST is imposed pursuant to a separate Quebec statute at the rate of 9.75%.

As a result, currently only Manitoba, Saskatchewan and British Columbia will continue to impose a sales tax at the provincial level. The following discussion provides general comments on provincial sales taxation in the referenced provinces. However, each province's legislation should be referred to for specific issues.

As a general rule, the provincial sales tax is levied on the purchaser of most tangible personal property purchased for consumption or use in the province or imported into the province, including most computer software. Certain services are also subject to this tax. Generally, the tax is based on the sale price of the taxable goods or services being sold at the retail level, calculated on the purchase price excluding the federal GST (and the GST is calculated on an amount excluding all provincial sales taxes).

The relevant provincial sales tax statutes generally provide that the vendor of the taxable goods or services is required to act as the agent for the provincial government in collecting the sales tax. In some cases, a non-resident vendor without a physical presence in the province is nevertheless required to register for purposes of the tax.

Various goods are exempt from the provincial sales tax, including certain foods, drugs and medicines, motor and heating fuels, certain production machinery and equipment, custom computer software, many items used in farming and fishing, and items to be shipped directly out of the province.

6.2.2 Which goods are subject to provincial commodity taxes?

The various provinces impose sales or transfer taxes on specific goods such as gasoline, fuel, and tobacco. These taxes are usually imposed as a specific tax (cents per litre or cents per cigarette) rather than on an ad valorem (i.e., a percentage) basis. Certain provinces have enacted specific statutes to impose taxes on certain services such as accommodation, admissions, insurance premiums, gambling, etc. As well, land transfer taxes are imposed on transfers of land, as described in Section XIII, “Real Estate”. In addition, the provinces also impose property taxes on landowners.

6.3 Customs tariffs

6.3.1 What are the treaties governing tariffs?

Canada is a member of the World Trade Organization (WTO). In accordance with the WTO, it grants most favoured nation tariff status to other WTO members. Goods are classified in Canada’s List of Tariff Provisions according to the *Harmonized Commodity Description and Coding System Convention*, which Canada adopted in the late 1980s. For details, see Section IV, 3.

VIII. Employment and Labour Law

Employment and labour law in Canada is designed to regulate both the conditions of employment and the relations between employers and employees. To understand Canadian labour and employment law, it is necessary to know about the constitutional division of power between the federal government of Canada and the governments of Canada's 10 provinces and three territories.

While labour and employment matters are principally within provincial and territorial jurisdiction, the federal government has jurisdiction over certain industries that are viewed as having a national, international or inter-provincial character, such as banks, air transport, pipelines, telephone systems, television and inter-provincial trucking. All other employers are provincially regulated for the purpose of labour and employment matters. As a result, the vast majority of employers in Canada are required to comply with the employment standards, labour relations and other employment-related legislation of each of the provinces in which it has operations.

Regardless of whether a business is provincially or federally regulated, or where in Canada it carries on business, Canadian employers should be familiar with the following types of employment-related legislation:

- Employment Standards Legislation
- Human Rights Legislation
- Federal and Provincial Privacy Legislation
- Occupational Health and Safety Legislation
- Workers' Compensation Legislation
- Labour Relations Legislation

The legislation referred to above is only the start. Regulations made pursuant to this legislation also establish numerous rights and obligations for employers and employees. For example, there are detailed regulations made under both employment standards and occupational health and safety legislation, which give substance to the obligations contained in the statutes. When considering any labour and employment problem, it is important to ensure there are no additional regulatory rights or obligations that may affect its solution. In addition to the statutory obligations discussed above, employers are often also required to satisfy common law obligations owed to their employees in Canada's common law provinces, and to abide by the *Civil Code of Québec* in Quebec. The most significant of these obligations is to provide employees with reasonable notice of the termination of the employment relationship without cause, which is described in greater detail below in Section 2, *Common Law Obligations to Employees*.

1. Statutory Obligations to Employees

In general, an employer's specific statutory and regulatory obligations will depend on the law of the province or territory in which it has operations. As such, any particular issue or question will have to be answered with reference to the law of that jurisdiction.

1.1 Employment standards legislation

Canadian employment standards legislation sets out the minimum terms and conditions of employment federally and in each provincial and territorial jurisdiction. Employers and employees may not contract out of these minimum obligations, except to provide for terms more favourable to the employee than those contained in the legislation. Accordingly, any document or practice that establishes a term of employment that is less favourable to an employee than an employment standard has no force or effect.

Generally, employment standards legislation sets out minimum standards relating to matters such as notice of the termination of employment, wages, hours of work, overtime pay, public holidays, vacations with pay, and various job-protected leaves of absence. Employment standards legislation and regulations include many exceptions to the statutory minimum standards for certain types of employees, such as managers and professionals.

1.1.1 Termination of employment

Critical to most employers, employment standards legislation in all Canadian jurisdictions sets out minimum notice obligations upon the termination of employment without cause which requires employers to provide written notice or pay in lieu of notice. Generally, an employee's entitlement to notice of dismissal increases with his or her length of service.

For example, in Ontario, employees are generally entitled under statute to one week's notice (or pay in lieu of notice) for each completed year of employment, to a maximum of eight weeks. Although employees' entitlement to notice of termination of employment varies slightly from province to province, Canadian employment standards legislation establishes a maximum statutory notice requirement of eight weeks or less. Employees in federally regulated businesses with a minimum of three consecutive months of service have a minimum statutory entitlement to two weeks of notice (or pay in lieu thereof).

Many employment standards statutes also include enhanced notice requirements for employers that effect a mass termination of employment, which is defined in most provinces and territories as the dismissal of 50 or more employees in a span of four weeks or less (although in several provinces the threshold is as low as 10 employees). Other obligations, including notice to government agencies, are also imposed.

For federally regulated businesses, under the *Canada Labour Code*, if an employer discontinues its business permanently or undertakes a mass termination (50 or more employees in a period of four weeks or less), it must give the federal government 16 weeks of prior notice. In most cases, the employer must also establish a "joint planning committee", which must include employee and trade union representatives if applicable. The object of the committee is to develop an adjustment program to: a) eliminate the necessity for termination of employment; or b) minimize the impact of the terminations on affected employees and assist them with obtaining other employment.

In Ontario and the federal jurisdiction, employment standards legislation also requires employers to provide employees with severance payments (in addition to notice or pay in lieu of notice) in certain circumstances. In Ontario, employees who have five or more years of service at the time of their dismissal are entitled to severance pay, if their employer has a payroll in Ontario of C$2.5-million or more, or if the dismissal is part of a discontinuance of a business involving the termination of 50 or more employees in a period of six months or less. Severance pay is equal to one week's pay for each completed year of employment and a proportionate amount of one week's pay for a partial year of employment, to a maximum of 26 weeks' pay.

In the federal jurisdiction, an employee is entitled to statutory severance pay if he or she has completed 12 consecutive months of employment with an employer prior to his or her dismissal. Severance pay is calculated as the greater of two days' wages for each year of employment completed by the employee and five days' wages.

Aside from the notice and severance pay requirements described above, employment standards legislation in three Canadian jurisdictions also includes "unjust dismissal" provisions.

Generally, absent serious misconduct or certain other conditions beyond the employer's control, these provisions permit certain employees to seek redress from employment standards tribunals or adjudicators following their dismissal. If the administrative decision-maker determines following a hearing that an employee has been unjustly dismissed, the employee may be reinstated to employment and/or receive compensation relating to his or her dismissal. In the federal jurisdiction, non-unionized employees who have worked for an employer for at least 12 months in a non-management position may make unjust dismissal complaints. In Quebec, employees with two years of service can claim that they have been unjustly dismissed and, in Nova Scotia, employees with at least 10 years of service can do so.

In some Canadian jurisdictions, namely, Alberta, Manitoba, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Saskatchewan and Yukon, an employee is required under statute to provide notice of resignation to his or her employer, which ranges from one week to six weeks, depending on the employee's length of service and jurisdiction of employment. In Quebec, employees are also required to provide reasonable notice of termination; however, no specific length of time is identified by the legislation.

1.1.2 Minimum wages

The minimum wages that must be paid to employees vary by province and territory, generally ranging from a low of C$9.95 per hour to a high of C$11 per hour, although there are lower minimum wages for certain jobs and types of employees prescribed by regulations in some jurisdictions. Employment standards legislation also includes various provisions regulating how employees are paid and the records that must be provided to employees and retained by employers regarding the employment relationship, including documentation with respect to the payment of wages.

1.1.3 Hours of work

Generally, the employment standards legislation in each jurisdiction provides that an employee's regular hours of work may not exceed certain daily and/or weekly maximums.

In many jurisdictions employees can agree to work more than these maximum hours and may be required to do so to deal with emergency situations. Employment standards legislation also provides employees with entitlements to meal breaks, hours free between shifts, and days of rest during each week.

Each employment standards statute includes provisions with respect to the payment of overtime pay (or, in some instances, time off in lieu of overtime pay) after an employee works in excess of a certain number of hours per day and/or week. For example, in Ontario, an employee is entitled to a premium of at least 50% of his or her regular rate for each hour worked in excess of 44 hours in a week, unless exempted from this entitlement by the regulations.

Generally, employees are entitled to overtime pay, although certain employees, including managers and some professionals, are often specifically exempted from this requirement. Further, in many provinces, a written agreement between the employer and employee may provide for the averaging of an employee's hours of work over a period of time for the purpose of calculating his or her entitlement to overtime pay. There are also specific provisions permitting employers to implement work schedules that include "compressed" or four-day workweeks.

1.1.4 Vacations and holidays

Employment standards legislation provides that employees are entitled to vacation time off work and vacation pay for each year worked. Except in Saskatchewan, employees are generally entitled to two weeks of vacation time annually for the first five years of their employment, with vacation pay of at least 4% of their annual wages. In most provinces, the minimum statutory entitlement to vacation time and pay increases with an employee's length of service to three weeks of vacation with vacation pay of 6% of annual wages. In Saskatchewan, employees are entitled to three weeks of vacation per year, increasing to four weeks after they have completed 10 years of service. In Ontario and the Yukon, employees are entitled to two weeks of vacation per year, with no mandatory increase based on service.

In addition, employment standards legislation recognizes a number of statutory holidays, including New Year's Day, Canada Day, Labour Day and Christmas Day. The number of holidays to which an employee is entitled under employment standards legislation will depend on the province or territory in which he or she works, and ranges from five to 10 holidays per year. Employment standards legislation generally provides that eligible employees must be paid for these statutory holidays. To be eligible, employees must often meet certain requirements, such as working for a certain number of days in a prescribed period prior to the holiday. If an employee works on a holiday, he or she will be entitled to premium pay for hours worked. In many provinces, the employee is entitled to 1.5 times his or her regular rate for hours worked on the holiday, in addition to the holiday pay for the day.

1.1.5 Protected leaves

Employment standards legislation also provides employees with a variety of protected leaves of absence. An employer may not dismiss or penalize an employee who chooses to exercise his or her right to take such leaves. Generally, employers are also required to continue to make contributions to certain benefit plans during the employee's leave, and the employee must be reinstated to his or her former position at the end of the leave. However, employers are not required to pay employees' wages during the vast majority of the statutory leaves as, in many cases, employees may collect benefits under Canada's federal employment insurance program while they are away from work.

The types of leaves of absences available to employees vary significantly depending on the province or territory where the employee works. However, all Canadian employees are eligible for some type of pregnancy and parental leave, although most provinces require that an employee have worked for an employer for a certain qualifying period before a pregnancy or parental leave may be taken. In most provinces, pregnancy leave can last for 15 to 18 weeks, and parental leave can last for 34 to 37 weeks, depending on whether the employee has also taken pregnancy leave. In Nova Scotia, an employee who has not taken pregnancy leave may take up to 52 weeks of parental leave. Quebec also provides employees with more extensive pregnancy and parental benefits, permitting employees to take 18 weeks of pregnancy leave and 52 weeks of parental leave. Quebec employees are also entitled to a leave of up to five days upon birth or adoption, two days of which must be paid by the employer in certain circumstances.

In most Canadian jurisdictions, employment standards legislation also provides for leaves which allow employees to take time off to meet child care responsibilities or due to the illness of the employee or certain of his or her family members. These protected leaves vary from a few days to many weeks. Employees generally have an obligation to provide their employers with medical or other information substantiating their absence.

In addition, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Quebec, Saskatchewan, the Northwest Territories, Yukon and the federal jurisdiction provide employees with bereavement leave on the death of specified family members. These bereavement leaves last from three to seven days and, in some instances, wages must be paid by the employer during a portion of that time. In Ontario, where the employer regularly employs 50 or more people, employees are permitted to take unpaid emergency leave for up to 10 days in the case of a death of a family member or other individuals defined in the legislation.

All jurisdictions in Canada provide employees with reservist leave. While reservist leave varies amongst jurisdictions, generally, it provides a protected leave for employees who are Canadian Forces military reservists and are deployed to an international operation overseas or for certain operations within Canada. To be eligible, most jurisdictions require that employees have at least six months of continuous service with an employer before being entitled to reservist leave. Employees are generally entitled to leave for the duration of the service required by the Canadian Forces.

1.1.6 Enforcement

Canadian employment standards legislation is enforced by way of a complaint made to the appropriate federal, provincial or territorial Ministry responsible for the legislation. In most jurisdictions, employment or labour standards officers investigate complaints and make rulings if the matters cannot be settled. Appeals from those rulings are heard by labour relations boards or other administrative or quasi-judicial bodies established in each jurisdiction. In some provinces, an employee can file a civil claim in court against his or her employer regarding alleged violations of employment standards legislation. Limits exist on when complaints may be made and, in some cases, the maximum amount that may be recovered, which varies by jurisdiction and whether the complaint proceeds through the statutory enforcement process or a civil proceeding.

In the case of unionized workplaces, bargaining unit members and their representatives generally enforce employment standards legislation by way of grievance arbitration.

1.2 Human rights legislation

Every Canadian jurisdiction has enacted human rights legislation that establishes, among other things, a comprehensive system for the investigation and resolution of complaints relating to discrimination. Although these human rights statutes deal with matters beyond the scope of the employment relationship, they also contain a number of provisions that deal with workplace discrimination.

Specifically, human rights legislation provides for an individual's right to equal treatment with respect to employment, and prohibits discrimination in the workplace based on certain "prohibited grounds", which are set out in the legislation. As a general observation, discrimination has been defined to include any distinction, exclusion or preference based on a prohibited ground as defined by the legislation.

Ontario recently enacted Regulations under the *Accessibility for Ontarians with Disabilities Act* (AODA) which apply in conjunction with human rights legislation in that province. The Regulations contain a number of significant employment-related obligations that require Ontario employers to revise their employment-related documentation and accommodations processes. Employers are also required to invest significant resources into training programs regarding accessibility matters in order to ensure compliance with the AODA.

1.2.1 Prohibited grounds of discrimination

The prohibited grounds of discrimination vary slightly from jurisdiction to jurisdiction, and include the following: place of origin; place of residence; creed; social conditions; social origin; source of income; language; civil status; sexual orientation; family status; political beliefs; ancestry; disability, including substance dependencies; criminal conviction for which a pardon or record suspension has not been granted; marital status; pregnancy; same-sex partnership; sex; age; religion; citizenship; nationality; national or ethnic origin; colour; and race. As such, employers in Canada must be careful to ensure that they do not make employment decisions with reference to any of these characteristics. In this respect, employment decisions include a wide variety of matters relating to the employment relationship and the terms and conditions of employment, including hiring, compensation, promotion and dismissal.

Human rights legislation in many provinces and territories also prohibits the distribution of employment applications that express or imply a preference for an individual with certain characteristics related to prohibited grounds of discrimination. In addition, the human rights statutes of most Canadian provinces and territories contain a prohibition against sexual harassment and harassment based on other prohibited grounds. The legislation also seeks to protect employees who make complaints regarding discrimination or harassment by prohibiting reprisals of any kind against those individuals.

1.2.2 Exceptions

Generally, Canadian human rights statutes contain a variety of exceptions to their very broad prohibitions against workplace discrimination. The exception most commonly relied upon by employers permits an employer to discriminate on the basis of disability with respect to employment because the person is incapable of performing or fulfilling the essential duties of his or her position. This exception is narrowly interpreted and is subject to an employer’s obligation to reasonably accommodate the individual in performing those essential duties, to the point of undue hardship. Many human rights statutes also protect programs designed to relieve hardship or economic disadvantage, or to assist persons or groups to achieve equal opportunity (i.e., affirmative action programs) by providing that their implementation does not constitute a discriminatory practice.

1.2.3 Enforcement

Enforcement of Canadian human rights legislation is essentially a complaint-driven process. Most jurisdictions have a human rights commission that will provide advice and assistance to individuals who believe they have been subject to unlawful discrimination. If a complaint is filed, the human rights commission will investigate the complaint. If the complaint cannot be settled, the human rights commission may refer the complaint to a human rights tribunal for adjudication. In some provinces, such as Ontario, individuals have a right to file complaints directly with the human rights tribunal without first filing a complaint with a commission or other investigative body.

Generally, human rights tribunals have broad remedial powers, including the power to award damages for loss of employment or wages, and damages relating to loss of enjoyment or hurt feelings. Human rights tribunals may also reinstate an employee to his or her employment or require an employer to take steps to ensure that discrimination does not continue. For example, in some jurisdictions an employer may be required to institute an anti-discrimination policy, report periodically to the human rights commission, and make specific changes to its employment systems or practices. Further, most human rights legislation provides that those persons who infringe the rights provided for by the legislation are guilty of an offence and liable to pay certain fines.

1.3 Occupational health and safety legislation

Occupational health and safety legislation creates health and safety obligations for both employers and employees to minimize the risk of workplace accidents. In all jurisdictions, employers are required to take all reasonable precautions to protect the health and safety of their workers. In some provinces, this obligation extends to the protection of the health and safety of all individuals at or near the employer's workplace, whether or not those individuals are employees.

Aside from the general obligation to take reasonable precautions to protect employees, the regulations passed under occupational health and safety legislation contain many and very specific responsibilities that are imposed on employers to ensure that their workplaces are safe. Some of these responsibilities apply to specific industries. Other regulatory responsibilities relate to particular hazards that may exist in the workplace, including the use of toxic substances and hazardous materials or equipment.

Canadian occupational health and safety legislation also provides employees with certain rights designed to promote workplace safety. For example, employees have a right to be informed by their employer about hazards in the workplace and have the right to refuse work that they reasonably believe is dangerous. Although the right to refuse work is subject to very specific procedural requirements in each jurisdiction, employers cannot discipline employees for properly exercising their statutory right to refuse dangerous work.

Generally, occupational health and safety legislation requires employers to promptly report, within specific time-frames, any workplace accidents that result in a fatality or critical injury. Additional reporting obligations may apply in most of the provinces depending on whether medical attention was required and/or whether the worker was disabled from performing his or her normal duties.

Employees also have a right to participate in the creation of safe workplaces and in the resolution of health and safety problems. Occupational health and safety legislation in all Canadian jurisdictions provides for the creation of joint health and safety committees, which are advisory groups composed of worker and management representatives. The statutes contain specific provisions with respect to the composition and operation of joint health and safety committees, including their duties, size and the frequency of meetings. Generally, joint health and safety committees are required to meet either monthly or quarterly to discuss health and safety concerns in the workplace, and to make recommendations to the employer for the benefit of the health and safety of workers.

In Ontario, the scope of occupational health and safety legislation was recently expanded to require employers to conduct a formal assessment of the risk of violence occurring in the workplace. In addition, employers must prepare policies and programs on both workplace violence and workplace harassment and must provide information and instruction to employees regarding the contents of the policies and programs. Similar obligations exist in Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Prince

Edward Island, Saskatchewan, and federally with respect to workplace violence, and British Columbia, Manitoba and Saskatchewan with respect to workplace harassment.

1.3.1 Enforcement

In all Canadian jurisdictions, government health and safety officers or inspectors enforce occupational health and safety legislation. These officers or inspectors typically have broad powers to investigate potential violations of the legislation, and may be called to the workplace by a worker or employer, or may audit the workplace without notice.

An officer or inspector who finds that an employer has failed to comply with occupational health and safety legislation has broad powers to make orders to require the employer to rectify that failure. An officer or inspector will typically order that violations be remedied within a certain time-frame. They may also issue “stop work” orders and require the removal of hazardous equipment or material from the workplace. Subject to the specific procedural requirements in the governing legislation, the orders of an officer or inspector may be appealed by the employer to a labour relations board or other adjudicative body.

Canadian occupational health and safety legislation also provides for the quasi-criminal prosecution of individuals and corporations for violations of the legislation, resulting in the potential imposition of fines and/or imprisonment. Maximum fines vary greatly and can be significant, up to C$1-million per count in some provinces. In addition to these quasi-criminal sanctions, the *Criminal Code* has been amended to expand both personal and corporate liability in the context of serious health and safety violations and workplace accidents. As such, employers and their representatives may also be subject to criminal sanctions with respect to a failure to ensure the health and safety of people in their workplaces which amounts to criminal negligence.

1.4 Workers’ compensation legislation

All provinces and territories in Canada operate a no-fault insurance plan with respect to injuries and illnesses arising from employment. Participation is compulsory for most employers. These plans provide workers who become sick or injured at work with compensation for both economic and non-economic losses, in certain circumstances.

An employee can collect benefits for workplace injuries causing temporary or permanent disabilities and make use of any rehabilitation services provided, but cannot sue his or her employer with respect to the injury. Workers’ compensation boards in each Canadian province and territory manage the insurance plans, and most provinces and territories have workers’ compensation tribunals to adjudicate disputes relating to benefit entitlements and other matters. Employees of federally regulated businesses are generally covered by the plan in the province or territory in which they work.

Most employers are required to register with the applicable workers’ compensation board and to pay premiums into the insurance fund. In some jurisdictions, employers who carry on business in low-risk industries are not required to participate, although they may choose to do so. The contribution an employer is required to make to the insurance fund will depend on the types of activities carried on in the workplace. In general, the greater the risk of accident in the workplace, the higher the premium that employer will be required to pay. In some provinces, workers’ compensation legislation provides that an employer’s claims history may also affect its premium, such that a surcharge is applied to the account of an employer with a poor claims history and an employer with a good claims history receives a rebate.

Workers' compensation legislation establishes many additional employer obligations. Generally, the legislation requires employers to report any accidents that occur in the workplace within specific time-frames. Employers are also required to work with employees to prevent injuries and to help injured employees return to work. In some provinces, workers' compensation legislation requires employers to reinstate certain workers to their previous or a comparable position when they are able to return to work following a workplace accident, even if the worker has been absent for a significant period of time.

Employers must also comply with various administrative obligations relating to the investigation and adjudication of benefits claims and the payment of insurance premiums. These obligations may vary significantly in each of the provinces and territories.

Employers and their representatives must comply with all obligations contained in workers' compensation legislation. As with occupational health and safety legislation, workers' compensation legislation generally provides inspectors with the right to conduct workplace audits to ensure compliance with workers' compensation obligations, and for the quasi-criminal prosecution of individuals and corporations for violations, which may result in significant fines and/or imprisonment.

1.5 Labour relations legislation

Labour relations legislation in each province and under the federal jurisdiction regulates trade union organization, certification, and collective bargaining. The legislation entrenches the right of employees to organize and to be represented by a bargaining agent, without interference from employers, through a certification process and by prohibiting conduct that interferes with the exercise of that right. The collective bargaining process is regulated to provide mechanisms for achieving collective agreements. Employers carrying on business in more than one province continue to be subject to provincial regulation, unless their business is subject to federal regulation as, for example, in the case of inter-provincial trucking.

If a provincially regulated employer carries on business in several provinces, a union must seek certification from the labour board of each province in which the employer is located to require the employer to deal with the union in each jurisdiction. Because the Canada Labour Code only applies to certain industries and is broadly comparable to provincial legislation, the provisions of that Code will not be reviewed below.

Generally, Canadian labour relations legislation governs the conduct of unions and employers, and addresses the various rights and obligations relating to collective bargaining and industrial disputes. It is important to remember that it is the right of every employee in Canada to join a trade union, and to participate in any lawful activity of a trade union. Consistent with that right, employers cannot discriminate against an employee because he or she has joined a trade union or is participating in an organizing drive.

1.5.1 Union certification

Labour relations legislation sets out the process by which a trade union may be certified to represent employees in a specific bargaining unit. Certification is generally approved by provincial and territorial labour relations boards, although the process used varies in each jurisdiction. In some jurisdictions, a certification vote is required, whereas, in other jurisdictions, the trade union need only sign up a certain percentage of the employees to be certified.

Although an employer in almost all provinces has the right to communicate with employees during an organizing drive, labour relations legislation limits such communication to ensure that the employer does not coerce or unduly influence employees. Further, an employer must be careful not to interfere in other ways with a trade union's organizing effort. If a trade union believes that an employer has committed an unfair labour practice during the certification process, it may file a complaint with the applicable labour relations board.

In many jurisdictions, labour relations boards may proceed to certify the trade union if it is determined that the true wishes of the employees are not (or were not) capable of being determined by a vote as a consequence of the employer's inappropriate conduct (e.g., threatening to fire employees or shut down a plant if the workplace becomes unionized).

1.5.2 Collective bargaining

Once a trade union is certified, the union becomes the exclusive bargaining agent for employees in its bargaining unit, and the employer has an obligation to bargain in good faith with the union to achieve a collective agreement. During the life of the collective agreement, strikes and lockouts are not permitted and all disputes are required to be resolved through grievance arbitration. Labour relations legislation in each Canadian jurisdiction sets out the procedures that trade unions and employers must follow before they are able to engage in a legal strike or lockout.

Generally, labour relations statutes also include provisions regarding the termination of a union's bargaining rights. As a general observation, an employer cannot encourage employees to initiate an application for termination in any way. In addition, labour relations legislation in each Canadian jurisdiction specifically provides that if all or part of a business is sold, bargaining rights are protected.

1.5.3 Strikes and lockouts

Strikes or lockouts are illegal during the life of a collective agreement. They can be undertaken only after the expiration of the agreement and after mandatory conciliation has failed to bring about an agreement.

1.5.4 Picketing

Traditionally, there are two forms of picketing. Primary picketing is lawful and involves picketing at the place of business of the struck employer. Where the employer has multiple places of business, picketing at other locations is considered to be primary picketing.

Secondary picketing, on the other hand, involves picketing third parties dealing with struck employers. Injunctive relief to restrain secondary picketing might be available from the courts or labour relations boards in appropriate circumstances.

Picketing is controlled by the criminal law and by the law of torts in addition to labour relations law, and is limited to communicating information. Forms of intimidation, including verbal threats, physical assaults or unreasonable blocking of premises, are unlawful.

1.5.5 Will the presence of a bargaining unit affect the sale of a business?

Generally, the purchaser of all or part of a business is bound by existing collective agreements and must recognize the certified union. In some cases after a sale, where there has been an intermingling of employees, an application can be made to the Labour Board to determine if the bargaining units are still appropriate.

2. Common Law Obligations to Employees

Over and above the statutory obligations summarized above, employers in Canada are also required to meet common law obligations owed to their employees working in Canada's common law provinces and territories, that is, all jurisdictions other than Quebec. Common law is essentially a "judge-made" body of law consisting of judicial decisions and precedents, instead of statutes or codes created by legislatures.

In the absence of a written contract of employment, certain terms and conditions of employment between an individual and his or her employer are implied by common law. One of the obligations imposed upon employers by the common law is the obligation to provide employees with reasonable notice of termination of employment, or pay in lieu of reasonable notice, in the absence of just cause for dismissal. Given that just cause for dismissal exists in only the most exceptional cases (typically involving serious wilful misconduct on the part of the employee such as theft or sexual harassment), terminations of employment in Canada are generally effected without cause by providing employees with reasonable notice or pay in lieu of notice.

There is no fixed formula for determining reasonable notice in any given case. There are, however, many factors that have been taken into account by courts of law when determining reasonable notice, including the:

- Age of the employee
- Employee's length of service
- Position held by the employee
- Employee's level of compensation

In essence, in each case, courts attempt to identify the length of notice that would be required to provide the employee with a reasonable opportunity to find alternate employment of a similar nature. Generally, notice periods determined by courts have not exceeded 24 months, but there are some exceptions, and the trend is currently toward longer notice periods. Further, any aggravating or "bad faith" behaviour on the part of the employer when dismissing an employee may serve to entitle the employee to additional damages in litigation.

Reference was made above to written contracts of employment. Written contracts of employment may contain provisions which speak to an employee's entitlement to notice or compensation upon the termination of his or her employment. In general terms, any obligations regarding dismissal described by a valid contract will govern the termination of employment, as long as minimum statutory obligations are met by the contracted provision.

Common law principles are not applicable in the province of Quebec. Rather, employers' obligations are established by the *Civil Code of Québec*. However, that legislation provides that an employee can claim reasonable notice (or compensation in lieu of notice) of the termination of his or her employment, such that an employee's entitlements upon dismissal in that province are substantially similar to those of employees in the common law provinces.

However, Canadian employers should be aware of the fact that there are unique legislative and other requirements relating to employment in Quebec that are not necessarily present in the common law provinces and territories.

3. Pensions, Benefits and Executive Compensation

3.1 Government-administered benefits – federal

Canada has many government-administered pension, benefit and welfare programs that provide a minimum degree of social security. Old Age Security provides pensions payable from general tax revenues from age 65, subject to residence requirements. The federal government has introduced measures to gradually increase the eligibility age to 67 by 2029. The Canada Pension Plan is a compulsory, contributory, earnings-related plan that applies to employees and self-employed individuals and provides basic retirement, survivor benefits, death, and long-term disability benefits. For individuals employed or resident in Quebec, the Quebec Pension Plan is applicable and is essentially identical to the Canada Pension Plan. The federal Employment Insurance Program (EI) pays a 15-week sickness benefit equal to 55% of average weekly insurable earnings in the employee's qualifying weeks to a fixed maximum. Most employers contract out of EI sickness benefits by providing equal or superior benefits, thereby reducing their EI premiums.

3.2 Government-administered benefits – provincial

All provinces maintain a hospital and medical insurance plan. In some cases, including in Ontario, it is financed by an employer health tax based upon annual payroll. Provinces also have workers' compensation legislation that provides non-taxable disability and death benefits for accidents that are work related, and which replaces the employee's right to take legal action against the employer in connection with work-related injuries. Workers' compensation is funded by employer contributions determined on an industrywide basis, depending on accident experience. The Ontario government has announced that it will be introducing a new mandatory provincial pension plan called the Ontario Retirement Pension Plan starting in 2017. The Ontario Retirement Pension Plan is intended to supplement, not replace, the Canada Pension Plan.

3.3 Privately administered benefits

3.3.1 Registered pension plans

Many employers voluntarily offer private pension plans. They, like employment and labour matters, are governed by federal or provincial legislation depending on the jurisdiction of the undertaking and must be registered in the jurisdiction where the plurality of members is employed. To qualify for preferential tax treatment, pension plans must also comply with federal income tax laws and must be registered under the *Income Tax Act* (Canada) (the ITA).

Pension legislation provides minimum standards applicable to pension plans and specifies rules relating to many aspects of the pension arrangement, including:

- Funding
- Eligibility
- Vesting
- Early, normal and postponed retirement
- Accrual of benefits
- Investing and withdrawing pension fund assets
- Transfers of pension fund assets
- Discontinuance of a pension plan

Employers with operations in more than one province or jurisdiction may operate one pension plan that contains terms required with respect to members employed in each province and jurisdiction.

3.3.2 Supplemental pension plans and executive compensation

Employers in Canada may choose to establish a supplemental pension plan (SPP) for executives and more highly compensated employees which will provide benefits in excess of the legislated limits under the ITA. SPPs often benefit from an exemption from the minimum standards legislation or registration requirements described in the preceding section. However, this should be confirmed when establishing a plan. Assuming that an exemption applies and subject to any relevant employment agreements, benefits provided under a supplemental plan need not be funded. Employers may choose to fund an SPP or secure the benefits provided pursuant to the plan using a letter of credit. If this is the case, the SPP may be considered a Retirement Compensation Arrangement (RCA) under the ITA and subject to a refundable tax regime. There are unique withholding and reporting requirements when the SPP is an RCA.

There are a number of other ways in which employers may compensate executives and other highly paid employees, such as stock options, restricted share units or other types of equity-based compensation plans. Proper plan design, in particular with respect to the ITA requirements and any cross-border tax considerations, will be important when implementing such plans. Generally, such plans benefit from broad exemptions from prospectus and registration requirements under Canadian securities laws.

3.3.3 Other retirement savings arrangements

The ITA contains a number of provisions designed to encourage individual savings for retirement. In particular, individuals may establish registered retirement savings plans (RRSPs). Contributions made to an RRSP are deductible in computing income, and income earned in the plan is not subject to tax prior to withdrawal. When the accumulated contributions and income are eventually paid out (generally upon retirement), tax is payable on amounts received. Thus, the effect of an RRSP is to defer tax on current earnings. The

ITA also contains provisions that permit an employer to share profits on a tax-sheltered basis with its employees (a deferred profit-sharing plan). Deferred profit-sharing plans, typically combined with a group RRSP (see below regarding such group plans), have become relatively popular employer-sponsored retirement income vehicles. There are many technical rules governing RRSPs and deferred profit-sharing plans, including the timing and method of withdrawal of contributions, annual contribution limits (which vary depending on whether the individual also participates in a pension plan) and qualified investment restrictions.

Individuals residing in Canada can also contribute up to C$5,500 per year to a tax-free savings account (TFSA). Contributions are made with after-tax dollars but individuals are not taxable on any income or capital gains earned in their TFSA or withdrawals from the TFSA. Contributions made by an individual to their TFSA will not reduce the amount the individual is permitted to contribute annually to a pension plan, an RRSP and/or a deferred profit-sharing plan under the ITA.

The Canada Revenue Agency permits the establishment and administration of RRSPs and TFSAs as group arrangements, as long as the group arrangement is sponsored by an employer, an association or other organization and is limited to employees or members of that employer, association or organization.

In 2012, the federal government enacted legislation to permit pooled registered pension plans or PRPPs. PRPPs are intended to be large, capital-accumulation plans administered by third-party administrators, such as, for example, Canadian banks or insurance companies, allowing for broad-based participation from multiple employers, individuals (without requiring employer participation), and the self-employed. The federal legislation permits the establishment of PRPPs applicable to persons subject to the federal jurisdiction, such as employees whose employment is regulated by federal law and their employers. Should the provinces wish to allow for PRPPs in their respective jurisdictions, they will have to enact their own legislation. To date, a number of provinces are well on their way towards enacting similar legislation. Quebec currently has legislation in place for “voluntary retirement savings plans” or “VRSPs”. Although the VRSP and PRPP regimes are very similar, the main difference is that employers in Quebec with five or more employees and no other retirement savings plan in place will be required to make a VRSP available to employees over the next few years. Employers will be required to deduct and remit employee contributions (unless the employee opts out), but employer contributions are not mandatory.

3.3.4 Employee benefit plans

In addition to sponsoring pension plans or other retirement savings plans, employers often offer health and welfare benefits to their employees. Such benefits typically include life insurance, accidental death and dismemberment insurance, long-term disability, short-term disability, extended health care and dental care. Employer-sponsored health and welfare plans supplement the universal health care provided in Canada, which generally does not provide coverage for prescription drugs or dental care outside a hospital setting. Health and welfare plans may be insured or self-insured. There will be different tax implications for employers and employees depending on the types of benefits provided under the health and welfare plan and the structure of the health and welfare plan.

IX. Immigration Law

Except in the province of Quebec, where jurisdiction is shared with the federal government, immigration is a federal jurisdiction and the provinces provide only a consulting role to the federal government.

Canada's immigration policy is governed by the federal *Immigration and Refugee Protection Act* (IRP Act).

The following discussion highlights key issues and requirements for work permits under the IRP Act. For a discussion of these issues and requirements as they pertain to the province of Quebec, please refer to Blakes *Doing Business in Quebec* Guide.

1. Temporary Foreign Workers

Canadian companies often wish to hire foreign workers with particular skills. Depending on the circumstances, this may be difficult in view of the federal government's policy, which provides that employment opportunities in Canada belong first to Canadian citizens and to permanent residents of Canada.

1.1 Temporary work permit – general requirements

The Act generally prohibits a foreign national (any person other than a Canadian citizen or permanent resident of Canada) from working in Canada without first obtaining a work permit. A work permit will generally only be issued when the use of a foreign worker will not adversely affect employment opportunities for Canadians or permanent residents of Canada. In addition, the issuance of the work permit will take into account other legislation to ensure the safety and security of Canadians, such as the *Safe Streets and Communities Act* which was adopted in March 2012. This Act includes proposed reforms to the IRP Act and makes it possible to deny issuing work permits to applicants who are vulnerable to abuse or exploitation.

1.2 How does a company obtain permission to hire a foreign worker?

Generally, an employer in Canada who wishes to hire a foreign worker must first obtain a positive or neutral 'confirmation' or 'labour market opinion' (LMO) from Service Canada (formerly Human Resources and Skills Development Canada) of the job offer in favour of the particular foreign worker. Before confirming an offer of employment, however, Service Canada must be satisfied that there is no Canadian or permanent resident available to fill the position.

The employer will be required to submit a temporary foreign worker application to Service Canada describing in detail the qualifications required and the duties of the prospective employee. Service Canada requires an employer to satisfy minimum advertising requirements before they accept an application for an LMO. Overall, it must be demonstrated to the satisfaction of Service Canada that the employer is genuinely prepared to give preference to a qualified Canadian or permanent resident. Recently, the government has imposed stricter regulation in this area and employers must now provide reasons explaining why Canadian applicants were not hired.

Certain categories of workers, however, do not need an LMO, but only a work permit. Some examples of such categories include: workers covered under international agreements, workers nominated by a province for permanent residence, entrepreneurs and intra-company transferees, spouses and common-law partners of certain skilled foreign workers, and refugees.

In addition, many temporary foreign workers will be subject to a four-year 'cumulative duration' limit on the length of time they may work in Canada. This means that starting April 1, 2011, a foreign worker can work four years in Canada, after which, no work permit will be granted to him and he will need to wait four years before being eligible to reapply. Extensions are possible in certain circumstances.

Among the workers to which this time limitation does not apply, there are:

- Temporary foreign workers who have applied for permanent residence and received a selection certificate from Quebec if applying as a Quebec Skilled Worker; a positive selection decision if applying under the Federal Skilled Worker Class; or a positive selection decision if applying under the Canadian Experience Class.

- Temporary foreign workers who are employed in Canada under an international agreement, such as NAFTA, or another agreement.

- Temporary foreign workers who are exempt from the LMO process.

In periods of economic recession and corresponding high unemployment levels, Service Canada is increasingly reluctant to confirm job offers in favour of foreign workers except in the clearest of cases.

1.3 Are employees to be transferred to Canada exempt from Service Canada confirmation?

Certain persons may be granted a work permit without the employer first obtaining an LMO from Service Canada. Included in this exemption from Service Canada confirmation are, among others, "intra-company transferees". Intra-company transferees include executives, managers and "specialized knowledge" workers who have worked as an employee of a branch, subsidiary, affiliate or parent of that company located outside Canada (for at least one year in the previous three years) for the company that plans to transfer them to Canada and who seek to enter Canada to work in a similar capacity for a temporary period at a permanent and continuing establishment of that company in Canada.

A specialized knowledge worker must demonstrate specialized knowledge of a company's service or product and its application in international markets or an advanced level of knowledge or expertise in the organization's processes and procedures. Stricter requirements have been imposed in the specific knowledge category. Workers must demonstrate enhanced experience and qualifications and longer tenure with their employer to qualify.

1.4 Has NAFTA liberalized the work permit requirement?

Under NAFTA, entered into by Canada, the U.S. and Mexico, the criteria for intra-company transferees are essentially the same as the general criteria. It should be noted that NAFTA applies only to *citizens* of Canada, the U.S. or Mexico (i.e., it does not apply to “permanent residents” or “green card holders”).

NAFTA also exempts certain designated “professionals” from the Service Canada LMO requirements. Included in the list of designated professionals are, among others, accountants, engineers, scientists, scientific technicians/technologists, certain medical professionals, architects, social workers, computer systems analysts, management consultants and hotel managers. These professionals, while still requiring a work permit to work in Canada, may be issued such permit without first having to obtain an LMO from Service Canada with respect to their job offer from a Canadian employer.

1.5 Accompanying dependants

The spouse and dependant children of a work permit holder are entitled to accompany the foreign worker to Canada but are not permitted to work in Canada without first obtaining a work permit in their own name. Spouses or common-law partners (but not dependant children – except in limited circumstances in the provinces of Alberta and Ontario) of most skilled people coming to Canada as temporary foreign workers are generally able to work in Canada without first obtaining a job offer confirmed by Service Canada or an LMO delivered, but they are still required to apply for a work permit. The spouse and dependant children of a work permit holder may be eligible to apply for an “open” work permit that will allow her or him to accept any job with any employer if eligible for a work permit through an active pilot project or work that meets a determined minimum skill level. Such permit will be for the same length of time as the worker’s permit. Dependants of a work permit holder are permitted to attend school in Canada and, in certain circumstances, may be required to first obtain a study permit from CIC.

2. Permanent Residence

A person wishing to become a permanent resident of Canada must (generally) file an application at a Canadian Embassy, High Commission or Consulate outside Canada. The application will be considered to determine whether the potential immigrant is qualified for admission to Canada as a permanent resident under the existing legislation, regulations and policy. In general, applications for permanent residence in Canada are considered under these categories:

- Family Class
- Economic Class, including Skilled Worker Class, Canadian Experience Class, and Provincial Nominees
- Business Immigration (including investors, entrepreneurs and certain self-employed persons)
- Refugees

With respect to these applications, the adoption of Bill C-35, *An Act to amend the Immigration and Refugee Protection Act*, must be taken into account. Essentially, this Act, which came into force on June 30, 2011, amends the IRP Act, making it an offence for unauthorized representatives to conduct any type of business, for a fee or other consideration, at any stage of an application. However, these restrictions do not apply to unpaid third parties, such as family members and friends, who can still act on behalf of or help an applicant during the application process. This Act creates a specific offence and provides strict penalties and/or imprisonment upon conviction. There are also provincial nominee programs which may apply to allow higher skilled workers to qualify.

2.1 Family class immigration

A Canadian citizen or permanent resident living in Canada, 18 years of age or older, may sponsor certain immediate family members such as spouses, common-law or conjugal partners 16 years of age or older, parents, grandparents and dependant children (generally under the age of 22) for permanent residence in Canada. Two processes exist. The first is the sponsorship of the spouse or dependant child, while the second is the sponsorship of all the other eligible relatives. Both processes require that a sponsorship application be made to the Government of Canada and an undertaking application to the Government of Quebec, and the conditions of both governments should be respected. By sponsoring a family member, the sponsor has strict obligations under the undertaking agreement towards the government as he commits to provide for the basic needs of the sponsored member of his family for the entire duration of the undertaking. Therefore, he must also meet certain income requirements. The undertaking, which may be from three to 10 years, depending on the nature of the relationship of the sponsored member and the sponsor, cannot be terminated.

It is to be noted that as of November 5, 2011, no new applications to sponsor parents or grandparents will be accepted for processing for up to 24 months. This measure is taken to reduce the backlog in the parents and grandparents category. However, they can be consoled by the new option for visiting Canada with the Parent and Grandparent Super Visa, which was available as of December 1, 2011. This last allows them to enjoy visits to Canada of up to two years without the need to renew their status.

Many changes have occurred with respect to the family class immigration process. First, as of November 17, 2011, new eligibility requirements for sponsors came into force for the purpose of protecting individuals from family violence. Previously, the *IRP Regulations* prevented a person from sponsoring a member of the Family Class where the sponsor had been convicted of an offence of a sexual nature against anyone or an offence that resulted in "bodily harm" against a list of specific members of their family. After the Federal Court decision in *Minister of Citizenship and Immigration v. Brar*, the authorities agreed that the list was restrictive and needed to be extended. Changes have now been adopted in order to bar sponsorship from someone convicted of an offence against an extended list of family-related relationships.

Second, fraud by marriage has been an evolving concern for the Government of Canada. Until now, a problem was detected when a sponsored spouse or partner arriving in Canada as a permanent resident could leave their sponsor and sponsor another spouse or partner themselves, while their original sponsor was still financially responsible for them for up to three years. Following the example of Australia, New Zealand and the U.S., the government has now put in place a bar on such sponsorship. Regulatory changes, in force since March 2, 2012, mean sponsored spouses or partners will have to wait five years from the day they are granted permanent residence status in Canada to sponsor a new spouse or partner.

Family Class applications receive the highest processing priority and qualifying applicants are exempt from the usual selection criteria.

2.2 Economic class

The Government of Canada has transformed its economic immigration program to create a fast and flexible immigration system. Under proposed legislation, CIC closed the files of foreign skilled worker applicants who applied before February 27, 2008, and for whom an immigration officer had not made a decision based on selection criteria by March 29, 2012. More details of the different changes will be discussed in the appropriate categories below.

2.2.1 Skilled worker class immigration

Applicants in the skilled worker class are expected to have the skills, education, work experience, language ability and other qualities needed to participate in the Canadian labour market. An application for permanent residence as a skilled worker is generally assessed on six selection factors (“point system”) and the applicant must achieve a minimum of 67 points out of 100, and meet certain other requirements of the Act and Regulations. Factors such as education, work experience, arranged employment, adaptability, age, English and/or French language ability and other specific qualities of the prospective immigrant are assessed within the point system. Applicants in the skilled worker class must have at least one year of full-time or equivalent part-time paid work experience (within the past 10 years) in one of 29 designated occupations or have “Arranged Employment” in Canada (which may need to be “confirmed” by Service Canada).

CIC is proposing changes to the selection system, which would only affect the number of points assigned to the criteria and the way they are assessed. The changes include:

- An increase in the number of points granted for language proficiency
- An increase in the number of points granted to younger immigrants
- A reduction in the number of years of education required to claim points for a trade or other non-university credential
- A reduction in the total number of points that could be awarded for work experience.

In addition, it is planned that a modernized federal skilled worker program will be unveiled later in 2012. This last was introduced for the purpose of filling Canada’s growing labour shortages in construction, natural resources and similar industries. CIC intends to create a separate and streamlined program for “skilled tradespersons”, which includes occupations in construction, transportation, manufacturing and service industries. The new skilled trades stream would also avoid some of the complexities of the traditional points grid.

As of July 1, 2012, CIC temporarily stopped accepting applications for the federal skilled worker program. This temporary pause does not apply to those with a qualifying job offer or applying under the PhD stream. CIC will likely start accepting applications again when the revised program selection criteria take effect. Proposed federal skilled worker program changes should come into force in early 2013.

2.2.2 Canadian experience class

The Canadian experience class is a permanent residence category for individuals with experience in Canada. It was developed for temporary foreign workers or graduates from qualifying post-secondary education in Canada with Canadian work experience.

Under the temporary foreign workers stream, an applicant must have acquired in Canada within the 36 months before the date the application is made, at least 24 months of full-time work experience or the equivalent in part-time work experience, in a skill level considered managerial, professional, skilled or technical (Skill Type 0, or Skill Level A or B as set out in the Canadian National Occupational Classification (NOC).

Under the post-graduation stream, the applicant must have completed a program of study in Canada and obtained a Canadian educational credential (e.g., diploma, degree or certificate), have been enrolled full-time in this program of study or training for at least two years and acquired in Canada at least 12 months of full-time work experience or the equivalent in part-time work experience in a qualifying occupational level, within the 24 months before the date the application is made. Both streams require applicants to demonstrate that they have met minimum language requirements in one of Canada's official languages, English or French.

2.2.3 Provincial nominee program

Persons who immigrate to Canada under the provincial nominee program have the skills, education and work experience needed to make an immediate economic contribution to the province or territory that nominates them. These individuals are ready to establish themselves successfully as permanent residents of Canada. To apply to the provincial nominee program, applicants must be nominated by a Canadian province or territory. The criteria for provincial nomination are determined by the individual provinces and territories and can change without notice. Applicants nominated by a province or territory have to make a separate application to CIC for permanent residence. A CIC officer will then assess the application based on Canadian immigration regulations. Provincial nominees are not assessed on the six selection factors of the federal skilled workers program.

2.3 Refugees

Canada's commitment to uphold its humanitarian tradition with respect to the displaced and the persecuted is stated in the objectives of the IRP Act. The legislation makes provision for refugees and special groups whose admission is to be facilitated on humanitarian grounds.

The adoption of a new bill, *Protecting Canada's Immigration System Act*, proposes changes that build on reforms to the asylum system passed in June 2010 as part of the *Balanced Refugee Reform Act*. The measures of the new bill, which came into effect as of June 28, 2012, aim to address human smuggling, and add the requirement to include biometric data as part of a temporary resident visa, work permit, and study permit application. More importantly, it provides faster protection to those who genuinely need refuge, and faster removal for those who do not. The Minister of Public Safety will also be able to designate the arrival of a group of persons into Canada as an irregular arrival, and make those involved subject to the Act's measures.

X. Privacy Law

Canada has comprehensive federal privacy legislation that applies to the private sector. In addition, certain provinces have enacted both comprehensive and sector-specific private-sector privacy legislation.

The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) applies generally to all collection, use or disclosure of personal information by organizations in the course of a commercial activity. "Personal information" is broadly defined in PIPEDA, and includes any "information about an identifiable individual", whether public or private, with limited exceptions.

All organizations subject to PIPEDA must comply with a range of obligations when collecting, using, disclosing and otherwise handling personal information, summarized in the following 10 principles:

1. **Accountability**: Organizations must appoint an individual (or individuals) to be responsible for the organization's compliance and to develop and implement personal information policies and procedures. Organizations are accountable for personal information transferred to third-party service providers (including affiliated companies) for processing on their behalf, and must use contractual or other means to protect personal information while being handled by those third parties.

2. **Identifying Purposes**: Organizations must identify the purposes for collecting personal information before or at the time of collection.

3. **Consent**: Knowledge and consent of the individual are required for collection, use and disclosure of personal information, with limited statutory exceptions. Consent cannot be made a condition for supplying a product or service unless use of the personal information is required to fill an explicitly specified and "legitimate" purpose. Individuals may withdraw their consent at any time, subject to contractual or statutory limitations.

4. **Limiting Collection**: Organizations are required to limit collection to the amount and type of information necessary for the identified purposes. Information must be collected by "fair and lawful means", and cannot be collected indiscriminately.

5. **Limiting Use, Disclosure and Retention**: Personal information may not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or pursuant to certain limited statutory exceptions. Personal information is to be retained only as long as necessary for the fulfilment of those purposes.

6. **Accuracy**: Personal information must be as accurate, complete and up-to-date as is necessary for the purposes for which it is to be used.

7. **Safeguards**: Organizations must use appropriate security safeguards to protect personal information against loss or theft, and unauthorized access, disclosure, copying, use or modification, and must train staff on security and information protection, among other matters.

8. **Openness**: Privacy policies and practices of the organization must be open, understandable and easily available.

9. **Individual Access**: Organizations must give individuals access to their personal information upon request, subject to certain statutory limits and, in appropriate circumstances, individuals must be given an opportunity to correct their information.

10. **Challenging Compliance**: Organizations must have a simple and easily accessible complaint procedure.

In addition to the foregoing principles, compliance with PIPEDA is subject to an overriding reasonableness standard whereby organizations may only collect, use and disclose personal information for the purposes that a "reasonable person would consider are appropriate in the circumstances". This reasonableness requirement applies even if the individual has consented to the collection, use or disclosure of their personal information.

In the context of personal information about employees of organizations, given the constitutional limits placed on federal legislation, PIPEDA applies only to the employment information of employees of federally regulated organizations such as banks, airlines and telecommunications companies. However, in the provinces that have enacted provincial privacy legislation, this legislation applies to employee information outside those sectors.

Quebec's *Act respecting the protection of personal information in the private sector* (Quebec Privacy Act) is similar in principle to PIPEDA, but there are important differences in detail. The Quebec Privacy Act applies to all private-sector organizations with respect to collection, use and disclosure of personal information (not just with respect to commercial activities) and to employee information. Alberta and British Columbia have also enacted comprehensive private-sector privacy legislation (in each case, the *Personal Information Protection Act* or PIPA) that applies generally, including to personal information of employees. Alberta, Saskatchewan, Manitoba, Quebec, Ontario, Nova Scotia, New Brunswick, and Newfoundland and Labrador have legislation in place specifically governing the collection, use and disclosure of personal health information.

PIPEDA permits the federal Cabinet, by order, to exempt an organization or class of organizations or an activity or class of activities from its application if the collection, use or disclosure of personal information occurs within a province that has enacted legislation that is substantially similar. The Quebec Privacy Act and the PIPA legislation in Alberta and British Columbia have each been designated as substantially similar to PIPEDA. In addition, in Ontario, New Brunswick, and Newfoundland and Labrador, the legislation governing the collection, use and disclosure of personal health information by certain designated entities (e.g., physicians, nurses, hospitals, etc.) has been designated as substantially similar to PIPEDA and therefore these entities are exempt from PIPEDA with respect to the activities covered by the provincial legislation. Given that many organizations operate in more than one province and inter-provincially, businesses are often required to deal with a "patchwork" of provincial and federal privacy legislation.

To date, Alberta's PIPA is the only piece of comprehensive private-sector privacy legislation that contains mandatory data breach notification requirements. Organizations must notify Alberta's Information and Privacy Commissioner, without delay, of a loss of or unauthorized access to or disclosure of personal information if a reasonable person would consider that there exists a real risk of significant harm to an individual as a result of the loss, access or disclosure. The Commissioner can direct the organization to notify individuals of the loss, access or disclosure. Organizations are also able to notify individuals on their own initiative.

Proposed amendments to PIPEDA, if enacted, would add a mandatory notification requirement to that statute. Federal and provincial privacy commissioners have also published guidelines that suggest disclosure and notification should be made in certain circumstances. In addition, the personal health information protection legislation in Ontario, Newfoundland and Labrador, Nova Scotia and New Brunswick also contains mandatory breach notification obligations.

Considerable attention has been given in Canada to cross-border transfers and outsourcing of Canadian personal information to the U.S. Much of this attention has centred on the concern that U.S. authorities could use the USA PATRIOT Act to obtain the information of Canadians where that information is located in or accessible from the U.S. PIPEDA and the related provincial legislation do not prohibit the transfer of personal information outside Canada. However, PIPEDA's "Openness" principle has been held by privacy regulators to require that notice of such transfers be provided to affected individuals.

In addition, the Alberta PIPA requires an organization that uses a service provider outside Canada to collect, use or disclose personal information to notify individuals as to how they can obtain information about the organization's policies and practices with respect to the use of service providers outside Canada, including the name, position or title of a person who is able to answer questions on behalf of the organization.

The organization is also required to include in its privacy policy or in a separate document, the countries outside Canada in which the collection, use or disclosure of personal information may occur and the purposes for which the service provider outside Canada has been authorized to collect, use or disclose personal information on behalf of the organization.

Under the Quebec Privacy Act, an organization may not communicate personal information outside Quebec, nor entrust anyone outside Quebec with the task of holding, using or communicating such information, unless adequate measures are put in place to ensure that the information will not be used for purposes not relevant to the purposes for which it was collected or communicated to third persons without the consent of the individuals concerned. If the organization considers the personal information being transferred outside Quebec will not receive the protection required, it must refrain from such transfer.

Somewhat different rules apply to personal information that is collected by federal, provincial or municipal public-sector organizations. This information is covered by federal and provincial legislation that limits the use and disclosure of such information to purposes related to a valid public purpose. While generally these public-sector privacy statutes apply only to public-sector organizations, under the laws of some provinces, hospitals and educational institutions are subject to the public-sector legislation. In British Columbia and Nova Scotia, there are restrictions on personal information collected by public-sector organizations, which, subject to limited exceptions, cannot be stored in, or accessed from locations outside Canada unless the individual consents. These restrictions apply to service providers to public-sector organizations. As a result, private-sector organizations that provide services to government agencies or other public-sector organizations in British Columbia and Nova Scotia will be directly subject to restrictions on foreign storage of, and access to, personal information collected by public-sector organizations.

In addition, British Columbia and Nova Scotia impose penalties for disclosure of personal information pursuant to foreign legal requirements (e.g., court orders, USA PATRIOT Act disclosure notices). Organizations that perform contracted services for federal public bodies should also be aware of federal government contracting guidelines that address privacy risks of contracting with foreign-based or foreign-affiliated service providers.

XI. Intellectual Property

Almost all business transactions and new product launches have intellectual property implications. Many products have various aspects that require protection.

For example, a "patent" protects new, useful and inventive functional features of a product or process. "Copyright" protects, among other things, original drawings by which a product is designed and software. An "industrial design" registration protects a novel and original aesthetic design of a functional article. "Trade-mark" protection is available for a distinctive word or design identifying the source of a product or service.

Any secret formula or process of manufacture of a product or business method that is known exclusively by the business would constitute proprietary "confidential information". "Personality rights" may be involved if the name or likeness of a person is used to promote a product. "Topography rights" and "plant breeders' rights" protect products in specific industries.

With only a few exceptions, federal law governs intellectual property in Canada. Federal statute law regulates patents, trade-marks, copyright and moral rights, industrial designs, topography rights and plant breeders' rights.

The only provincially regulated aspects of intellectual property are through the common law of passing off, personality rights and confidential information, and the statutes in some provinces governing personality rights. Provincial law also governs trade names and contracts related to intellectual property, such as assignments, licences and security interests.

1. Federal Law

1.1 Patents

1.1.1 What inventions are eligible for a patent?

A patent is granted by the federal government for an invention that satisfies certain criteria pursuant to the *Patent Act*. The patentee may exclude others from making, using or selling an invention protected by a patent.

A patent may only be obtained for certain classes of inventions, namely processes (such as a method for refining oil), machines (devices with moving parts), manufactured articles and compositions of matter (such as chemical compounds like plastics).

To be patentable, an invention must be new, useful and inventive. Utility is determined by whether the invention has a useful purpose and is capable of operation. Inventiveness means that the invention is not obvious to a person having ordinary skill in the art to which the invention relates.

The novelty of an invention is assessed with reference to certain statutory criteria. In the event of competing applications, only the person whose application has the earliest effective filing date may be entitled to a patent. However, only an inventor or a person who derives rights from the inventor is entitled to a patent. An invention made by an employee within the scope of employment is the property of his or her employer.

An invention is not patentable if it is made available through disclosure by publication, sale or otherwise in any country prior to the filing date of the application, unless the disclosure is made by the inventor or someone who derives knowledge from the inventor and an application is filed within one year of such a disclosure.

1.1.2 How does a person apply for a patent?

Canada is a signatory to the *Paris Convention* and the *General Agreement on Tariffs and Trade* establishing the World Trade Organization. Thus, in determining priority of filing, an applicant may rely on the filing date of its first application for a patent for the same invention in another country which is also a member of either of these treaties ("priority date") if the Canadian application is filed within one year of the priority date. Canada is also a signatory to the *North American Free Trade Agreement*, the *Budapest Treaty* and the *Patent Co-operation Treaty* (PCT). An international PCT application may designate Canada, entitling the applicant to enter the national phase in Canada.

A patent application is subject to examination by the Canadian Intellectual Property Office (CIPO) prior to grant. Examination must be requested within five years of the filing of an application.

1.1.3 May a patent be transferred?

An invention, a patent application and a patent may be voluntarily licensed and transferred. Transfers and exclusive licences must be recorded in the CIPO. A security interest may be recorded in the CIPO but the effect of such recordal is not clear. A security interest may also be recorded under provincial personal property security regimes.

1.1.4 What rights does a patent provide?

A patent is in force from the date of grant to a date 20 years after the date the application is filed in Canada. Annual maintenance fees are required to keep patent applications pending and issued patents in force.

A valid patent protects against the unauthorized manufacture, use or sale in Canada of devices or methods embodying the claimed invention, whether copied or resulting from an independent act of invention. The sale in Canada of products made abroad by a process patented in Canada may also be prevented. There are a number of remedies for patent infringement. These include: (i) temporary and permanent injunctive relief; (ii) either the damages suffered by the patent owner or the profits earned by the infringer; (iii) punitive damages; and (iv) delivery up or destruction of infringing articles.

1.2 Trade-marks

1.2.1 Must a trade-mark be registered to be protected?

A trade-mark is a word, symbol, sound or shape used to distinguish a person's goods or services from those of others. Recent amendments to Canada's trade-mark legislation will, when they take effect, recognize additional categories of trade-marks such as scents, tastes and textures. Trade-mark rights may be acquired through use of the mark in Canada in association with goods, services or both, or by registration. Although a trade-mark need not be registered to be protected, registration will usually ensure protection throughout Canada and facilitate enforcement of trade-mark rights.

In the absence of registration, a trade-mark can be protected only in the geographical area in which the owner can establish a reputation or goodwill in association with the mark and the goods and services offered with it. (See the discussion under "Provincial Law" below.) The reservation of a business name or a corporate name, the incorporation of a company or the registration of a domain name will not itself create any trade-mark rights.

1.2.2 What trade-marks may be registered?

A trade-mark is registrable if it is not: (i) primarily merely the name or surname of an individual who is living or has died within the preceding 30 years; (ii) either clearly descriptive or deceptively descriptive in the English or French language of the character or quality of the wares or services in association with which it is used or of the conditions of, or the persons employed in, their production, or of their place of origin; (iii) the name in any language of the wares or services in association with which it is used; (iv) confusing with a registered trade-mark; or (v) a mark of which the adoption is prohibited by certain provisions of the *Trade-marks Act*.

Although otherwise not registrable, some marks may be registrable if they have been so used in Canada as to have become distinctive or, if registered in a foreign country, are not without distinctive character.

1.2.3 How does a person apply to register a trade-mark?

Canada is a signatory to *the Paris Convention* and the *General Agreement on Tariffs and Trade* establishing the World Trade Organization (WTO). Canada is also a member of the *North American Free Trade Agreement*. Canada has recently announced its intention to adhere to the *Nice Agreement*, the *Singapore Treaty* and the *Madrid Protocol*.

For the purposes of the federal registration system, governed by the *Trade-marks Act*, the first person to “adopt” a trade-mark in Canada is generally considered to be the person entitled to registration in Canada, even if someone else was the first to apply to register the same mark. A trade-mark may be adopted by “use” or “making known” of the trade-mark in Canada or by filing an application for registration of the trade-mark in Canada. A person who has filed a trade-mark application in its country of origin, which is a member of the *Paris Convention* or the WTO, may be entitled to treat the filing date of the first foreign application (“priority date”) as an adoption date in Canada if a Canadian application for the same mark is filed within six months of the priority date.

A trade-mark may be registered on one or more of the following bases:

- **Use in Canada by the applicant or a predecessor in title:** “Use” in Canada with goods occurs when a trade-mark is marked on the goods or their packaging or when the mark is otherwise associated with the goods so that a purchaser would have notice of the association when the goods are sold or their possession is transferred in Canada in the normal course of trade. While mere advertising of a mark is not use of the mark in connection with goods, use with services occurs if the mark is used or displayed in Canada in performance of the services, or in advertising of the services if the applicant is capable of performing the services in Canada.

- **A stated intention to use a trade-mark in Canada:** Actual use must occur in Canada before registration is granted.

- **Making the trade-mark known in Canada by the applicant or a predecessor in title**: A mark is “made known” in Canada with goods or services if it is used in a foreign country which is a member of the Paris Convention or the WTO and is made well known in Canada to a substantial segment of the relevant population by reason of prescribed types of advertising.

- **Use abroad and registration of the mark in the applicant's country of origin that is also a member of the *Paris Convention* or the WTO:** Although the Canadian application can originally be based on an application filed by the applicant in its country of origin, the Canadian application will not be approved for advertisement until registration is granted in the applicant's country of origin.

The CIPO examines the application. If the mark is found to be registrable, the application is advertised in the *Trade-marks Journal*. Any person may file an opposition to registration within two months of advertisement.

Recent amendments to the *Trade-marks Act* will, when they are proclaimed in force, eliminate the requirement to specify a basis of registration in a trade-mark application.

1.2.4 May a trade-mark be transferred?

A trade-mark, an application for registration or a registration may be assigned, although one must be careful that the distinctiveness of the trade-mark is not thereby impaired. "Distinctiveness" refers to the ability of a trade-mark to distinguish a person's goods and services from those of others. The owner of a trade-mark may license others to use the mark if the owner controls the nature and quality of the licensee's goods or services associated with the mark pursuant to a licence agreement. An agreement is required even if the parties are related. If notice is given of the trade-mark owner's name and that the use is a licensed use, control by the owner will be presumed.

A grant of a security interest may be filed against a trade-mark of record in the CIPO but the effect of such a filing is unclear. A security interest may also be recorded under provincial personal property security regimes.

1.2.5 What rights does a trade-mark registration provide?

Registration of a trade-mark is granted for indefinitely renewable periods of 15 years. Recent amendments to the *Trade-marks Act*, not yet proclaimed in force, will reduce this period to 10 years. A registration is subject to expungement if: (i) after the third anniversary of registration the mark has not been used in Canada during the preceding three-year period; (ii) the mark was not validly registered; or (iii) the mark is no longer distinctive of the goods and services of its registered owner.

A valid trade-mark registration gives the owner the exclusive right to use the mark throughout Canada in respect of the goods and services for which it is registered. A person who sells, distributes or advertises goods or services in association with a confusing trade-mark or trade name infringes this right. Confusion is caused if the use of two trade-marks, or a trade-mark and a trade name, in the same area would likely lead to the inference that the goods, services or business associated with such marks or names are manufactured, sold, leased, hired or performed by the same person.

The remedies for trade-mark infringement include: (i) temporary and permanent injunctive relief; (ii) either the damages suffered by the trade-mark owner or the profits earned by the infringer; (iii) punitive damages; (iv) an order prohibiting importation; and (v) delivery up or destruction of offending materials.

1.3 Copyright

1.3.1 What types of works are capable of copyright protection?

Copyright is governed by the *Copyright Act.* Copyright is the sole right to reproduce, publish and perform literary, dramatic, artistic and musical works. Copyright also includes rights of performers in their performances, and rights in relation to sound recordings and broadcast signals. Only the form of expression of a work is protected. Copyright does not protect an idea, concept or information. Computer programs are protected as literary works, regardless of the medium in which such programs are expressed.

Canada is a signatory to the *Berne Convention*, the *Universal Copyright Convention* and the *Rome Convention*. Canada is also a signatory to the *General Agreement on Tariffs and Trade* establishing the World Trade Organization. Pursuant to those conventions, Canada recognizes copyright in works and other subject matter created by nationals of other signatories to the conventions. Canada is also a member of the World Intellectual Property Organization (WIPO) *Copyright Treaty*, the WIPO *Performances and Phonograms Treaty* and the *North American Free Trade Agreement*. Canada is also a member of other work or subject matter specific treaties.

Copyright protection subsists in any work capable of being so protected from the moment it is created and fixed in a tangible form, provided that certain conditions relating to the publication and residence or domicile of the author in a convention country are satisfied. No registration of copyright is necessary, although registration in the CIPO is helpful as a means of proof of copyright and its ownership in the event of litigation. Marking of copyright on articles with a copyright notice is not necessary in Canada but is a usual practice.

1.3.2 Who owns copyright?

The author of a work is generally the first owner of copyright in the work. If the author is in the employment of another and the work is made in the course of such employment, the employer is the first owner of copyright. If the author is an independent contractor and there is no written transfer of copyright, copyright is owned by the author. Special rules apply to contributions to periodicals and works prepared or published by or under the direction or control of the federal government. Other special rules apply for performers' performances, sound recordings and communication signals.

1.3.3 What does copyright protect?

Copyright generally lasts for the life of the author of the work plus the period to the end of the calendar year 50 years thereafter. There are different rules for performers' performances, sound recordings and broadcast signals.

Copyright includes the right to produce or reproduce a work or any substantial part thereof in any material form whatsoever and to perform a work or any substantial part thereof in public. Copyright protects original works against the unauthorized reproduction in different media, adaptation or conversion to a different form, translation, publication, making available, and telecommunication to the public, among other activities, and the authorization of such activities. Copyright also protects against certain commercial activities with infringing copies if there is knowledge that the copies infringe. Copyright law further protects against interference with technological protection measures.

1.3.4 May copyright be transferred?

Copyright may be assigned and licensed. Any assignment or licence of exclusive rights must be in writing. Assignments and licences should be recorded in the CIPO. The effect of the recordal of a security interest in the CIPO is not clear. A security interest may also be recorded under provincial personal property security regimes.

1.3.5 How may copyright be infringed?

Copyright is infringed by a person who performs any activity with a work protected by copyright without the permission of the author.

A person need not be a copier or performer to infringe copyright. Copyright may also be infringed by certain commercial activities in relation to a work which are done with knowledge that the work infringes copyright or would infringe copyright if it had been made within Canada. In some cases, importation of a work may constitute infringement.

For reasons of public policy, a number of activities in relation to copyright works which would otherwise constitute infringement are specifically exempted from infringement by users' rights. By way of example, any fair dealing with any work for the purposes of private study, research, criticism, review, newspaper summary, education, parody or satire may be exempted from infringement.

A user who is in lawful possession of a computer program may, in certain circumstances, alter and adapt that program to its particular needs, and make back-up copies of it, without infringing copyright. There are numerous other user rights, directed to specific institutions and activities. For example, non-commercial user-generated content reproduced for private purposes may, in some circumstances, be exempt from infringement.

The civil remedies for copyright infringement include: (i) temporary and permanent injunctive relief; (ii) an order prohibiting importation; (iii) both the damages suffered by the copyright owner and the profits earned by the infringer through the sale of infringing copies (subject to a deduction for any overlap); and (iv) punitive damages. In some cases, statutory damages may be available as an alternative to damages and profits. Further, all infringing copies of any work in which copyright subsists, and all plates used or intended to be used for the production of such infringing copies, are deemed to be the property of the owner of the copyright.

In addition to civil liability for copyright infringement, an infringer may be exposed to criminal liability.

1.3.6 What are moral rights?

Independently of any right of ownership of copyright in any literary, artistic, musical or dramatic work, the author of a work has moral rights in the work and a performer has moral rights in its performance. These include the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym, the "right of paternity"; and the right, where reasonable in the circumstances, to remain anonymous, the "right of anonymity".

As well, the author has the "right to integrity" of the work. An author's right to integrity of a work is infringed if the work is, to the prejudice of the honour or reputation of the author, distorted, mutilated or otherwise modified or used in association with a product, service, cause or institution. In the case of a painting, sculpture or engraving, prejudice is deemed to have occurred as a result of any distortion, mutilation or other modification of a work. Moral rights may not be assigned, but may be waived in whole or in part. A simple assignment of copyright in a work does not constitute a waiver of moral rights.

1.4 Industrial designs

1.4.1 What industrial designs are registrable?

An industrial design registration under the *Industrial Design Act* protects the aesthetic features of a useful article. Registrable designs are those having an original conception of shape, configuration, pattern or ornamentation. To be registrable, a design must be directed to an aesthetic feature. Entirely functional features may not be the subject of registration. Features of the construction, mode of operation and functioning of an article may be patentable, but may not be registered as industrial designs.

1.4.2 How does a person apply for registration?

Canada is a signatory to the *Paris Convention*, the *General Agreement on Tariffs and Trade* establishing the World Trade Organization and the *North American Free Trade Agreement*.

An application for registration must be filed within a year of the first publication or sale of the design in Canada. A person who has filed a design application in its country of origin, which is a member of the *Paris Convention* or the World Trade Organization, may be entitled to treat the filing date of the first foreign application ("priority date") as the effective filing date in Canada if a Canadian application for the same design is filed within six months of the priority date.

An industrial design registration must be obtained in the name of the original proprietor. The proprietor of an industrial design is the author or the person for whom the design was authored for valuable consideration, such as an employer. An application is examined by the CIPO.

1.4.3 What does registration provide to a proprietor?

A registration is granted for a term of 10 years. A maintenance fee must, however, be paid to keep the registration in force for the last half of this term. If this fee is not paid, the registration is deemed to have expired at the end of the fifth year of the term.

An industrial design registration entitles the registrant to restrain the manufacture, importation for trade, sale and rental of any article in respect of which the design is registered and to which the design or a design not differing substantially therefrom has been applied.

The remedies for industrial design infringement include: (i) temporary and permanent injunctive relief; (ii) either the damages suffered by the design owner or the profits earned by the infringer; (iii) punitive damages; and (iv) delivery up or destruction of infringing articles.

1.4.4 May an industrial design be transferred?

An industrial design, an application for registration and a registration may be assigned or licensed. Assignments and licences may be recorded in the CIPO. The effect of recordal of a security interest in the CIPO is unclear. A security interest may also be recorded under provincial personal property security regimes.

1.5 Personality rights

Although personality rights are generally governed by provincial law (see the discussion under “Provincial Law” below), the *Trade-marks Act* provides that no person may adopt in connection with a business, as a trade-mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for any matter that may falsely suggest a connection with (i) any living individual, or (ii) the portrait or signature of an individual who is living or has died within the preceding 30 years.

1.6 Topographies

The *Integrated Circuit Topography Act* permits the protection of original integrated circuit topographies. Topographies are the three-dimensional configurations of electronic circuits used in microchips and semiconductor chips. They may be protected for 10 years from the filing of an application for registration or the date of first commercial exploitation, whichever is earlier. However, to obtain such protection, topographies must be registered within two years of first commercial exploitation.

1.7 Plant breeders’ rights

Canada is a member of the *International Union for the Protection of New Varieties of Plants*. New varieties of certain plants may be protected under the *Plant Breeders’ Rights Act*. Protection is currently available for all species, except algae, bacteria and fungi. New species will be brought on stream gradually.

1.8 Domain names

Canada has its own country code top-level domain name registry, **.ca**. To register a .ca domain name, an applicant must satisfy one of the 18 criteria in the Canadian Presence Requirements (CPR) which require some nexus with Canada. For example, the CPR may be satisfied if the applicant is a corporation incorporated in Canada or the domain name comprises a trade-mark registered in Canada by the applicant. The .ca registry has a domain name dispute resolution policy that is modelled on, but differs in some respects from, the Uniform Dispute Resolution Policy.

1.9 Criminal law

The federal *Criminal Code* provides sanctions against the forgery of trade marks. Although the theft of tangible materials bearing confidential information is a criminal offence, the theft of information by itself is not a criminal offence.

2. Provincial Law

2.1 Trade-marks/passing off

Where someone makes a misrepresentation in the course of trade to prospective customers or ultimate consumers of goods or services which is calculated to injure the business or goodwill of another trader in the sense that it is a reasonably foreseeable consequence, and which causes, or is likely to cause, actual damage to a business or goodwill of the trader by whom the action is brought, such activity may be restrained by an action for passing off at common law. A similar cause of action is available pursuant to the *Civil Code of Québec*. To succeed in a passing off action, it is not necessary that the plaintiff conduct business in Canada, provided that the plaintiff has a reputation in its trade-mark in association with which the goods or services are offered.

2.2 Business names

Business names, being the names (other than a corporate name) by which a business is known, are regulated by provincial law. By way of example, *the Business Names Act* of Ontario requires registration by every business operating in Ontario that uses a name other than its corporate name, or in the case of individuals, the names of the owners. Business is defined very broadly to include "every trade, occupation, profession, service or venture carried on with a view to profit".

A person who has not registered the name of a business may not maintain a proceeding in a court in Ontario in connection with that business except with leave of the court. The court may grant leave if the person in contravention of the Act satisfies the court that: (i) the failure to register was inadvertent; (ii) there is no evidence that the public has been deceived or misled; and (iii) at the time of the application, the person is no longer in contravention.

2.3 Personality rights

The provinces of British Columbia, Manitoba, Newfoundland, Quebec and Saskatchewan have legislation dealing with personality rights. At common law, which applies in all Canadian jurisdictions other than Quebec, an individual generally has the right to restrain activities which suggest unauthorized endorsement, sanction or other involvement by him or her. Such involvement may be suggested through the misappropriation of a name, likeness or other recognizable indicia of the personality.

2.4 Confidential information and trade secrets

The possessor of confidential information, which is of commercial or other value, can generally require another party who obtains that information to maintain it in confidence. The existence of this legal right depends on whether there is a contractual or other relationship imposing an obligation of confidentiality.

The remedies for the unauthorized use or disclosure of confidential information include: (i) temporary and permanent injunctive relief; (ii) an order prohibiting use or disclosure; (iii) either the damages suffered by the possessor or the profits earned by the violator; and (iv) punitive damages. As well, other benefits gained from the unauthorized use of confidential information may in some circumstances be recoverable by the party from whom the information was obtained.

2.5 Licensing

All types of intellectual property may be licensed. The licensing of trade-mark rights must be handled carefully (see 1.2.4 above). The law of licensing is governed by the law of the contract. No approvals are necessary, although recordal in the CIPO is advisable for some intellectual property rights. Licence agreements are subject to federal competition law and to other laws of general application.

XII. Information Technology

Information technology law in Canada covers a wide range of legal rules and practices, many of which are discussed elsewhere in this Guide, related to activities and transactions involving software, hardware, databases, electronic communications, the Internet and other information technologies.

This section is a summary of some of the key legal issues under Canadian information technology law that one needs to consider when doing business in Canada.

1. Information Technology Contracting in Canada

1.1 What terms are generally negotiated?

In Canada, information technology contracts generally specify each party's obligations (such as delivery, performance, payment and confidentiality obligations) ownership and licence rights (including scope of use), acceptance tests and procedures, source code escrow (if applicable), representations, warranties, indemnities, limitations on liability and disclaimers. Disclaimers and limitation of liability clauses in information technology contracts can help minimize risks. However, it is important to note that there are some peculiarities in Canadian law that may render such clauses unenforceable, and require careful drafting and review by Canadian counsel.

1.2 Assignments and licences

In Canada, assignments and licences of intellectual property rights should be in writing and should be registered with the Canadian Intellectual Property Office. Note that an author's moral rights, which exist under the *Copyright Act*, cannot be assigned but must be waived. For a more detailed discussion on intellectual property legal issues in Canada, see Section XI, "Intellectual Property".

1.2.1 Are software licences assignable and capable of being sublicensed?

A software licence may be viewed by Canadian courts as "personal" and thus not be assignable or capable of being sublicensed to third parties unless the licence contains the express permission by the licensor to do so. In addition, confidentiality restrictions and limitations on licence scope can also affect the transferability of a licence agreement. This is an important point to keep in mind when doing due diligence in any Canadian commercial acquisition.

1.2.2 Are shrink-wrap, click-wrap and browse-wrap licences enforceable in Canada?

Off-the-shelf computer programs that are accompanied by "shrink-wrap" licences and online "click-wrap" and "browse-wrap" agreements have received mixed enforceability before Canadian courts due to the requirement in Canadian law that both parties must assent to a contract in order for it to be binding on them. Such agreements have been enforced where the purchaser was impressed with the knowledge of the terms at the time of sale. They have also been enforced with proof of established prior business conduct or by the subsequent conduct of the user.

1.3 Applicability of sale of goods legislation

1.3.1 Are information technology purchases sales of goods?

If a transaction for the acquisition of information technology falls within the scope of provincial sale of goods legislation, certain rights and obligations will follow. Canadian courts tend to treat computer system acquisitions as sales of goods while transactions involving pure service, maintenance, custom training or programming are generally characterized as incidental to the sale of goods and therefore not subject to sale of goods legislation. Pre-packaged software supplied pursuant to a licence agreement is not subject to sale of goods legislation as no property in the software is transferred to the licensee. An exception occurs where the software is provided in conjunction with a larger transaction involving the sale of goods (e.g., hardware).

1.4 Consumer protection

1.4.1 How do consumer protection laws affect Internet business and e-commerce?

Certain provinces have enacted consumer protection legislation that prescribes various requirements that must be met for Internet sales contracts, such as the disclosure of relevant information and the delivery of a copy of the contract to the consumer. The federal government has also released a code of conduct for businesses engaging in electronic commerce transactions with consumers. For a more detailed discussion on consumer protection laws, see Section IV, “Trade and Investment Regulation”.

2. Intellectual Property Rights in Information Technology

2.1 Copyright

2.1.1 What information technology is protected by copyright?

Copyright is currently a primary source of protection for software programs, user manuals, databases, websites and other information technology works in Canada, provided that they meet the requirements of the federal *Copyright Act*. To be the subject-matter of copyright, the work must be “original”, meaning that it originated from the author and that skill and judgment were used in its creation. Further, for a work to garner copyright protection in Canada it must be fixed. The fixation requirement with respect to information technology is generally easily met.

2.1.2 Who owns the copyright in information technology?

As discussed in Section XI, “Intellectual Property”, the author of an information technology work is generally considered to be the first owner of the copyright in it. An exception to this rule is where the author is an employee and the work is created in the course of his employment, in the absence of an agreement to the contrary, the first owner of the copyright is the employer not the employee. A written assignment agreement is considered essential where works are created using non-employee third parties.

2.1.3 Is software a copyright work?

Computer programs are protected under the *Copyright Act* as literary works. Canadian courts have recognized that the writing of a computer program uses sufficient skill and judgment and therefore computer programs will typically meet the minimal originality requirement to obtain protection under the *Copyright Act*. Updates or enhancements to software are subject to independent copyright protection. The fact that a computer program is created using well-known programming techniques or contains unoriginal elements may not be a bar to copyrightability if the program as a whole is original.

2.1.4 What elements of hardware are copyrightable?

Computer hardware designs and plans have received copyright protection in Canada. Further, any software code stored on the hardware may be subject to copyright. Computer chips may be subject to integrated circuit topography protection. (See Subsection 2.2 below.)

2.1.5 Can databases receive copyright protection? What criteria must be met?

Under the *Copyright Act*, databases are given protection as "compilations". The Supreme Court of Canada has ruled that, to receive copyright protection, databases must be independently created by the author, and the selection and arrangement of the components that make up the database must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment must not be so trivial so as to be characterized as a purely mechanical exercise. However, "creativity", in the sense of novelty or uniqueness, is not required. In addition, the creator of the database only acquires copyright in the database and not in the individual components of the database.

2.1.6 What other Internet elements have received copyright protection in Canada?

Courts in Canada have held that a web page's look, layout and appearance are protected by copyright, as are underlying elements that would otherwise qualify for copyright protection, such as text or musical works.

2.1.7 What information technology is not protected by copyright?

Canadian copyright law does not protect the underlying mathematical calculations, algorithms, formulae, ideas, processes, or methods contained in information technology, only the expression of the same.

2.1.8 What information technology has not yet been considered by the courts to be protectable?

Canadian courts have yet to determine whether, and to what extent, computer languages, macros and parameter lists, communications protocols, digital type-fonts, and works that result from the use of computer programs are protected by copyright. Nevertheless, there is no reason to doubt their protectability.

2.2 Integrated circuit topographies

Integrated circuit topographies (or computer chips) are protectable in Canada by the Integrated *Circuit Topography Act*. See Section XI, “Intellectual Property”, for more detail.

2.3 Trade secrets

Information technology, including but not limited to a formula, pattern, compilation, program, method, technique, or process, may also be protected under trade secret law where duties of confidence exist either at law or by virtue of an agreement (which must be reasonable to be enforceable). See Section XI, “Intellectual Property”, for more detail.

2.4 Trade-marks

Trade-marks can be used to protect the goodwill associated with the names, slogans, symbols, and other marks used by businesses in the information technology industry. Trade-mark rights arise under the federal *Trade-marks Act* and at common law. Significant amendments have been introduced to the *Trade-marks Act* in 2014, although it has not yet been announced when they will come into force. The amendments include the elimination of the requirement that a mark be used in Canada or abroad before registration. For a more detailed discussion on trade-mark law in Canada, see Section XI, “Intellectual Property”.

2.4.1 How are domain names protected?

Domain names may garner trade-mark rights if they meet the statutory or common law requirements for trade-marks. Trade-mark owners may be able to obtain relief in Canada for cybersquatters under trade-mark law and the Canadian Internet Registration Authority’s alternative dispute resolution process (where the dispute is in respect of a .ca domain name). For generic domain names, the rules promulgated by the Internet Corporation for Assigned Names and Numbers will apply.

2.4.2 What risks do metatags pose?

Canadian courts have held that the use of metatags (i.e., tags or key words in a website’s coding that are used by search engines to sort web pages) that are confusingly similar to another person’s trade-marks may constitute trade-mark infringement.

As for the use of keyword advertisement, such as Google AdWords, Canadian courts have yet to address whether or not it infringes the *Trade-marks Act*. The Québec Superior Court addressed keyword advertising, ruling that such practice is generally legitimate and provides greater choice to consumers, as opposed to creating confusion.

2.5 Patents

In Canada, to obtain patents on information technology inventions one has to meet the statutory requirements of the federal *Patent Act*. See Section XI, “Intellectual Property”, for more detail on patent law in Canada.

2.5.1 Is software and other information technology patentable in Canada?

The Canadian Intellectual Property Office routinely issues patents for software-based inventions, particularly methods performed using computer-executable instructions that operate with some hardware elements or that focus on the systems, processes, and methods used to achieve a solution to a specific technical problem, rather than on the algorithm per se. Furthermore, the Canadian Federal Court of Appeal recently ruled that an online method of doing business included patent-eligible subject matter. However, computer programs are not patentable in Canada if they only perform a series of mathematical calculations or if they relate to an abstract idea.

3. Criminal Law Issues Relating to Information Technology

3.1 Offences under the *Criminal Code*

In Canada, offences under the *Criminal Code* directly dealing with information technology include:

- Theft of computer data
- Defrauding the public of any property, money, or valuable security by deceit, falsehood or other fraudulent means using computers
- Use of a computer in an unauthorized manner or to possess an instrument for that purpose (i.e., hacking)
- Mischief in relation to computer data (i.e., distributing computer viruses)
- Trafficking in unauthorized passwords.

There are several other criminal offences under the *Criminal Code* and the *Copyright Act*, which may indirectly involve information technology.

3.2 Lawful access

On November 20, 2013, the federal government introduced Bill C-13, the *Protecting Canadians from Online Crime Act*, which was at the stage of consideration in committee at the time of publication of this guide. This bill is regarded as the latest attempt by the federal government to introduce stronger lawful access measures in Canada. Lawful access generally refers to the interception of communications and the search and seizure of information carried out by law enforcement agencies pursuant to legal authority, including under the *Criminal Code*.

Among other things, this omnibus crime bill introduces a preservation demand and preservation order requirement which would enable law enforcement officials to demand or order third parties, including Internet service providers, to preserve computer data for 21 to 90 days, depending on whether the investigation is domestic or foreign.

In addition, this bill introduces new production order standards for historical transmission data and tracking data, as well as requirements for real-time transmission data and tracking data which would allow law enforcement officials to retrace an individual's web patterns and to remotely activate existing tracking devices (e.g., in vehicular GPS). Importantly, the threshold for obtaining the proposed production orders in the bill is "reasonable grounds to suspect" rather than the higher threshold of "reasonable grounds to believe".

4. Cryptography Controls

4.1 Are there restrictions on using encryption in Canada?

Other than export controls, and subject to any applicable intellectual property, confidentiality and criminal law issues, businesses and consumers in Canada are free to develop, import and use whatever encryption technology they wish.

5. Privacy and Data Protection

As discussed in Section X, "Privacy Law", the federal Personal Information Protection and *Electronic Documents Act* (PIPEDA) and the provincial private-sector privacy legislation in some provinces impose conditions on the collection, use and disclosure of personal information by organizations in the course of commercial activity.

These laws contain requirements for the protection of personal information within the control of an organization, including security measures to prevent unauthorized access, collection, use, disclosure, modification, destruction, and other similar acts. There may also be requirements in the event of a data breach. Businesses that collect, use or disclose personal information must comply with PIPEDA and/or the applicable provincial private-sector legislation.

6. Electronic Evidence

6.1 Is electronic evidence admissible in court?

In Canada, electronic evidence is admissible in the courts provided that it meets the rules found in the common law and applicable statutes such as the federal and provincial Evidence Acts and the *Rules of Civil Procedure*. These rules include: (i) authentication by the party tendering the evidence; (ii) integrity of the system used and the method of record keeping, information storage, and retrieval; (iii) originality; and (iv) reliability.

Canadian courts have admitted electronic evidence where it accurately and fairly represented the information it purported to convey. Finally, Canadian courts have permitted the use of the Internet in court and have admitted the contents of websites.

7. Electronic Contracting

7.1 Are electronic signatures and documents valid in Canada?

In Canada, at both the federal and provincial/territorial levels, a series of e-commerce legislation has given statutory recognition to the legal effect of most types of electronic signatures and documents (with some exceptions such as wills, negotiable instruments and land transfers) that meet the requirements set out in the applicable statutes and regulations.

8. French Language Issues

8.1 Must websites and information technology contracts be translated into French?

The province of Quebec has language laws that may impact electronic contracting and websites, by requiring French translations if the parties or transactions involved have a Quebec connection, such as an office or employees located in Quebec. If certain criteria are met, the parties to a contract may expressly agree to have it written in the English language.

8.2 Must software be translated into French?

Under Quebec's language laws, all computer software sold in Quebec must be available in both English and French, unless no French version exists. In addition, the software must meet the French language packaging and labelling requirements.

9. Jurisdiction and the Internet

9.1 Where are electronic contracts formed?

In Canada, the issue of where electronic contracts are considered to be formed has not yet conclusively been determined and the answer may be different from one province to another. Unlike faxes, which Canadian courts have held to be "instantaneous" in some circumstances and thus formed when and where the offeror receives notice of the acceptance, it is not clear whether electronic communication such as emails or contracts formed on a website are instantaneous. The Canadian e-commerce legislation (discussed in Subsection 7.1 above) provides some guidance as to when and where electronic documents are presumed to be received. However, the mere posting of information on a website may not be sufficient to deliver that information to another person. In addition, the exchange of emails discussing a contract or a contractual relationship may not be sufficient to form a contract.

9.2 Can foreign websites and Internet transmissions be subject to Canadian laws?

A court can exercise jurisdiction in Canada if there is a "real and substantial connection" between the subject matter of the litigation and the jurisdiction. Generally speaking, the courts have found that the more active a website or its owner's activity is in Canada, or if the website or business activity targets persons in Canada, it will be subject to the laws of Canada. The fact that the physical location of a website or its server is outside Canada will not immunize the website owner from legal consequences in Canada.

The Supreme Court of Canada has also applied the "real and substantial connection" test in determining jurisdiction in online copyright matters. The application of the *Copyright Act* depends on whether there is a real and substantial connection between the Internet transmission and Canada. This test turns on the facts of each case and relevant connecting factors include the situs of the content provider, host server, intermediaries and end user.

9.3 Can parties to an online contract choose the governing law and forum?

In Canada, the parties to an online contract have, subject to certain exceptions (for example consumer protection), the right to choose the governing law of the contract, the exclusive court in which disputes are to be heard, and to exclude the application of conflict of laws principles. However, the Canadian courts have found that such clauses cannot be used to oust the jurisdiction of a substantially connected province.

10. Regulation of the Internet

10.1 Are Internet activities regulated in Canada?

The Canadian Radio-television and Telecommunications Commission, the body responsible for regulating broadcasting and telecommunications in Canada, has determined that, generally speaking, it will not regulate content transmitted over the Internet in Canada (with the exception of certain commercial electronic messages discussed below). However, if an Internet business qualifies as a "telecommunications common carrier", i.e., by offering voice or data telecommunications services, under the *Telecommunications Act*, it may be subject to telecommunications regulation, which would impact its operations, ownership, facilities, rates and services.

With respect to Internet-based broadcasting, there exists an exemption from the application of the *Broadcasting Act*. Note, however, that there are no compulsory copyright licences available for retransmission of over-the-air broadcasts over the Internet. As a result, re-transmitters have to negotiate copyright licences with all rights holders to broadcast works. Further, there are certain obligations that must be met under consumer protection laws, when doing business with consumers on the Internet. (See Subsections 1.4 and 9.3, above.)

Also, many regulatory, licensing, registration and permit requirements are imposed in Canada by stock exchanges, securities commissions, the Office of the Superintendent of Financial Institutions, public health and safety boards, transportation safety commissions, competition boards, industry associations and a variety of other agencies and bodies that regulate different businesses and activities in Canada.

10.2 What rules apply to online advertising?

The same basic rules that govern traditional advertising and marketing practices, including the *Competition Act* and the *Criminal Code* apply to all forms of Internet advertising and marketing, such as deceptive prize notices, representations on websites and bulletin boards, or in emails, newsgroups and chat rooms. The Competition Bureau has prepared guidelines that address some of the ways in which these traditional rules are applied in the online context, including the use of disclaimers and hyperlinks, and the information that should be provided online when advertising products, services and businesses.

Canada's Anti-Spam Legislation (CASL) introduces new civil and criminal provisions in the *Competition Act*, which regulate false and misleading representations and deceptive marketing practices in the electronic marketplace. For more details on CASL, see below in Subsection 10.3, and for more information on advertising regulations, see Section IV, "Trade and Investment Regulation".

10.3 Is spam illegal in Canada?

Designed as one of the most stringent anti-spam regimes in the world, CASL has a significant impact on the electronic communication practices of companies in Canada and foreign companies sending commercial electronic messages (CEMs) to recipients in Canada. Most of the provisions of CASL, including those dealing with CEMs, came into force on July 1, 2014. CASL also restricts other activities, including the ability of businesses to alter transmission data in electronic messages and install software updates and upgrades. The provisions dealing with the unsolicited installation of computer software will not come into force until January 15, 2015.

Subject to certain exceptions set out in the law and its accompanying regulations, CASL prohibits the sending of CEMs to an electronic address unless: (1) the person to whom the message is sent has consented to receiving it; and (2) the message complies with prescribed form and content requirements. Among other requirements, express consent under CASL must be "opt-in", meaning that an explicit and positive consent from an intended recipient of a CEM must be obtained before sending a message. This differs from the common industry practices of using an opt-out or negative option method of obtaining consent for marketing, such as a pre-checked consent box that a consumer has to un-check to signify they do not wish to receive marketing messages.

The potential penalties for non-compliance under CASL are significant and include administrative monetary penalties of up to C$1-million for individuals and C$10-million for corporations.

CASL also creates a private right of action for persons who have been affected by a contravention of any number of CASL's provisions, including the anti-spam provisions. The provisions of the statute providing for a private right of action will not come into effect until July 1, 2017. This three-year delay is welcome news for industry, which has been very concerned about class action lawsuits being instituted while both industry and the regulators are trying to navigate the new regime.

It should be noted that the *Competition Act* provisions dealing with the advertising of certain products, such as tobacco, or misleading advertising as well as the *Criminal Code* provisions dealing with fraud, authorized access and use of computers and mischief against data, could also apply against spammers. Various industry groups have established member codes and guidelines dealing with the distribution of promotional materials and enforcement.

PIPEDA and similar private-sector privacy legislation in some provinces (discussed in Section X, "Privacy Law") may also affect spammers by imposing obligations on how personal information, which may include email addresses, is collected, used and disclosed in the course of commercial activity.

11. Liability of Internet Service Providers (ISPs)

11.1 What risks of liability do ISPs face?

ISPs, and possibly their directors and officers, may be liable under contract, tort or statute, for various claims arising from the provision of their services.

11.2 Does Canada have any laws that protect ISPs from liability?

Canada has not passed legislation providing blanket immunity to ISPs from liability, however, courts have generally not held them liable for the infringing activities of their users. In the area of copyright, the Supreme Court of Canada has concluded that ISPs, and other intermediaries, will not face liability for copyright infringement if they restrict their activities to providing a conduit for information and do not engage in acts that relate to content. The Supreme Court has also found that caching (the temporary storage of material by the ISP) is also a protected activity.

Canada's *Copyright Modernization Act,* certain provisions of which came into force in 2012, codifies the Supreme Court's approach by limiting the liability incurred for "providing services related to the operation of the Internet or another digital network". This limitation covers the activities of ISPs as well as those of persons who provide caching and hosting services. The *Copyright Modernization Act* will also implement a "notice-and-notice" regime, under which ISPs will be required to send notices of potential infringement received from copyright holders to their potentially infringing subscribers. This requirement is expected to come into force in January 2015.

The province of Quebec's *Act to Establish a Legal Framework for Information Technology* also establishes a regime for liability and some protection in certain circumstances for ISPs acting as intermediaries on communication networks.

XIII. Real Estate

1. Federal Law

The laws relating to the acquisition of real property in any particular province of Canada are, as a rule, those of the province itself. The federal government imposes relatively few regulations or restrictions in the field.

The notable exceptions to that general principle include the review and regulation of foreign investment in Canada, the regulation of bankruptcy and insolvency, the regulation of the activities of certain major lending institutions in Canada, the levying and collection of income taxes (in particular, taxes on capital gains realized by non-resident vendors) and sales taxes (in particular, the Goods and Services Tax or, in the province of Ontario, the Harmonized Sales Tax in connection with the sale and leasing of real property), the application of federal environmental standards, and the application of federal laws and regulations in the transportation sector such as with railway and airport lands.

2. Provincial Law

2.1 Laws of general application

Generally speaking, Ontario imposes no restrictions or prohibitions upon foreign investors in land, whether natural or corporate, although certain taxing, reporting and registration provisions may apply. For example, in Ontario the *Extra-Provincial Corporations Act* requires corporations incorporated outside Canada to obtain licences to carry on business in Ontario, which, for the purposes of that Act, includes holding an interest, other than by way of security, in real property situate in Ontario. Quebec has a similar registration requirement.

The *Business Corporations Act* (British Columbia) requires that any company carrying on business in British Columbia be registered under the Act, either as a B.C. company or an extra-provincial company. Under the old *Company Act*, an extra-provincial company that was not registered was not capable of acquiring or holding an interest in land in British Columbia.

As that restriction is not contained in the new *Business Corporations Act*, the land title office requires a foreign entity to provide proof of incorporation and proof of current existence in the form of a certificate of status or affidavit from the appropriate government authority. A statutory declaration stating the entity is exempt from the extra-provincial registration requirements is no longer required. Accordingly, a company that wishes to buy or lease land, or hold a mortgage on land in British Columbia must satisfy these requirements.

Conversely, Alberta does restrict or prohibit certain foreign investments in Alberta land. Pursuant to the *Agricultural and Recreational Land Ownership Act* (Alberta), and the related *Foreign Ownership of Land Regulations*, no ineligible person or foreign controlled corporation may take or acquire an interest in certain controlled land, subject to various exceptions. Generally, controlled land includes all privately owned land outside urban boundaries (usually farmland or rural recreational land). In addition, any corporation that acquires or attempts to register an interest in Alberta land must be registered in Alberta (either as an Alberta corporation or as an extra-provincially registered corporation).

2.2 How is real estate held and registered?

Investors in Ontario real estate may acquire several types of interests in land, including full ownership (a "freehold" interest), an interest for a specified period (a "leasehold" interest) or a partial interest in a freehold or leasehold interest as co-owners under a joint venture. Special legislation permits condominium ownership, under which owners have title to their individual units and a right to use the "common elements" of the condominium project (e.g., a swimming pool, landscaping, etc.). Although condominiums are most usually residential units, their use for commercial or industrial purposes is becoming increasingly more common.

Two systems of land recording co-exist in Ontario: a registry system in which the individual is responsible for the determination of the quality of title based primarily on priority in time of registration, and a land titles system based upon the Torrens System of recording where the quality of the title is determined by the recording authority with indemnities supporting that determination. Most properties in the registry system have been converted to the land titles system to facilitate the introduction of electronic production and registration of documents. Generally speaking, Ontario has a fully automated electronic searching and registration system. Quebec civil law does not generally recognize beneficial interests in land and does not yet have a Torrens System. Both Alberta and British Columbia have a Torrens-based land titles system exclusively.

Investors in Quebec real estate should refer to Blakes *Doing Business in Quebec* guide for a discussion of the civil law system surrounding ownership and registration of such property, known as "immovables" in Quebec.

2.3 The agreement of purchase and sale

2.3.1 Is a written contract required? How much is paid up-front for the deposit and agent commissions?

As oral agreements for the purchase and sale of land are generally unenforceable, most acquisitions of real property begin with an agreement of purchase and sale. Such an agreement is often initiated by the purchaser signing an offer to purchase which, when accepted by the vendor, becomes the agreement of purchase and sale. Although certain legal rights and obligations arise from that agreement, the actual transfer of title (ownership) usually takes place at a later time upon the completion or "closing" of the transaction.

It is usual for the purchaser to provide a deposit as "earnest money" which is held in trust by the agent for the vendor or by one of the law firms involved in the transaction pending closing. Generally speaking, the size of the deposit ranges from 1% of the purchase price for a typical commercial transaction to 5% of the purchase price for residential transactions.

Most real estate transactions in Canada involve the services of an agent, generally licensed under provincial legislation. The agent should have expertise as to the market, the availability of properties for sale and prospective purchasers and the terms of sale that may be acceptable to the parties. Agents are usually paid a commission of 5% or 6% (but sometimes a lower percentage) of the purchase price on smaller properties and 10% on recreational properties.

Those percentages are usually reduced on larger properties and commercial properties. The agent is usually hired, and paid, by the vendor (or the landlord in leasing transactions) with the duty to obtain for the vendor (or landlord) the highest price available. The purchaser who wishes the assistance of an agent should retain one by specific contract expressly defining the agent's duties to the purchaser.

2.3.2 What services does a lawyer provide?

Before signing an offer to purchase, a purchaser should obtain legal advice from a lawyer practising in the province in question, to ensure the offer contains appropriate representations, conditions and other provisions. The purchaser's lawyer will conduct various searches and enquiries to verify that the vendor has good title to the property and that there is no prior lien or other claim by others affecting title. In the acquisition of commercial properties (such as office buildings), the purchaser's counsel may conduct other due diligence investigations (for example, reviewing the terms of leases in the building). The offer should specify the purchaser's right to search the title and conduct various inspections and investigations prior to completing the sale. In Canada, title insurance companies are not generally involved in the title due diligence process, and this is the responsibility of the purchaser's lawyer.

2.3.3 What are the usual conditions for the purchaser's benefit?

It is usual in commercial transactions for the purchase agreement to contain a "due diligence" condition allowing the purchaser to inspect the property (with or without professional assistance) and permitting termination if the purchaser is not satisfied with the state of the property or the rental income. In exchange, however, the vendor will generally resist giving warranties and representations as to quality of construction, state of repair, or suitability to the purchaser's needs, as such may be matters not within the vendor's knowledge and are matters in respect of which the purchaser will be advised to satisfy itself through its due diligence.

From a real estate investor's point of view, other conditions will likely be included in the agreement of purchase and sale relating to the state of the title and, in the case of income properties, the amount of any income (e.g., rental income or royalties) being derived from the property. Of central importance are representations and conditions relating to the environmental history and standing of the property.

Other typical conditions might relate to satisfaction with zoning, the terms of any existing leases, the terms of any mortgage to be assumed by the purchaser or the availability of suitable financing for the transaction. Unless otherwise dealt with in the agreement, the concept of "*caveat emptor*" – let the buyer beware – generally governs.

Many purchasers require the vendor to produce a current survey or real property report prepared by a land surveyor showing the outline of any buildings situated on the property. Such a survey would confirm the identity of the land, whether the land is subject to or benefited by easements, that the buildings and other improvements do not encroach onto neighbouring land and that the buildings are "set back" the appropriate distances from the boundaries of the property in accordance with zoning requirements. It will also show whether the buildings, fences or other improvements belonging to neighbouring owners encroach on the property to be purchased. If the vendor does not have a recent survey to deliver to the purchaser, or is not required to have one prepared for the purchaser's benefit, the purchaser will usually be well advised to arrange for an up-to-date survey as part of its due diligence investigations.

2.3.4 The closing and beyond – what remedies are available upon a breach of the agreement?

The closing of a transaction of purchase of real property located in Ontario generally involves lawyers for the purchaser and vendor exchanging documents and closing funds which are released upon successful registration of title documentation, such as the transfer/deed and any security being granted. Notaries may also be used in Quebec and British Columbia. In Ontario and British Columbia, the purchaser normally pays the transfer tax (called the land transfer tax in Ontario, the municipal land transfer tax in the City of Toronto (which is payable in addition to the Ontario land transfer tax in respect of properties situate within the boundaries of the City of Toronto) and the property transfer tax in British Columbia) and any provincial or federal sales tax payable on the purchase. In Alberta, there is no land or property transfer tax or provincial tax payable pursuant to a real estate transaction.

Where the vendor breaches his or her obligations in the agreement of purchase and sale, the purchaser may proceed with the transaction and apply to the court for an order for "specific performance", compelling the vendor to complete the transaction. Alternatively, the purchaser may terminate the contract, have the deposit returned to him or her and sue the vendor for any damages resulting from the vendor's breach of contract.

If the purchaser does not perform his obligations under the contract, the vendor may either affirm the contract or seek specific performance and ancillary damages, or terminate the contract and retain the purchaser's deposit. The vendor's rights and remedies in the event of purchaser default may also be limited by the terms of the agreement of purchase and sale.

2.4 Restrictions on use or sale – what types of consent are needed?

As with many areas of the world, all provinces regulate the development, use and disposition of real property. For example, the *Planning Act* (Ontario) prohibits, with certain exceptions, the disposition of less than the whole of a parcel of land held by any owner. Therefore, an owner is not entitled to sell or mortgage, or lease for a term of more than 21 years, parts of his or her holdings while retaining abutting property, without first obtaining consent from a local planning committee. A transfer or mortgage that violates this legislation, even inadvertently, will be void.

Although there is no equivalent legislation in British Columbia to the provisions of the *Planning Act* (Ontario) referred to above, the *Land Title Act* (British Columbia) does impose certain restrictions on the leasing of less than an entire legal lot (the lease of less than an entire building is permitted), unless the subdivision requirements of the *Land Title Act* are complied with. As a result, in certain circumstances, a leasehold subdivision plan is required to be approved by the appropriate authority.

In Alberta, the *Municipal Government Act* prohibits the registration of an instrument that may have the effect of subdividing a parcel of land unless the subdivision has been approved by the appropriate authority. For example, certain long-term leases may constitute a subdivision and therefore may require approval by the subdivision authority prior to being able to be registered on title to the leased lands pursuant to this provision.

Ontario also has in place family law legislation that gives spouses an equal right to possession of the couple's matrimonial home, even though it may be owned by only one of them. Thus the spouse of the owner of the matrimonial home is a necessary party to the transaction, for the purpose of consenting to any sale or mortgage of the property, and must execute both the agreement and the transfer or mortgage in question.

Family law legislation in British Columbia also provides certain protections to a spouse who may have an unregistered interest in land. Accordingly, care must be taken if there is any indication of marital problems between a seller of real estate and his or her spouse.

In Alberta, the *Dower Act* prohibits a married person from disposing of a homestead without consent of the non-title spouse. A disposition includes, among others, a transfer, a mortgage and a lease over three years.

2.5 Provincial and municipal transfer taxes and provincial sales taxes

In Ontario, a land transfer tax is payable in most cases upon the transfer of ownership of real property interests. This land transfer tax is imposed at graduated rates but for most commercial transactions is slightly less than 1.5% of the total consideration for the transfer. For real property situate within the boundaries of the City of Toronto, in addition to the Ontario land transfer tax, a municipal land transfer tax is also payable in most cases upon the transfer of ownership of real property interests. The municipal land transfer tax is also imposed at graduated rates but for most commercial transactions is slightly less than 1.5% of the total consideration for the transfer. The purchase of real estate is often accompanied by the purchase of certain goods, such as furniture, appliances or equipment. In Ontario, harmonized sales tax is payable by a purchaser at the rate of 13% of the value of all tangible personal property purchased. Quebec also levies a graduated land transfer tax and a sales tax. As previously mentioned, these taxes do not apply in Alberta, though there are land registration charges (the fees are C$50 per transfer, plus C$1 per C$5,000 of value) and federal goods and services taxes payable on certain real property interests at a rate of 5%.

A property transfer tax is payable in British Columbia upon the registration of a transfer of land. The transfer tax is calculated at 1% of the first C$200,000 of fair market value and 2% on the value above C$200,000. As well, there is a federal goods and services tax payable on some real property interests at a rate of 5% and, in addition, a provincial sales tax payable on most tangible personal property at a rate of 7%.

2.6 How are leasehold interests regulated?

Long-term ground leasehold interests are more common in the United Kingdom and Europe than in North America. Nevertheless, increasingly, parcels of land in Ontario are held pursuant to long-term ground and building leases as an alternative to freehold ownership in arrangements often structured for tax purposes or to permit differing degrees of participation and liability.

In Ontario, with few exceptions, any lease in excess of 21 years is treated as a conveyance for the purposes of the *Planning Act* and any lease with a term (including renewals) in excess of 50 years will attract land transfer tax and municipal land transfer tax (for leases of land in the City of Toronto) calculated on the market value of the land. Quebec also has analogous provisions. The registration of a lease in British Columbia with a term (including renewals) in excess of 30 years will attract property transfer tax calculated on a formula set out in the *Property Transfer Tax Act*.

2.7 How are landlords regulated?

If a purchaser is interested in acquiring a property that is occupied by residential tenants, a number of additional considerations become relevant. In Ontario, in addition to reviewing the terms of the leases, the purchaser should be aware that the *Residential Tenancies Act* and certain other legislation dealing specifically with residential tenancies, limit the rights of a landlord to evict existing tenants of residential premises, limit the landlord's ability to increase rents beyond specified statutory limits, and permit rent reductions in certain cases where substandard levels of landlord maintenance persist. Quebec also has generous residential tenant protection legislation, as does Alberta. In British Columbia, the *Residential Tenancies Act* accords certain protections to residential tenants.

2.8 Joint ventures

Real estate investors in Canada often enter into joint venture arrangements with other investors. There are many ways in which a joint venture may be organized, including joint venture corporations, partnerships, co-ownerships and sale and leaseback arrangements. Often the selection of the appropriate structure will depend on the tax or other legal ramifications of the proposed joint venture.

XIV. Infrastructure

1. Overview

The infrastructure market continues to be robust in Canada. In Canada, there are three levels of government: federal; provincial/territorial; and municipal. Each level of government utilizes various affiliated entities for public service delivery in addition to the direct delivery of such services.

The federal government, most of the provinces and many urban municipalities have committed substantial resources to upgrading Canada's infrastructure through both traditional procurement and alternative finance or public-private partnerships (P3).

P3s in the broadest sense have been utilized by the three levels of government and some entities for a wide range of large and medium-sized projects. Large-scale capital projects involving long-term, privately financed concessions have been procured in a number of provinces. We are also seeing substantial and growing interest in P3 transactions in many municipalities, particularly where federal government support is available. Large-scale capital projects are the focus of this review.

Many provincial governments in Canada have established dedicated agencies to execute large-scale capital projects. These agencies include:

- The B.C. provincial government was an early adopter and leader in the P3 market in Canada creating Partnerships British Columbia in 2002.

- SaskBuilds is the newest agency, launched in 2012 by the Government of Saskatchewan, to lead a review of procurement options and make recommendations.

- In 2005-06, the Government of Ontario created the Ontario Power Authority to procure major power supply projects and the Ontario Infrastructure Projects Corporation (Infrastructure Ontario) to manage the implementation of major infrastructure projects other than power supply.

- In Alberta, the provincial government's Ministry of Infrastructure and Transportation is responsible for procurement for the province's major projects.

- In 2005, Quebec formed the Agence des partenariats public-privé du Québec (Public-Private Partnerships Québec), now known as Infrastructure Québec.

- Partnerships New Brunswick was established in 2011 to provide advice, support and consulting services regarding the assessment, procurement and implementation of projects as P3s.

The federal government has also established its own agency, Public-Private Partnerships Canada (P3 Canada), with a mandate to improve the delivery and deliver more P3 infrastructure projects throughout Canada. It also manages the C$1.25-billion P3 Canada Fund established in 2008, and renewed in 2013 with the federal government committing an additional C$1.25-billion.

P3 procurement methodology has been adopted in Canada for roads, bridges, rail (including rapid transit), hospitals, courthouses, schools, hydroelectric power generation facilities and water/wastewater projects for long-term concessions. A wide range of accommodation and other public facilities have also been built, based upon design-build (DB), design-build-operation (DBO), design-build finance (DBF) and related transaction structures.

With several exceptions, P3 transactions have proceeded in Canada without specific enabling legislation. In most cases, there are questions which require analysis about the continuing authority of the Crown or other procuring authority to pay for P3s. For example, each jurisdiction typically has a statute governing the transfer of funds by the Crown from its general revenue account to a specific ministry or agency, which transfer is referred to as “appropriation”. Appropriations are made periodically and most commonly on an annual basis. Without the benefit of an annual (or more frequent) appropriation, ministries and Crown agencies would lack the financial resources necessary to fund the payments to the concessionaire required by P3 concession agreements. Despite these questions, the P3 market in Canada has grown substantially in recent years.

Typical sources of private debt finance include international banks, Canadian pension funds, Canadian insurance companies and bonds issued on the Canadian public markets. Typical sources of private equity finance include private equity/infrastructure funds, international contractors, Canadian pension funds, domestic non-bank finance companies, investment funds, subcontractors and other stakeholders in the particular P3 transaction. Although active as financial advisers in P3 transactions in Canada, with the exception of energy projects, the Canadian banks have not provided significant capital (debt or equity) to P3 financings.

The principal risks typically allocated to the private sector include design, construction, operation (where the operation is within the control of the concession company) and financing (where private financing is part of the contract). Milestone payments for project delivery followed by monthly payments for service delivery and deductions for failure to maintain specified service standards are key risk components of the contract.

The principal risks typically retained by the public sector depend in part upon the industry and the jurisdiction. For example, for an acute care hospital, the public sector may assume the demand (volume) risk, whereas such risk might be shared on a highway or rapid rail transit project. Other risks typically retained by the public sector include discriminatory or industry-specific changes in law, costs of insurance, uninsurable events and risk related to pre-existing but undiscoverable environmental conditions. *Force majeure* event risk is typically shared between private-sector and public-sector parties.

The manner in which private participants manage P3 risk varies with how the contract is negotiated with the private sector, how the concessionaire entity organizes itself and allocates risks among its equity participants, its construction company and its service providers, and the availability of insurance. In general, the concessionaire entity will seek to manage its risk in three ways: (i) by insurance; (ii) by comprehensive due diligence investigations and inquiries; and (iii) by allocating risks to the subcontractors best able to manage such risks via subcontract agreements. Such agreements usually feature parent company guarantees and the provision of other performance security to the concessionaire entity which then forms part of the debt security package for the private financing.

2. Current State of Canadian P3 Market

The P3 market in Canada is maturing as a number of the early P3 projects have now been successfully completed and are in operation, many projects having been sold to long-term investors in the secondary market. As a result, the P3 model has been proven and this has resulted in more interest in utilization of the model throughout the country, including the increased interest from municipalities noted above.

The majority of the projects in Canada are availability-based where the private sector does not take demand risk. Consequently, unlike the U.S. experience where toll roads have predominated, the Canadian taxpayer and facility user is generally neutral-to-pleased with the utilization of projects delivered via the P3 model.

With the renewed support of the lending community, the Canadian P3 market has continued to show increased levels of activity throughout Canada, particularly at the municipal level.

Initial Canadian P3 deals were financed through long-term bank borrowing which became scarce to non-existent in late 2008. As the most recent financial crisis continued through 2009, the various Canadian P3 agencies introduced some form of milestone payments during or at the end of the construction period to reduce the level of long-term debt financing required. Although the financial markets have been more stable in recent years, we continue to see milestone payments utilized in most Canadian P3 transactions. Lender exposure to market fluctuations has also been reduced by shortening the period between preferred proponent notification and financial close, and by the use of credit-spread reset mechanisms.

The most recent financial crisis also introduced new lenders into the Canadian P3 market. As noted above, Canadian banks have not traditionally participated in financing P3 transactions, however, they have shown a growing interest (alongside their European counterparts) to provide short-term debt (essentially construction period debt) with longer-term debt continuing to be led by life insurance companies, certain pension funds and the rated bond market.

3. Cross-Canada Review

3.1 British Columbia

- British Columbia remains a leader in the field with Partnerships BC expanding its use of the P3 model into new sectors beyond its traditional environment, health and transport projects.

- The Emily Carr University of Art & Design Campus Redevelopment Project is currently in procurement and is the province's first major education P3.

- Partnerships BC has been expanding its advisory services to other provinces and territories as well as to municipalities. It has also been instrumental in the creation of the West Coast Exchange, a body set up to share P3 knowledge between the provinces and the states of Oregon, Washington and California.

3.2 Alberta

- The 2014 Alberta provincial budget committed C$19-billion over the next three years to infrastructure projects, for which the government promised to continue to explore the use of P3s.

- The initial focus was on roads and schools with later expansion to water/wastewater and rapid transit projects.

3.3 Saskatchewan

- The 2013-14 provincial budget in Saskatchewan announced C$847.5-million for schools, hospitals, highways and other infrastructure projects.

- Several projects are currently in procurement, including a long-term care facility, a bypass, elementary schools, and a correctional facility.

3.4 Manitoba

- Several projects have been announced and are in the market.

- The *Public-Private Partnerships Transparency and Accountability Act* was proclaimed in force in September 2013.

3.5 Ontario

- The Ontario market remains a leader in P3 procurements, having an established agency and a commitment to publish their project pipeline in advance.

- The Eglinton Crosstown Project is currently in construction and is the largest transit expansion in the history of Toronto, representing an investment of over C$5.3-billion.

- Infrastructure Ontario has expanded its advisory services to municipalities and other agencies developing P3 procurements.

- Ontario has an extensive and continuing deal flow.

3.6 Quebec

- Despite continued political opposition to P3s, a few major projects have been completed or are under construction.

- The CHUM Hospital Project was successfully procured and featured the single largest bond offering in Canadian P3 projects.

3.7 Atlantic provinces

- The pipeline in the Atlantic provinces is not as robust as elsewhere in Canada. However, several projects are in planning and procurement.

3.8 Federal government

- PPP Canada continues to develop and position itself in the market.
- A significant focus has been on providing support (financial and expertise) to municipalities for large capital projects at the municipal level.
- The new bridge for the St. Lawrence project has recently entered the procurement phase. The bridge is intended to replace the Champlain Bridge by 2018 and is expected to be one of the largest infrastructure projects in North America.

3.9 Municipalities

- The demand for P3s by municipalities has been steadily growing with projects often receiving federal support.
- Municipal P3 projects have generally focused on water/wastewater and transit projects, as well as cultural and sports training facilities.

4. Current Market Trends

- The continuing robust P3 market in Canada has attracted international players. For the most part, international participants partner with large Canadian P3 participants.
- P3 documentation is becoming relatively standard, which has resulted in reduced pursuit costs.
- All of the provinces are expanding the sectors in which P3 procurement is utilized.
- Many municipalities have embraced the P3 model as an alternative approach to major capital projects.
- A secondary market has developed, and is expected to grow, for P3 projects in Canada.

XV. Environmental Law

As Canadians become ever more vigilant about the state of the environment and insistent that offenders of environmental laws be held accountable, we have witnessed an increasing degree of government regulation and corresponding activity intent upon protecting the environment.

As a result, it is imperative that anyone in a business venture be fully informed on what the relevant environmental laws allow and prohibit, and how to respond to the demands of both governments and the public.

All levels of government across Canada have enacted legislation to regulate the impact of business activities on the environment. Environmental legislation and regulation is not only complex, but all too often exceedingly vague, providing environmental regulators with considerable discretion in the enforcement of the law.

Consequently, courts have been active in developing new standards and principles for enforcing environmental legislation. In addition, civil environmental lawsuits are now commonplace in Canadian courtrooms involving claims over chemical spills, contaminated land, noxious air emissions, noise and major industrial projects. The result has been a proliferation of environmental rules and standards to such an extent that one needs a "road map" to work through the legal maze.

The environment is not named specifically in the *Canadian Constitution* and consequently neither federal nor provincial governments have exclusive jurisdiction over it. Rather, jurisdiction is based upon other named "heads of power", such as criminal law, fisheries or natural resources. For many matters falling under the broad label known as the "environment", both the federal and provincial governments can and do exercise regulatory responsibilities.

This is referred to as "concurrent jurisdiction", which, in practical terms for business managers, means that businesses must comply with both provincial and federal regulations. Historically, the provinces have taken the lead with respect to environmental conservation and protection. However, the federal government continues to have a role in this area. In addition, some municipalities are also becoming more active, as is evidenced, for example, by their use of bylaws to regulate such matters as the development of contaminated land, the discharge of liquid effluent into municipal sewage systems, and reporting on the emission of chemical substances in the course of business operations.

Environmental statutes create offences for non-compliance that can result in substantial penalties, including million-dollar fines and/or imprisonment. Many provide that maximum fines are doubled for subsequent offences and can be levied for each day an offence continues. Most environmental statutes impose liability on directors, officers, employees or agents of a company where they authorize, permit or acquiesce in the commission of an offence, whether or not the company is prosecuted. Companies and individuals may escape environmental liability on the basis that they took all reasonable steps to prevent the offence from occurring. However, in a growing number of cases, liability may be absolute if a spill or discharge of a contaminant occurs.

Some statutes create administrative penalties, which are fines that can be levied by government regulators as opposed to the courts. There are also some jurisdictions that allow for tickets, similar to motor vehicle infractions, to be issued for non-compliance. Enforcement officers generally have rights to inspect premises, issue stop-work orders, investigate non-compliance and obtain warrants to enter and search property, and seize anything that is believed to be relevant to an alleged offence. A number of jurisdictions also have administrative tribunals to handle appeals of decisions made by such inspectors and other government officials.

1. Toxic and Dangerous Substances

The *Canadian Environmental Protection Act* (CEPA) provides the federal government with "cradle to grave" regulatory authority over substances considered toxic. The regime provides for the assessment of “new” substances not included on the Domestic Substances List, a national inventory of chemical and biotechnical substances. The Act requires an importer or manufacturer to notify the federal government of a new substance before manufacture or importation can take place in Canada. Consequently, businesses must build in a sufficient lead-time for the introduction of new chemicals or biotechnology products into the Canadian marketplace. In certain circumstances, manufacturers and importers must also report new activities involving approved new substances so they can be re-evaluated.

All existing substances included on the Domestic Substances List are in the process of being assessed by Environment Canada for bioaccumulation, persistence and inherent toxicity (BPIT). Environment Canada has collected information and conducted risk assessments with respect to a series of “Batches” as part of the “Challenge to Industry” program, which addressed approximately 200 high-priority substances. The government has identified approximately 500 substances, which it has divided into nine groups, as the next priority for assessment over the next five years. This initiative is known as the Substances Grouping Initiative, which will include information gathering, risk assessment, risk management, research and monitoring.

If the government determines that a substance may present a danger to human health or the environment, it may add the substance to the Toxic Substances List, which currently lists upwards of 125 toxic substances or groups of substances. Within two years of a substance being added to the list, Environment Canada is required to take action with respect to its management. Such actions may include preventive or control measures, such as securing voluntary agreements, requiring pollution prevention plans or issuing restrictive regulations that may provide for the phase-out or outright banning of a substance. Substances that are persistent, bioaccumulative, and result primarily from human activity must be placed on the Virtual Elimination List, and companies will then be required to prepare virtual elimination plans to achieve a release limit set by the Minister of Environment or the Minister of Health. Listed toxic substances include PCBs, CFCs and chlorinated solvents, to name but a few.

The *Pest Control Products Act* (PCPA) prohibits the manufacture, possession, handling, transportation, importation, distribution or use of a pest control product that is not registered under the Act or in any way that endangers human health or the safety of the environment. Pest control products are registered only if their risks and value are determined to be acceptable by the Minister of Health. A risk assessment includes special consideration of the different sensitivities to pest control products of major identifiable groups such as children and seniors, and an assessment of aggregate exposure and cumulative effects. New information about risks and values must be reported, and a re-evaluation of currently registered products must take place. The public must be consulted before significant registration decisions are made. The public is given access to information provided in relation to registered pest control products.

The *Hazardous Products Act* (HPA) prohibits suppliers, in certain circumstances, from importing and/or selling hazardous “controlled products” that are intended for use in a workplace in Canada. The legislation identifies six classes of controlled products, namely compressed gas, flammable and combustible material, oxidizing material, poisonous and infectious material, corrosive material and dangerously reactive material.

The Workplace Hazardous Materials Information System is a national program designed to protect workers from exposure to hazardous material that is established in part by the *Controlled Products Regulations* under the HPA. This system is similar to what is known in other jurisdictions as “worker right-to-know” legislation. In Canada, it consists of both federal and provincial legislation, reflecting the limited constitutional power of the federal government over worker safety and labour relations. In 1987, the federal government took the lead role in developing regulations that require manufacturers and importers to use standard product safety labelling and to provide their customers at the time of sale with standard Material Safety Data Sheets (MSDSs). Provincial occupational health and safety regulations require employees to make these MSDSs, along with prescribed training, available to their workers.

The classification of hazardous materials or “controlled products” is similar to that used under the *Transportation of Dangerous Goods Act* (TDGA). Test procedures determine whether a product or material is hazardous and, in some cases, the procedures are extremely complicated and require the exercise of due diligence in obtaining reasonable information on which to base the classification. A significant amount of information must be disclosed on an MSDS, including a listing of hazardous ingredients, chemical toxicological properties and first aid measures.

Prior to June 20, 2011, in addition to regulating “controlled products,” the HPA also defined and regulated certain “restricted” and “prohibited” products. On June 20, 2011, the provisions relating to restricted and prohibited products were repealed and were replaced by the new *Canada Consumer Product Safety Act* (CCPSA), which now regulates the importation, advertisement and sale of consumer products, including consumer products previously regulated under the HPA. The purpose of the CCPSA is to protect the public by addressing or preventing dangers to human health or safety that are posed by consumer products in Canada. Among other things, the legislation prohibits the manufacture, importation, advertisement or sale of any consumer product that is a “danger to human health or safety,” defined as any unreasonable hazard – existing or potential – that is posed by a consumer product during or as a result of its normal and foreseeable use and that may reasonably be expected to cause death or an adverse effect on health. The legislation also prohibits the manufacture, importation, advertisement or sale of “prohibited products” previously regulated under Part I of the HPA, and prohibits the manufacture, importation, advertisement or sale of certain consumer products unless they meet regulatory requirements. In addition, the CCPSA imposes a number of new obligations on manufacturers, importers, advertisers, sellers and testers of consumer products, including mandatory record-keeping and document retention requirements and mandatory reporting of any “incidents” related to a consumer product.

The TDGA applies to all facets and modes of inter-provincial and international transportation of dangerous goods in Canada. Each of the provinces has parallel intra-provincial requirements. The objective of the TDGA is to promote public safety and to protect the environment during the transportation of dangerous goods, including hazardous wastes. The TDGA applies to those who transport or import dangerous goods; handle, manufacture, ship, and package dangerous goods for shipment; or manufacture the containment materials for dangerous goods.

The TDGA and the *Transportation of Dangerous Goods Regulations* (TDG Regulations) establish a complex system of product classification, documentation and labelling; placarding and marking of vehicles; hazard management, notification and reporting; and employee training. The TDGA requires an Emergency Response Assistance Plan, security training and an implemented security plan before the offering for transport, handling or importation of prescribed goods. An Emergency Response Assistance Plan must be approved by the Minister of Transport or the designated person, and such approval is revocable. A security plan must include measures to prevent the dangerous goods from being stolen or unlawfully interfered with in the course of importing, offering for transport, handling, or transporting.

Dangerous goods are specified in the TDG Regulations and arranged into nine classes and over 2,000 shipping names. The classes include: explosives, compressed gases, flammable and combustible liquids and solids, oxidizing substances, toxic and infectious substances, radioactive materials, corrosives and numerous miscellaneous products prescribed by regulation. The TDGA also applies to any product, substance or organism that "by its nature" is included within one of the classes. The TDG Regulations have equivalency provisions with respect to such international rules as the International Maritime Dangerous Goods Code, the International Civil Aviation Organization Technical Instructions and Title 49 of the U.S. Code of Federal Regulations.

2. Air Pollution and Greenhouse Gases

Most air emission regulation is conducted at the provincial level of government, but a number of industry-specific air pollution regulations exist under CEPA. They limit the concentration of such emissions as: (1) asbestos emissions from asbestos mines and mills; (2) lead emissions from secondary lead smelters; (3) mercury from chlor-alkali mercury plants; and (4) vinyl chloride from vinyl chloride and polyvinyl chloride plants. The trend is for Environment Canada to focus on substance-specific regulations, some of which, like CFCs, are considered air pollutants.

New standards for air quality and industrial air emissions are currently in the process of being developed. In May 2008, the federal government agreed to work with provinces, territories and stakeholders to develop a proposal, known as the Comprehensive Air Management System, for air emissions. Subsequently, in October 2010, the Canadian Council of Ministers of the Environment agreed to move forward to finalize a new air quality management system based on the proposal. The new framework, known as the Air Quality Management System (AQMS), is currently in development. In October 2012, all jurisdictions (with the exception of Quebec) agreed to begin implementing the AQMS. The AQMS includes new Canadian Ambient Air Quality Standards (AAQS), which set the bar for outdoor air quality, and which will have to be implemented by 2015. It is expected that new air quality standards will continue to be developed over the next decade.

The federal government has also recently been focusing attention on regulations aimed at reducing greenhouse gas (GHG) emissions such as carbon dioxide. The regulations are part of the federal government's strategy to reach its target of achieving a 17% GHG emission reduction from 2005 levels by 2020. In the fall of 2010, the government released the *Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations* and a Notice of Intent outlining its commitment to continue working with the U.S. towards the development of tighter standards for vehicles for 2017 and later model years. The *Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations* apply to vehicles for 2011 to 2016 model years, and are aligned with mandatory national standards of the U.S. They are expected to reduce emissions per vehicle by 25% from those sold in 2008. The government has now proposed amending the Regulations to include emission standards for vehicles of 2017 to 2025 model years.

In February 2013, the government enacted the *Heavy-duty Vehicle and Engine Greenhouse Gas Emission Regulations* (SOR/2013-24). The Regulations establish progressively more stringent emission standards for 2014 to 2018 model year heavy-duty vehicles, such as pick-ups, semi-trucks, garbage trucks, and buses. It is expected that, as a result of these Regulations, emissions from 2018 model year heavy-duty vehicles will be reduced by up to 23%.

The federal government also recently passed *the Renewable Fuel Regulations*, which require an average renewable fuel content of 5% in gasoline and 2% for diesel fuel and heating distillate oil.

Further, the government has passed the *Reduction of Carbon Dioxide Emissions from Coal-Fired Generation of Electricity Regulations* (SOR/2012-167). These Regulations impose registration, monitoring, and reporting requirements on all coal-fired generation units, as well as establishing emission standards. The implementation of the Regulations is phased, with certain sections (mostly related to registration and applications for exemption) coming into force on January 1, 2013, the bulk of the Regulations coming into force on January 1, 2015, and Regulations applicable to stand-by units coming into force on January 1, 2030.

CEPA requires Environment Canada to keep and publish a *National Pollutant Release Inventory* (NPRI). Owners and operators of facilities that manufacture, process or otherwise use one or more of the numerous NPRI-listed substances under certain prescribed conditions are required to report releases or off-site transfers of the substances to Environment Canada.

Alberta has developed a greenhouse gas (GHG) emissions reduction program. Under the *Climate Change and Emissions Management Act* (CCEMA), Alberta's GHG emissions reduction system includes emissions trading systems, mandatory reporting and the creation of a fund for implementing new technologies, as well as programs and measures for reducing emissions. Regulated facilities have four compliance options available to them. They may reduce their emissions through operational efficiency, purchase emissions offsets, contribute to the Climate Change and Emissions Management Fund (Fund Credit) or purchase emissions performance credits. The CCEMA includes several regulations which provide further guidance for regulating emissions in the province.

The *Specified Gas Reporting Regulation* sets out the GHG reporting requirements for regulated facilities that emit more than 50,000 tonnes of carbon dioxide equivalent (CO2e) per year. The Specified Gas Emitters Regulation (SGER) requires all regulated facilities in Alberta emitting over 100,000 tonnes of CO2e per year to reduce their emissions intensity by 12% per year from their government-approved baseline. Facilities and sectors not subject to the SGER that are able to reduce their GHG emissions according to government-approved protocols are eligible to generate emissions offset credits which can be bought and sold in the Alberta emissions offset market. The *Climate Change and Emissions Management Fund Administration Regulation* regulates the Climate Change and Emissions Management Fund which is where the Fund Credits under the CCEMA are deposited. The price of a Fund Credit was originally set at C$15/tonne but is now established on an ongoing basis by Ministerial Order.

In British Columbia, the *Carbon Tax Act* imposes a tax on the purchase of fossil fuel with rates for different types of fuel set out in a schedule to the legislation. The *Reporting Regulation* requires B.C.-based operations emitting 10,000 tonnes or more of carbon dioxide emissions equivalent per year to report GHG emissions to the B.C. Ministry of Environment. Certain sectors are exempt from the initial phase of the *Reporting Regulation*, including air and marine transportation.

The *Clean Energy Act* sets out B.C.'s energy objectives (one of which is the generation of at least 93% of the electricity in B.C. from clean or renewable resources), requires the British Columbia Hydro and Power Authority (B.C. Hydro) to submit integrated resource plans on how it will meet those objectives and requires the province to achieve electricity self-sufficiency by the year 2016. Electricity generated for purposes of serving liquefied natural gas (LNG) facilities is excluded from the 93% clean energy objective.

The *Greenhouse Gas Reduction Targets Act* sets a provincial target of a 33% reduction in the 2007 level of GHG emissions by 2020 and an 80% reduction by 2050. While the Act sets targets, it does not yet impose requirements on the private sector to achieve the stated goals.

The *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* allows the government to set standards for the amount of renewable fuel that must be contained in transportation fuel blends, reduce the carbon intensity of transportation fuels and meet its commitment to adopt a new low carbon fuel standard similar to California's. The renewable fuel requirement for gasoline is a 5% annual average and for diesel a 4% annual average.

Air emissions are regulated under Ontario's *Environmental Protection Act (*EPA*)* through a combination of the environmental approval process and specific air contaminant limits determined at "points of impingement." The principal air emission regulation is Regulation 419/05. Among other things, this regulation requires the use of new air emission models, detailed monitoring and reporting, and the phasing-in of stricter air emission standards for over 100 different chemical parameters.

The Ontario government has issued a number of regulations that have strengthened its air emission controls. In 2005, the province commenced implementation of a five-point action plan to reduce industrial emissions, particularly smog causing emissions of nitrogen oxide (NOx) and sulphur dioxide (SO2). NOx and SO2 limits and monitoring requirements now govern the electricity generation, base metal, iron and steel and petroleum sectors, among others.

Ontario is working with other provinces and U.S. states through the Western Climate Initiative to design a cap-and-trade system that will support the transition to a low-carbon economy.

In Quebec, the *Clean Air Regulation* sets standards for contaminant emissions to the atmosphere. This Regulation applies throughout Quebec, except for the Island of Montreal where the Montreal Metropolitan Community has adopted specific air quality regulations. Quebec has also adopted a cap-and-trade regime for the purpose of managing greenhouse gas emissions. Emitters of GHG above 10,000 MtEq must file a declaration in accordance with the Regulation respecting mandatory reporting of certain emissions of contaminants into the atmosphere, CQLR c Q-2, r 15. Emitters of GHG above 25,000 MtEq are subject to the cap-and-trade regime that is regulated under the Regulation respecting a cap-and-trade system for greenhouse gas emission allowances, CQLR c Q-2, r 46.1. It is useful to note that Quebec forms part of the Western Climate Initiative with California and that Quebec and California's cap-and-trade regime have certain linkages.

3. Contamination to Land

Historic environmental damage can be imposed upon a current or purchasing operator or owner. A purchaser, in a share purchase transaction, takes on the environmental liability of a given property upon the completion of the sale – provided that any defects in the property are evident to the purchaser (if acting reasonably) or are discoverable with the exercise of reasonable diligence by the purchaser.

This liability can be vested upon the current owner in different ways.

First, liability – that is, responsibility for clean-up or remediation – for historic environmental damage can be imposed upon a current or past operator or owner by way of legislation. For example, under the Ontario EPA, current or past owner, operator or person in charge, management or control of a source of contaminant is considered to be a "person responsible." This captures a broad grouping of current entities, certainly including past or current operators and landowners, who may be required to remediate the property.

Second, liability for historic environmental damage can be imposed upon a current or purchasing operator or owner by operation of the common law, in the context of a lawsuit brought by another landowner whose property has been contaminated by migration of pollutants. More specifically, a civil action for environmental damage based on common law liability principles such as nuisance, negligence, trespass, riparian rights or strict liability may be started against the current owner of a property. However, there are obviously restrictions placed on these limits by the common law.

Each of the provinces has legislation dealing with releases to the environment. Alberta's *Environmental Protection and Enhancement Act* (EPEA) is a comprehensive statute aimed at promoting "the protection, enhancement and wise use of the environment."

The EPEA also regulates the release of specific substances and imposes a reporting obligation on any person who "releases or causes or permits the release of [one of these substances] into the environment." The EPEA further regulates the issuance of reclamation certificates and environmental protection orders (EPOs). The director may issue an EPO directing a person to take whatever measures the director deems necessary to deal with the release or potential release of a substance that may cause, is causing, or has caused an adverse effect.

In addition, the EPEA regulates the use and storage of hazardous substances and pesticides, as well as waste management.

British Columbia's *Environmental Management Act* (EMA) is the principal environmental statute in British Columbia. It prohibits the introduction of waste into the environment in such a manner or quantity as to cause pollution, except in accordance with a permit, regulation or code of practice established by the government for particular activities. The Waste Discharge Regulation prescribes the activities that may operate under a code of practice and those that must have a permit. The EMA also establishes a specific regime for the handling of hazardous wastes, spills and spill reporting, orders, municipal waste management programs, enforcement procedures and penalties, and environmental emergencies.

Part 4 of the EMA and the *Contaminated Sites Regulation* establish a detailed regime for the identification, determination and remediation of contaminated sites, and the assessment and allocation of liability for remediation. Liability under the regime is absolute, retroactive, joint and separate. Once a site is found to be contaminated, "responsible persons" will be responsible for remediation of the site and may be liable to anyone who has incurred costs to remediate the site unless an exemption from liability can be established. The term "responsible person" is broadly defined and includes current and past owners and operators of a site, plus transporters and producers of contaminants.

The Quebec *Environment Quality Act* (EQA) contains a framework for managing contaminated sites. The EQA requires a person who permanently ceases an activity that is designated in a regulation or a person who changes the use of property on which a designated activity once occurred to carry out a site assessment in accordance with the

Ministry of Sustainable Development, Environment and the Fight against Climate Change (MSDEF) guidelines. In the case of a permanent cessation of activities, the site assessment must be carried out within six months of cessation. If the site assessment indicates that the MSDEF standards are exceeded, there is a requirement to provide the MSDEF with a remediation plan and an execution timetable for approval. The EQA recognizes the possibility of carrying out remediation by way of a risk-management approach. Once the remediation plan is approved by the MSDEF, it must be carried out and completed and a remediation report prepared. All reports prepared as part of this process must be certified by a MSDEF-recognized expert.

In addition, if the site assessment establishes that standards are exceeded, a Notice of Contamination must be registered at the land registry. A Notice of Decontamination can be registered against title once a government-certified expert establishes that concentrations of contaminants onsite no longer exceed regulatory criteria. Where an approved risk-management approach is carried out, a Notice of Land Use Restriction setting out limits on the future use of the property must be registered on title.

The EQA also requires a person to notify their neighbours if they become aware that contaminants resulting from designated activities are present in soil at the property limits or if there is a serious risk that contaminants in groundwater are migrating offsite that might affect the use of water.

The EQA gives the MSDEF the power to order polluters or custodians of property to carry out site assessment and site remediation when MSDEF is aware that contaminants exceed regulatory limits or where there are no limits set for a contaminant that it is likely to adversely affect the life, health, safety, welfare or comfort of human beings, other living species or the environment. Defences available to innocent custodians of contaminated land facing an order from the MSDEF to assess or remediate the land are: (1) they honestly did not know about the contamination; (2) they knew about the contamination but they complied with the law and acted reasonably and diligently under the circumstances; and (3) the site was contaminated by a neighbouring property caused by a third party.

Ontario's EPA is the principal legislation dealing with pollution in that province. Where accidental spills or discharges of contaminants occur, the persons in control are obligated under the EPA to notify government agencies "forthwith" and to do everything practicable to clean up major spills and restore the natural environment. Persons suffering loss or damage from a spill are entitled to compensation. If the government incurs clean-up costs, it is able to recover these costs from the past or current owners and persons in control of the substances spilled. The EPA gives the power to the government to issue orders against and recover costs of the remediation from owners of property, even in circumstances where the owner of the property is not responsible for the contamination. Directors and officers are specifically obligated to exercise "reasonable care" to prevent their corporations from causing or permitting the discharge of contaminants into the environment.

Where land has been contaminated by current or past activities, the Ministry of the Environment and Climate Change is authorized to issue orders requiring remediation. Some orders will require a comprehensive remediation plan, involving expensive studies of the situation prior to the implementation of remediation measures. These orders may be appealed to an environmental tribunal if the terms and conditions are considered unreasonable. Land remediation may also be required as a condition to obtaining land use approvals from municipal authorities who are responsible for land use planning and development activities. The municipal authorities will typically have regard to provincial and national soil and groundwater guidelines.

The "record of site condition" (RSC) part of the EPA, Regulation 153/04 and certain related "brownfield" legislation, encourage the revitalization of contaminated land by establishing a voluntary remediation certification system involving the filing of an RSC when acceptable soil and groundwater standards are met, and allowing lenders, bankruptcy trustees and other fiduciaries to deal with contaminated land, without assuming liability for historical environmental conditions. Landowners who complete an environmental assessment or remediation of a property in accordance with the requirements of the EPA and file an RSC with the Ministry of the Environment and Climate Change, obtain protection from EPA environmental orders with respect to historic contamination. The RSC soil and groundwater standards vary depending upon the nature of the land use and the potability of the groundwater, among other things.

The central part of the RSC process is the preparation and filing of the RSC certificate with an electronic public registry. An RSC is completed by both a property owner and a qualified person experienced in environmental site assessment and remediation. Regulation 153/04 specifically defines "qualified persons" to ensure that they have minimum qualifications and sets out standards for the conduct of phase one and two environmental assessments and site-specific risk assessments.

The obligation to report environmental incidents is contained directly in environmental legislation, and varies between jurisdictions within Canada.

In some provinces, such as Ontario, this requirement is quite broad. For instance, under the EPA, any discharge which may have an adverse effect must be reported, and under the *Ontario Water Resources Act* there is an obligation to report a discharge (that is not in the normal course of events) or an escape (that may impair the quality of any waters) to the Ministry of the Environment and Climate Change. It is possible for an entity to be charged with failing to report, even if ultimately it is determined that the environmental incident itself does not result in charges or a conviction. Several other provinces have parallel provisions.

At the federal level there are also various duty to report requirements. For instance, the *Fisheries Act* requires that notification be given when there has been a deposit of certain substances in water frequented by fish. There are numerous examples of the duty to report in the *Canadian Environmental Protection Act*.

4. Water

The primary purpose of the *Fisheries Act* is to protect Canada's fisheries as a natural resource by safeguarding both fish and fish habitat. While much of the *Fisheries Act* is aimed at regulating harvesting, it also provides protection for waters "frequented by fish" or areas constituting fish habitat. The Act applies to both coastal and inland waters, and is generally administered by the Department of Fisheries and Oceans (DFO), although the environmental protection parts of the Act are administered by Environment Canada.

The *Fisheries Act* was amended on July 6, 2012. The amendments were made to increase the oversight by the federal government of activities impacting fish-bearing waters and fish habitat. This includes extending the power to order works to mitigate harm, allowing government officials to shut down operations permanently and increasing responsibilities on individuals and corporations to report potentially harmful activities.

There are two key prohibitions in the *Fisheries Act*, namely a prohibition against the deposit of deleterious substance into waters frequented by fish, and the harmful alteration, disruption or destruction (HADD) of fish habitat. The Act requires reporting the occurrence of a HADD or a serious or imminent danger thereof. The requirement to notify of a deposit requires such a report if a detriment to fish or fish habitat may reasonably be expected to occur. The amendments to the Act also impose a new requirement to provide a written report after notifications are made to fisheries officers, inspectors, or others prescribed by the regulations. The notification requirements and the duty to take measures apply broadly to anyone who owns or has charge, management or control of the activity that causes the HADD or deposit; causes or contributes to the HADD or deposit; or, in the case of a deposit, owns or has charge, management or control of the substance.

The Act also prohibits any person from carrying on any work, undertaking or activity that results in serious harm to fish that are part of aboriginal, commercial and recreational fisheries, unless an application to do so has been made and approved under paragraph 35(2)(b) of the Act. The federal government has indicated that these amendments will not be brought into force until the DFO has revised its habitat policies to guide how the prohibition is to be interpreted and how activities impacting habitat can be appropriately mitigated.

Where an activity will create a HADD, the DFO must approve the project before the work commences. The application process for a HADD approval includes providing the DFO with plans, specifications, studies and details of the proposed procedures. This may trigger an environmental assessment under the *Canadian Environmental Assessment Act*, 2012 (CEAA).

Offences under the *Fisheries Act* include the failure to: report a HADD or deposit; take measures to address a HADD or deposit; comply with any conditions of authorizations; supply information required by the Minister; or comply with directions from inspectors or fisheries officers. The limitation period for laying of charges under the *Fisheries Act* has been extended from two to five years.

Each of the provinces has legislation dealing with water rights and water pollution. Alberta's *Water Act* (WA) supports and promotes the conservation and management of water, while recognizing the need for Alberta's economic growth and prosperity. Property in and the rights to the diversion and use of all water in Alberta are vested in the provincial Crown. The definition of "water" is broad, including all water on or under the surface of the ground, whether in liquid or solid state.

The WA enables the director to establish water management areas and water management area plans for specified areas within Alberta. However, the central function of the WA is to establish an approvals, priority and licensing regime. With the exception of deemed licence holders, exempt agricultural uses, households and riparian owners or occupants, a party must have an approval before it commences an activity (as defined under the Act) or a licence before it diverts water. The WA operates on a FITFIR (first in time, first in right) principle. Older licence holders, therefore, have priority to the water supply over newer licence holders. There is presently a moratorium on the issuance of new licences for the South Saskatchewan River basin, which encompasses an area in and around Calgary.

The WA definition of "activity" is expansive. For example, an approval is needed for any activity that alters flow or water level, could cause siltation or erosion, affects aquatic life or alters the location of water. The WA defines a "diversion" as the impoundment, storage, consumption, taking or removal of water for any purpose. With some exceptions, anyone wishing to commence or continue a diversion of water or operate a works to divert water must apply to the director for a licence.

British Columbia's *Water Act* establishes a licensing regime for diversion and use of water, construction of works and alteration or improvements to streams and channels. The *Water Protection Act* prohibits the removal of water from British Columbia or the construction or operation of large-scale projects capable of transferring water from one watershed to another without a licence. The *Drinking Water Protection Act* regulates drinking water supply systems, establishing mechanisms for source protection and providing for greater public accountability of water suppliers.

The *Fish Protection Act* prohibits the construction of dams on specified significant rivers, allows for the designation of sensitive streams and establishes rules for new residential, commercial or industrial development. According to the Riparian Areas Regulation, an assessment of potential impact to fish habitat must be carried out before development can be approved by a local government.

The *Ontario Water Resources Act* (OWRA) is a companion statute to the EPA. Its purpose is to provide for the conservation, protection and management of Ontario's waters and for their efficient and sustainable use.

Where a waste generator wishes to discharge its waste to a local water body, the discharge must be subject to an environmental approval granted by the Ontario Ministry of the Environment and Climate Change pursuant to the OWRA. Without such a licence, if the discharge "may impair the quality of the water," the person causing or permitting the discharge is guilty of an offence under the Act. Upon conviction for such an offence, the generator/discharger may be fined or imprisoned in accordance with the same penalty structure provided for under the EPA.

Under the Act, no person is permitted to establish or operate a facility or works for the collection, transmission, treatment and disposal of commercial and industrial sewage wastes, among other wastes (sewage works), without first obtaining an environmental compliance approval.

Where one discharges liquid wastes into a municipal sanitary sewer, it is necessary to become familiar with any applicable sewer use bylaw. In most areas of the province, municipal sewer bylaws restrict what may be discharged into local sanitary and storm sewers and, in some cases, require pollution prevention plans.

The construction of water wells and the use or taking of any surface or groundwater above 50,000 litres a day is also regulated by the Act, which requires such takings to be permitted by the Ministry of the Environment and Climate Change.

The Ontario *Clean Water Act* was enacted in October 2006 and represents the Ontario government's most recent comprehensive legislation aimed at ensuring clean and safe water for its residents. The Act establishes conservation authority areas that will be subject to development plans that will protect drinking-water sources such as groundwater aquifers and surface watersheds. Each conservation area must develop a source protection plan in consultation with various local agencies and, once completed and approved by the Minister of the Environment and Climate Change, the plans will guide and restrict development activities within the plan areas much like current provincial and municipal development plans.

Quebec's *Act to Affirm the Collective Nature of Water Resources and Provide for Increased Water Resource Protection* provides for the requirement to obtain a water withdrawal authorization for any withdrawal of water – defined as the taking of surface water or groundwater by any means – in amounts exceeding 75,000 litres per day. Authorizations are valid for 10 years and government decisions regarding their issuance and renewal must give priority to public health needs and the environment. No water withdrawn in Quebec may be transferred out of Quebec. Exceptions are provided for water used in hydroelectric power generation, agriculture and bottled water operations. Regulations require payment of fees for water takings: C$0.0025 per cubic metre, except oil and gas extraction and industries where water is incorporated into the final product (such as the bottled water industry), in which case the fee is C$0.07 per cubic metre.

5. Waste Management

While most waste regulation is at the provincial level, a number of regulations exist under CEPA that regulate the movement of waste and recyclable material in, out and across the country. Waste movement is also regulated by the provincial levels of government within their individual boundaries. The *Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* implement Canada's obligations under the Basel Convention and certain other international treaties or agreements aimed at controlling the international movement of such materials. Section 185 of CEPA requires that the Minister be notified of any intended international shipment of hazardous wastes or hazardous recyclable materials. An international movement may consist of an export from Canada, an import into Canada, a transit through Canada, or a transit through a country other than Canada.

The notification requirements are set out in the Regulations and include providing information such as: the nature and quantity of the hazardous waste or hazardous recyclable material involved; the addresses and sites of the exporters, importers, and carriers; the proposed disposal or recycling operations of the hazardous waste or hazardous recyclable material; proof of written contracts between the exporters and importers; and proof of insurance coverage. With this information, Environment Canada is able to determine whether the proposed shipment of hazardous wastes or hazardous recyclable materials complies with regulations for the protection of human health and the environment.

If the notification requirements set out in the Regulations are met, Environment Canada notifies the authorities in the jurisdiction of destination. If any authority (including those in any transit countries) objects to the proposed shipment, the shipment cannot proceed until the objection is lifted. A permit may be granted following a review of the notice and approval from the authorities in the jurisdiction of destination. Various requirements, including prescribed liability insurance, also apply to any shipment.

The *PCB Waste Export Regulations*, 1996 allow Canadian owners of PCB waste to export such wastes to the U.S. for treatment and destruction (excluding landfilling) when these wastes are in concentrations equal to or greater than 50 mg per kilogram. The Regulations require that advance notice of proposed export shipments be given to Environment Canada. If the PCB waste shipment complies with the Regulations for the protection of human health and the environment, and authorities in any countries or provinces through which the waste will transit do not object to the shipment, a permit is sent from Environment Canada to the applicant authorizing the shipment to proceed.

The *Interprovincial Movement of Hazardous Waste Regulations* maintain a tracking system, based on a prescribed waste manifest, for the movement of hazardous waste and hazardous recyclable material between provinces and territories.

Each of the provinces has a waste approvals regime. For example, in Ontario any business which collects, transports, treats or disposes of waste must obtain environmental approval from the Ministry of the Environment and Climate Change and, in certain circumstances involving energy generation, may require a renewable energy approval. In the case of "liquid industrial and hazardous wastes," special rules apply. The generators of such waste must register each waste with the Ministry and use prescribed waste manifests in respect of each shipment from the waste generation facility. Hazardous waste must be packaged and labelled in accordance with the federal *Transportation of Dangerous Goods Act* and the generator must confirm the delivery of a waste shipment at the intended receiving facility. If the liquid industrial or hazardous wastes are stored onsite for more than three months, the Ministry must be notified and, in most cases, it will require assurances that the waste will ultimately be removed from the site.

Over the past few years, the Ministry of the Environment and Climate Change has taken steps to encourage the reduction and recycling of waste. Waste materials destined for recycling are exempt from some of the strictures of the legislation, including the requirement for environmental approval under the *Environmental Protection Act*. There are also regulations that require industrial and other waste generators to conduct waste audits and meet prescribed waste reduction targets.

The provincial government, under the authority of the *Waste Diversion Act*, now has several stewardship recycling programs aimed at the end use of consumer products. The "Blue Box" recycling program applies to packaging and printed materials with respect to a variety of consumer products and affects all "brand owners and first importers" of products that generate plastic, paper, glass, metal or textile packaging waste. The program requires such organizations to register with Waste Diversion Ontario or its delegate, Stewardship Ontario, and implement a waste diversion or recycling program, or pay annual fees based upon sales volumes. Similar recycling programs have been extended to household hazardous wastes and electronic products. New and expanded "extended producer responsibility" recycling and reduced packaging programs are expected over the coming years as Ontario moves towards a target of "zero" waste.

Quebec has a decentralized framework for siting landfills for disposal of non-hazardous material, with public involvement through regional county municipalities.

Regulations have been adopted requiring manufacturers to take back used paint and paint containers, as well as used oil, used batteries, consumer electronics and fluorescent light bulbs. Landfill operators and companies that market printed materials, containers and packaging pay dues that are remitted to municipalities to help finance the cost of curbside recycling programs.

Standards are in place for the use and storage of hazardous waste (known as residual hazardous materials in Quebec). A permit is required to treat or use for energy generation third-party hazardous waste, and to store third-party hazardous waste onsite (a transfer station).

Permits are also required to transport hazardous waste and to operate hazardous waste disposal sites. The *Transportation of Dangerous Substances Regulation* adopted under the

EQA governs the handling and transportation of dangerous substances, including hazardous waste, on Quebec's roads. It tracks the provisions of the federal *Transportation of Dangerous Goods Regulations*.

6. Project Approvals

The CEAA 2012 came into force on July 6, 2012. It replaces *the Canadian Environmental Assessment Act* (CEAA). The CEAA 2012 is designed to ensure that federal government agencies and bodies take environmental concerns into consideration in their decision-making processes. The CEAA 2012 is a self-assessment regime whereby environmental assessments must be conducted prior to a designated project proceeding. "Designated Projects" are defined broadly to mean one or more physical activities that are carried out in Canada or on federal lands; are designated by regulations; or are linked to the same federal authority as specified in those regulations, as well as the activities incidental to those physical activities.

The assessments will consider whether designated projects are likely to cause significant adverse environmental effects on components of the environment that are within the legislative authority of the federal government. Assessments will be conducted by the Canadian Environmental Assessment Agency, by the Canadian Nuclear Safety Commission (for projects that are regulated under the *Nuclear Safety and Control Act*), and by the National Energy Board (for projects that are regulated under the *National Energy Board Act* or the *Canada Oil and Gas Operations Act*). Time limits are set in the CEAA 2012 for assessments. Unless otherwise modified, a decision on a standard environmental assessment will generally be required within 365 days from the issuance of the Notice of Commencement. In cases that involve a public review panel, unless otherwise modified, a decision statement from the Minister must be issued not later than 24 months from the date the review panel was established.

The end product of a federal environmental assessment will include a "decision statement" to be issued under the CEAA 2012, approving a project and stipulating conditions to mitigate any environmental effects that are directly linked or necessarily incidental to the power exercised by the federal authority. These conditions are binding and enforceable.

The CEAA 2012 constitutes a radical change from the previous CEAA, under which there were four types of assessments, namely: screening, comprehensive study, panel review (public hearing), or mediation. The federal government indicated that the intention of the CEAA 2012 was to strengthen and streamline the environmental assessment process. The following describes how the federal environmental assessments which had already commenced under CEAA have been affected by CEAA 2012:

- Panel reviews have been transferred to the process and timelines under CEAA 2012;

- Comprehensive studies have been continued under the process in CEAA, with the addition of new timeline requirements; and

- Screenings have been continued under the process in CEAA only if they were included in a special order from the Minister of the Environment on July 6, 2012. All other federal screening assessments have been permanently suspended as of July 6, 2012, regardless of where they were in the process.

The CEAA 2012 has resulted in a dramatic reduction in the number of projects being subject to formal environmental assessment at the federal level, which was a key commitment made by the federal government in implementing CEAA 2012.

The *Regulations Designating Physical Activities* were amended in the fall of 2013. The amendments are aimed at ensuring that the Regulations capture the major projects that the federal government believes have the greatest potential for significant adverse environmental effects. Of particular note, many large industrial facilities such as those which process heavy oil and oilsands or manufacture pulp and paper, steel and chemicals, as well as certain industrial mineral mines, will no longer be automatically subject to the CEAA 2012, while railway yards, offshore exploratory wells, and expansions to oilsands mines are designated physical activities.

The *Alberta Land Stewardship Act* (ALSA) provides a statutory framework that allows the provincial government to give direction with respect to the economic, environmental and social objectives of Alberta, and to create policy that enables sustainable development through cumulative effects management.

Under the ALSA and Alberta's Land-Use Framework, a holistic approach is taken and development decisions are considered in light of the overall impacts to a region. The types of cumulative effects considered may include (among other things) water withdrawals, air emissions, land-based environmental impacts and overall habitat degradation.

The ALSA divides Alberta into seven regions: Lower Peace, Upper Peace, Lower Athabasca, Upper Athabasca, North Saskatchewan, Red Deer Region, and South Saskatchewan. Each region will be subject to a separate regional plan based on its particular environmental, economic and social needs. Regional plans are ultimately approved by cabinet and thus form part of the government's policy for the region. Accordingly, these regional plans may be viewed as top-down policy directives governing the interpretation and implementation of all legislation in Alberta including, where appropriate, statutes whose primary focus is not the environment.

Currently two regional plans have been finalized, including:

- Lower Athabasca Regional Plan (LARP), which encompasses significant portions of the Alberta oilsands regions. LARP has been in force since September 1, 2012.
- South Saskatchewan Regional Plan (SSRP), which encompasses the south-central part of the province including Calgary. The SSRP has been in force since September 1, 2014.

The ALSA has procedures in place respecting property rights and compensating rights holders. Due process is ensured through public consultation and presentation to the Legislative Assembly before a regional plan can be adopted or amended by cabinet. Individual rights holders may seek variances to a regional plan, and adversely affected parties may request a review of the plan.

The oil, gas and energy industry is heavily regulated in Alberta and has recently been subject to significant change. Pursuant to the *Responsible Energy Development Act* (REDA), in June 2013 the Energy Resources Conservation Board (ERCB) was replaced by the Alberta Energy Regulator (AER). The mandate of the AER includes all regulatory environmental functions pertaining to upstream oil and gas development as well as all energy-related and resource extraction issues. The mandate is intended to enable the AER to provide full lifecycles regulating oversight of energy resource developments in Alberta – "from application and construction to abandonment and reclamation, and everything in between." In addition to the AER, Alberta has the Alberta Utilities Commission (AUC). The AUC's mandate is to ensure the delivery of Alberta's utility services occurs in a manner that is fair, responsible and in the public interest. Authorities such as the AER and AUC must balance economic development with resource conservation.

The new AER has been referred to as the single energy regulator for all upstream oil, oilsands, natural gas and coal development in Alberta and basically combines several functions of various Alberta government departments and agencies previously involved in regulating energy projects and exploration activities.

In spite of considerable movement toward a more integrated regulatory system under the AER, Alberta is still not a true one-window regulatory jurisdiction as it relates to energy activities. For example:

- Part 4 of the *Mines and Minerals Act*, which deals with tenure as discussed above, will still be under the purview of Alberta Energy for the time being, meaning Alberta Energy will still grant the Crown mineral leases.

- The Surface Rights Board will remain in place to deal with certain surface access issues on private and Crown lands.

- The jurisdiction over provincial environmental assessments will remain with Alberta Environment and Sustainable Resource Development (ESRD).

- The AER has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of Aboriginal Peoples. Given that the duty to consult can be a major factor in determining how a project can move forward, it is clear that the AER will still have significant gaps in the amount of finality it can provide to a project proponent with respect to any approvals it has granted.

- A mix of federal regulators and regulations will continue to have jurisdiction over certain energy activities in the province. For example, the National Energy Board will continue to have oversight over international and interprovincial pipelines and Indian Oil and Gas Canada will continue to have regulatory functions pertaining to oil and gas resources located on First Nations reserves. Furthermore, the federal government will continue to have certain authority over energy developments through various federal statutes such as the *Species at Risk Act*, the *Migratory Birds Convention Act*, 1994, and *the Fisheries Act*.

British Columbia has a range of legislation related to project approvals. The *Environmental Assessment Act* (BCEAA), which is administered by the B.C. Environmental Assessment Office (EAO), establishes a comprehensive process for the assessment of the environmental effects of major projects in British Columbia. Projects designated in the *Reviewable Projects Regulation* or designated as reviewable by ministerial order must undergo an environmental assessment and cannot proceed without an environmental assessment certificate, unless the EAO Executive Director exempts the requirement for a certificate.

The British Columbia Utilities Commission (BCUC) is an independent regulatory agency that operates under and administers the *Utilities Commission Act* (UCA). The BCUC's responsibilities include the regulation of B.C.'s natural gas and electricity utilities as well as intra-provincial pipelines. A certificate of public convenience and necessity must be obtained from the BCUC before beginning the construction, operation or extension of a public utility plant or system. The BCUC can issue administrative penalties and impose fines of up to C$1-million per day.

The *Forest and Range Practices Act* sets the framework for a “results-based” forestry system on public land. It sets environmental objectives for soils, timber, fish, biodiversity, cultural heritage, forage and associated plant communities, visual quality, water, wildlife, and resource and recreation features. Operators prepare plans designed to achieve objectives. The *Private Managed Forest Land Act* creates a mechanism for the regulation of forest practices on private land. A governing council that establishes and enforces environmentally sustainable forest practices on privately managed forest land in accordance with objectives set by the government in the Act.

The *Oil and Gas Activities Act* regulates conventional oil and gas producers, shale gas producers and other operators of oil and gas facilities in B.C. The Act establishes the B.C. Oil and Gas Commission (Commission) which has broad powers over permitting compliance and enforcement and the setting of technical safety and operational standards. The *Environmental Protection and Management Regulation* establishes environmental objectives for water, riparian habitats, wildlife and wildlife habitat, old-growth forests and cultural heritage resources. The Act requires the Commission to consider these objectives in deciding whether or not to authorize an oil and gas activity. The *Petroleum and Natural Gas Act* requires proponents to obtain various approvals before undertaking exploration or production work.

The *Mines Act* applies to all mines during exploration, development, construction, production, closure, reclamation and abandonment activities. Before starting any work in or about a mine, the owner, agent, manager or any other person must hold a permit and have filed a plan outlining the details of the proposed work, a program for the conservation of cultural heritage resources, and for the protection and reclamation of land, watercourses and cultural heritage resources affected by the mine.

Quebec has several laws regulating natural resources development and conservation.

The *Mining Act* has recently been amended to clarify that surface minerals are owned by the landowner; to raise the amount of the reclamation guarantee to 100% of anticipated reclamation costs and accelerate payment thereof; and to make more mining projects subject to environmental assessment and public consultation obligations.

The *Natural Heritage Conservation Act* allows the MSDEF to designate various types of protected areas in Quebec, sometimes on an emergency basis. The *Act respecting the conservation and development of wildlife* sets out rules for hunting, fishing and trapping on public land; allows the government to adopt wildlife conservation measures; and contains provisions for accommodating the rights of Aboriginal Peoples. The government has recently proposed legislation that would significantly amend this legislation.

The *Forest Act* is intended to promote sustainable forest management. It contains different sets of requirements for public and private forests. Persons carrying on a forest management activity in public forests, other than road maintenance, must hold a forest management permit. The Act also provides for the negotiation of timber supply and forest management agreements, and forest management contracts. An authorization must be obtained from the MSDEF pursuant to the Tree Protection Act to destroy or damage a tree, sapling or shrub, or any underwood, anywhere other than in a forest under the management of the MNR. In case of failure to obtain such authorization, punitive damages may be payable.

Quebec's *Act respecting the sustainable management of the forest territory* provides for a three-level approach to land use planning, where the forested land base is divided into three types of areas, each with its own level of land use intensity: (1) off limits to resource development (biodiversity conservation); (2) sustainable resource management (multiple use, with a focus on ecosystem-based forest management); and (3) intensive forestry operations (plantation agriculture). Another element is decentralized decision-making by local forest management corporations using results-based management, with MNR taking a step back and concentrating on protecting the public interest, addressing aboriginal issues, road planning, and certain other matters. A further innovation will be selling fibre at market prices, giving existing rights holders a right-of-first refusal on market-priced lumber.

The *Petroleum Products Act* is intended to ensure the continuity and security of the petroleum products supply. Regulations under the *Petroleum Products Act* and related statutes set out standards governing the types of permitted petroleum products (oil and gasoline). Regulations adopted under the *Building Act* set standards for the use, monitoring and maintenance of petroleum storage tanks and other petroleum equipment, leaks and leak prevention, safety procedures, and government inspections and reporting, and permitting of high-risk petroleum products storage equipment.

Pursuant to the *Ontario Environmental Assessment Act* (EAA), significant public projects proposed by the provincial and municipal governments and, in a few cases, environmentally sensitive private projects, are subject to an assessment of their environmental impacts or effects. The application of the process is subject to the discretion of the Minister of the Environment, who must provide an approval before a project or undertaking may proceed. In some cases, a public project that is caught by the legislation may be exempted by order of the Minister. In other cases, private projects that would normally not be subject to the Act may be designated by the Minister after having been asked to do so by members of the public. In anticipation of the further privatization of Ontario's electricity generation system, a regulation exists under the Act requiring environmental assessments of prescribed electricity projects, which captures virtually all electricity projects of significance.

If a project is required to undergo an environmental assessment, at the very least extensive environmental studies will be required to determine the project's environmental impacts and consider the need for, and alternatives to, the undertaking. Some public consultation will be required and, in many cases, full public hearings are carried out before an independent tribunal known as the Environmental Review Tribunal. Where other government approvals are required, a consolidated public hearing may be held and the hearing can easily go on for a number of months. In the past, the types of private projects required to undergo an environmental assessment have included major waste management undertakings and new mines.

The *Crown Forest Sustainability Act* is the principal statute governing forestry activities in the province. The Act provides for the administration and regulation of forest management planning, forest resource agreements and licences, information management, reforestation and revenue collection. The Ministry of Natural Resources and Forestry administers the Act and relies on several manuals to guide various aspects of forest management activities and ensure that provincial forests are managed in a sustainable manner consistent with the long-term objectives set out in forest management plans. After the sustainable supply of wood is determined for a management unit, forest resource disposition occurs based on demand, and access is afforded to forest industry companies primarily through socio-economic-based policy instruments, including supply agreements and licences for harvesting and processing forest resources.

Mining activities are governed by the *Mining Act*, which provides for the exploration, development and rehabilitation of mines. Before a mine may be opened, the Ministry of Northern Development and Mines must first approve or accept a closure and rehabilitation plan for the mine. Such a plan will require a description of the proposed conditions and uses of the mine site and those that will exist after mine closure. The plan must provide for the rehabilitation of tailings areas and detail all other necessary rehabilitation work. The plan will be subject to negotiation with various government officials, including representatives of the Ministry of the Environment and Climate Change, which will likely be required to issue permits or certificates of approval under their legislation. The Ministry of Northern Development and Mines may also require some form of financial assurance that the closure plan will be carried out at the end of the mine's life.

Similar rehabilitation requirements are provided for under the *Aggregate Resources Act*, which governs the extraction of sand, gravel and other aggregates.

7. Environmental Permitting

The licensing or permitting system in Canada depends on the provinces, with permits granted on a facility-wide basis in some cases and those granted in association with particular activities (relating to air, water, soil and so on) in others. These approvals may be accompanied by conditions, which may concern certain infrastructure that is required at the facility at issue, routine testing and reporting and basic contamination control measures. There are typically mechanisms for appeal, such a review by a government official, an administrative tribunal, the relevant Minister, and possibly to the courts.

Quebec's *Environment Quality Act* is the main environmental statute in that province. The EQA makes it an offence to discharge or allow the discharge of a contaminant into the environment over and above limits set by regulation that is prohibited by regulation or in a manner that negatively impacts human health, safety, welfare or comfort or that causes damage or impairment to soil, vegetation, wildlife or property. Accidental releases must be reported to the Ministry of Sustainable Development, Environment, and the Fight Against Climate Change (MSDEF) immediately.

Anyone who intends to undertake an activity that may result in the release of a contaminant into the environment must first obtain a certificate of authorization from the MSDEF. These certificates are transferable only with MSDEF consent. Air emissions control and wastewater treatment equipment are normally covered by a separate authorization issued by the MSDEWP under the EQA. However, if a facility is located on the Island of Montreal, then as regards air emissions, the facility is subject to standards set forth in regulations of the Montréal Metropolitan Community (MMC). Moreover, if a facility is located within the territory of the MMC, then with respect to wastewater discharge standards, the facility is subject to standards set forth in the regulations of the MMC. Under the EQA, facilities in certain industrial sectors are subject to the requirement to obtain a "depollution attestation," a type of comprehensive environmental operating permit that must be renewed every five years. The first three sectors to have been made subject to this requirement are pulp and paper mills, and the mining and primary metals industry. Emissions standards in depollution attestations are tailored to the facility and its receiving environment. Holders of attestations pay fees that are based on their emissions and are subject to requirements to monitor the effects of their emissions on the local environment.

Certain types of projects listed in a regulation to the EQA must undergo an environmental impact assessment process before the Quebec government may issue a certificate of authorization. The environmental assessment process always includes the preparation of an environmental impact assessment, a public notification step and may include public hearings before the *Bureau des audiences publiques en environnement* (BAPE, the office of public hearings on the environment). The recommendations of the BAPE must be taken into account by the Quebec government in making its decision to authorize the project and in setting permit conditions. The EQA contains a separate environmental and social impact assessment process for the James Bay and Northern Quebec region which requires the involvement of Cree or Inuit representatives in the approval process.

Whenever a contaminant is discharged from a factory stack or wastewater outfall, or when waste is deposited on land, approval must first be obtained from the Ontario Ministry of the Environment and Climate Change, which administers the Ontario EPA and a companion statute, the *Ontario Water Resources Act*, which regulates both the taking of water for human or industrial use and the discharge of wastes and storm water directly into a river or lake.

While this approval, prior to October 31, 2011, took the form of a Certificate of Approval, it now takes the form of an Environmental Compliance Approval (ECA).

The change to the ECA regime from the previous Certificate of Approval regime is mostly procedural and does not impose new, substantive environmental obligations on applicants. The ECA process is used to regulate high-risk activities. Unlike previous Certificates of Approval, an ECA can authorize multiple activities at a single site and a single activity at multiple sites. The Ministry of Environment and Climate Change has also indicated that the ECA system would allow for more operational flexibility to businesses once they have obtained an approval.

Prior to issuing an ECA, the Ministry generally requires detailed plans and modelling describing the discharge source, the expected off-site impact and the manner in which the level or concentration of contaminants discharged will be minimized. The Ministry has increasingly required evidence that the owner or operator of the subject facility has identified the best available pollution control technology that is economically feasible. The Ministry will also have regard to concentration limits that have been developed for specified contaminants and is aggressively pushing Ontario industries to continually reduce the levels of contaminants being discharged into the province’s air and water. Major facilities are subject to detailed wastewater discharge requirements, contained in both their approvals and industrial sector regulations.

Certificates of Approval issued prior to October 31, 2011 remain in force. Existing Certificates of Approval can be amended, suspended, or revoked, as though they were an ECA.

In addition to the new ECA regime, the Ontario government has also created the Environmental Activity and Sector Registry (EASR). EASRs are intended for certain prescribed low-risk activities, such as the use and operation of heating systems and standby power systems, printing, solar facilities, waste management systems and automotive refinishing. No specific approval is required for activities that fall within the EASR. All that is required is that the activity be registered with the Ministry of the Environment and Climate Change.

Renewable energy projects such as solar and wind-powered generation facilities are subject to a special approval or permit under the EPA as a result of amendments associated with the *Green Energy Act*.

8. Species Protection

The federal *Species at Risk Act* (SARA) identifies wildlife species considered at risk, categorizing them as threatened, endangered, extirpated or of special concern, and prohibits a number of specific activities related to listed species, including killing or harming the species, as well as the destruction of critical habitat that has been identified in any of the plans required under the Act.

These include recovery strategies and action plans for endangered or threatened species and management plans for species of concern. Plans are developed by Environment Canada in partnership with the provinces, territories, wildlife management boards, First Nations, landowners and others. SARA allows for compensation for losses suffered by any person as a result of any extraordinary impact of the prohibition against the destruction of critical habitat. SARA provides for considerable public involvement, including a public registry and a National Aboriginal Council on Species at Risk that provides input at several levels of the process.

The protections in SARA apply throughout Canada to all aquatic species and migratory birds (as listed in the *Migratory Birds Convention Act*, 1994) regardless of whether the species are resident on federal, provincial, public or private land. This means that if a species is listed in SARA and is either an aquatic species or a migratory bird, there is a prohibition against harming it, or its residence, and the penalties for such harm can be substantial. For all other listed species, SARA's protections only apply on federal lands, including National Parks and First Nations Reserves. However, SARA also contains provisions under which it can be extended to protect other species throughout Canada, if the federal government is of the view that the provinces or territories are not adequately protecting a listed species.

Maximum penalties under SARA for a first-time offence are C$1-million for a corporation and C$250,000 and/or five years' imprisonment for an individual. A court may also order the offender to pay an additional fine in an amount equal to the monetary benefits accrued to the person as a result of the commission of the offence.

Some provinces have also enacted endangered species legislation, most notably Ontario with an extremely restrictive regime that can significantly affect development.

The MBCA enacts an international agreement between Canada and the U.S. for the protection of migratory birds. Although most of the statute focuses on the regulation of harvesting or hunting, it also contains some environmental protection provisions. The MBCA prohibits the deposit of substances harmful to migratory birds in any waters or areas frequented by migratory birds, except as authorized by regulation. It also prohibits the disturbance of the nests of migratory birds except as authorized by regulation.

Maximum penalties were recently changed by the amendments under *the Environmental Enforcement Act* such that large corporations may face maximum penalties, for more serious offences, of C$6-million for a first offence and C$12-million for subsequent offences. A court may also order the offender to pay an additional fine in an amount equal to the court's estimation of the value of any property, benefit or advantage accrued to the person as a result of the commission of the offence. In addition, there are substantial minimum fines for offences involving large vessels.

9. Enforcement

In summary, individuals and corporations may be held liable for any damage to the environment.

First, such liability may be "regulatory" and enforced under federal or provincial criminal statutes. An offence, such as the discharge of waste, will be accompanied by fines or jail terms. Some of these fines can be significant and accumulate rapidly upon subsequent offences. Canada relies more heavily on the criminal process for environmental enforcement than do many jurisdictions.

Second, there are also administrative penalties which may be imposed without a full prosecution upon those who run contrary to the dictates of certain environmental legislation. Recent federal legislation, which created the *Environmental Violations Administrative Monetary Penalties Act* and amended various pieces of federal environmental legislation, aims to update the fine structure in a wide variety of federal legislation to make the fines more severe. At the provincial level, in addition to fines stemming from a conviction of an offence, various provinces have established administrative "environmental penalties" very shortly after an environmental incident. This does not preclude the laying of charges.

Third, there is also significant potential for civil liability under common law. This may arise in a variety of circumstances, such as under tort or in relation to defects in disclosure of environmental problems prior to a transaction. More specifically, the common heads of action under which environmental claims are brought are nuisance (unreasonable interference with the use and enjoyment of land), negligence stemming from a failure to meet a standard of care and damage caused to a plaintiff, trespass and strict liability.

Under CEPA, enforcement officers have broad powers of investigation. They may issue compliance orders to stop illegal activity or require actions to correct a violation, among other powers. They may also carry out inspections and, in certain circumstances, search and seizure.

The ranges of fines payable for a first offence under CEPA are as follows:

- For individuals, between C$5,000 to C$1-million, and/or a term of imprisonment of up to three years
- For small-revenue corporations, between C$25,000 to C$4-million
- For all other persons and corporations, between C$100,000 to C$6-million.

In all cases, the range of fines payable doubles for repeat offenders.

Other federal environmental legislation, and all provincial environmental legislation, impose fines or jail terms for breaches, some quite significant. When imposing penalties, courts are required to consider specified aggravating factors to ensure that penalties reflect the gravity of the offence. CEPA imposes broad liability on officers and directors who "directed or influenced" the corporation's policies or activities in respect of conduct that is the subject matter of the corporation's offence. A public registry is used to maintain details of convictions of corporate offenders.

In addition to the enforcement provisions contained in CEPA, the federal government also has the authority to assess administrative monetary penalties, pursuant to *the Environmental Violations Administrative Monetary Penalties Act*. The stated purpose of this Act is "to establish, as an alternative to the existing penal system and as a supplement to existing enforcement measures, a fair and efficient administrative monetary penalty system" for the enforcement of certain federal environmental protection statutes, including CEPA. The amounts of the administrative penalties that may be assessed in response to a violation of the underlying statute may be up to C$5,000 in the case of an individual or up to C$25,000 in the case of a corporation.

The federal *Criminal Code* contains provisions that address corporate liability and provide a basis for criminal charges to be brought against corporations in the event that an activity causes harm to persons or property and negligence or fault can be proven. Three provisions expand criminal responsibility so that it can be attributable to organizations in addition to individuals. First, for negligence offences, criminal intent will be attributable to an organization where one of its representatives (directors, partners, employees, members, agents or contractors) is a party to the offence and departs markedly from the standard of care that could reasonably be expected to prevent the commission of the offence.

Second, in respect of offences where fault must be proven, an organization is a party to an offence if one of its senior officers is a party to the offence, or, acting within the scope of his or her duty, directs other representatives of the organization to commit the offence, or fails to take all reasonable measures to stop the commission of the offence by a representative of the organization. Another provision imposes a legal duty on those who direct how another person does work to take reasonable steps to prevent bodily harm to that person or any other person.

XVI. Power

1. Overview

The generation, distribution and transmission of electric power is primarily governed by the laws of the individual provinces, with each province selecting its method of regulation, such as rate-regulated government-owned utilities or open markets with private utility providers, and supply mix based on each province's policy considerations and available resources.

Privately held generators or a mix of private and government-owned corporations provide the power generation in Newfoundland and Labrador, Prince Edward Island, Nova Scotia, Ontario, Alberta and British Columbia. Generation is primarily provided by rate-regulated government corporations in Quebec, Saskatchewan and Manitoba. Independent power producers that generate electricity for their own use and for sale to the power grid and utilities exist throughout the country.

There is a variety of regulatory regimes that control the wholesale and retail prices of electricity. Alberta is deregulated, and Ontario is partially deregulated (and is often referred to as having a hybrid market). Most other provinces generally have a regulated price structure where the price of electricity is set by a regulatory board based upon the cost of generating and delivering the power to customers. A summary of the main laws governing the power industry in Ontario, Alberta and British Columbia is set out below.

1.1 Energy boards and commissions

There are several statutes at both the federal and provincial level that govern Canada's electricity sector. In many cases, these statutes provide for ongoing regulation by federal or provincial agencies and tribunals.

The National Energy Board is an independent federal regulatory tribunal that regulates the interprovincial and international aspects of the energy industry, including the construction and operation of international and designated interprovincial power lines and the export out of Canada and import into Canada of electricity.

Power lines that are completely within the borders of one province are usually regulated by that province's regulatory tribunals such as the Alberta Utilities Commission, the British Columbia Utilities Commission, the Ontario Energy Board and Quebec's Régie de l'énergie. Energy tribunals, whether they are federal or provincial, typically review, among other things, the economic and technical feasibility, and the environmental and socio-economic impact of proposed projects subject to their jurisdiction.

In addition, utility companies that supply electricity within a province are usually regulated by that province's regulatory tribunal. The mandate of the various tribunals varies from province to province, depending upon how electricity is regulated in that province.

1.2 Supply mix

Canada is blessed with significant hydroelectric resources, and hydroelectric generation accounts for a meaningful portion of electricity production in Quebec, Manitoba, British Columbia, Newfoundland and Labrador, and, to some extent, Ontario, Alberta and other provinces.

Quebec, Manitoba, British Columbia and Ontario have significant heritage hydroelectric assets which are regulated and supply electricity to local ratepayers at below-market rates. Quebec, Newfoundland and Labrador, British Columbia and Manitoba are undertaking significant new hydroelectric development and Ontario is redeveloping some of its hydroelectric projects in northern Ontario.

Nuclear generation supplies a portion of the baseload requirements in Ontario and New Brunswick. Alberta is also considering nuclear generation, with some oilsands producers expressing an interest in miniature nuclear reactor technology, in order to support the development of the oilsands resource in northern Alberta. At the opposite end of the spectrum, Quebec closed its only nuclear power facility and British Columbia's policy expressly excludes nuclear energy development.

Canada also has significant natural gas and coal resources. As a result, natural gas-fired and coal-fired generation can be found in most Canadian provinces. The ability to quickly ramp up or ramp down these forms of energy supply often means that they are used to support other intermittent forms of generation, such as wind and solar. Alberta and Ontario have recently added, and are in the process of adding, additional gas-fired generation. However, Ontario deliberately eliminated coal-fired generation and Nova Scotia is also moving away from coal-fired generation.

Every province has indicated its intention to support more generation from renewable sources, primarily wind and solar. Each has set its own renewable energy targets and how it proposes to achieve those targets. In most cases, this has taken the form of government support by offering long-term power purchase agreements at favourable prices to encourage renewable energy development, including through standard offer programs, requests for proposals and feed-in-tariff (FIT) programs.

2. Ontario – Power Industry and Power Laws

2.1 Policy setting and regulation

Two entities set electricity policy and regulate Ontario's electricity market: the Government of Ontario and the Ontario Energy Board (OEB). There are two provincially owned corporations that administer the electricity market: the Independent Electricity System Operator (IESO) and the Ontario Power Authority (OPA), although the provincial government may soon merge these two corporations into one entity.

2.1.1 Government of Ontario

The Ontario cabinet retains authority to set policy for Ontario's energy sector, but day-to-day oversight of Ontario's electricity and natural gas industries is maintained by the Minister of Energy. Upon the approval of cabinet, the Minister can issue policy directives to the OEB, the IESO and the OPA, and each is required to implement such policy directives. The Minister of Energy can also request that the OEB examine and advise upon any issue with respect to Ontario's energy sector.

2.1.2 Ontario Energy Board

The OEB is the regulator of Ontario's electricity industry. Although the OEB reports to the Minister, it operates as an independent entity. OEB responsibilities include: determining the rates charged for regulated services in the electricity sector including transmission and distribution services; approving the construction of new transmission and distribution facilities; formulating rules to govern the conduct of participants in the electricity sector; engaging in advocacy on behalf of electricity consumers; hearing appeals from decisions made by the IESO; monitoring and approving the IESO's budget and fees; and monitoring electricity markets and reporting thereon to the Minister.

In Ontario, the cost for transmission and distribution of electricity to a customer is charged separately from the commodity price of electricity. The OEB typically regulates the cost of transmission and distribution service, while the commodity cost of electricity is determined in the IESO's real-time wholesale market. In addition, the provincial government has imposed on most electricity customers an additional charge known as the Global Adjustment. The Global Adjustment rate is typically inversely related to the IESO market price of electricity, and usually the lower the market price the higher the Global Adjustment rate.

2.2 Market creation and the successor corporations to Ontario Hydro

Until 1998, the Ontario electricity sector was dominated by Ontario Hydro, a provincially owned company that integrated generation, transmission, system planning, electrical safety and rural and remote distribution functions. Ontario Hydro directly produced over 90% of the province's electricity and local distribution companies (LDCs) distributed electricity from Ontario Hydro to consumers within LDC's territory.

In 1998, the provincial government dismantled Ontario Hydro with the promulgation of the *Energy Competition Act*, *1998* which included the *Electricity Act*, *1998* and the *Ontario Energy Board Act*, *1998*. These latter two statutes constitute the principal electricity legislation in Ontario.

Pursuant to the *Electricity Act, 1998*, Ontario Hydro was separated into five companies including: Ontario Power Generation Inc. which assumed Ontario Hydro's generation assets; Hydro One Inc. which assumed the transmission and rural distribution businesses of Ontario Hydro; and the IESO which assumed responsibility for administering the electricity markets in Ontario and for directing the operation of Ontario's transmission grid.

A fully competitive wholesale and retail market opened on May 1, 2002, but electricity price and distribution rate freezes were enacted in December 2002 because of political pressure due to volatile electricity prices. The rate freezes have since been lifted, but some elements of price smoothing and subsidy still remain.

As a result of intervention in the market, merchant generation effectively ceased. The OPA was created to act as a creditworthy counterparty through which new generation can be procured, by means of long-term power purchase or contract-for-differences agreements. The OPA is also responsible for long-term system planning, conservation and demand management, and certain aspects of market evolution.

2.3 Independent Electricity System Operator

The IESO is responsible for administering the electricity markets in Ontario and for directing the operation of Ontario's transmission grid. The IESO has issued the Market Rules that govern the market for electricity and ancillary services in Ontario. The IESO is required to administer the electricity market in accordance with the Market Rules, and Market Participants are required to comply with the Market Rules.

2.3.1 IESO physical and financial markets

The IESO administers both physical markets and financial markets for electricity. In terms of physical markets, the IESO operates the real-time wholesale market and the market for ancillary services. The IESO may also procure physical output through reliability must-run contracts with generators. Currently, the transmission rights market is the only financial market, although the IESO has proposed to implement a day-ahead market. A day-ahead commitment process has already been implemented to enhance system reliability and forward-price signals.

Energy buyers and sellers have the option to enter into physical bilateral contracts which are not part of the IESO scheduling and dispatch process, but if the parties choose, they can submit specific data to the IESO and ask the IESO to provide a market settlement service.

The IESO is considering in 2014 the pros and cons of implementing a capacity market. A capacity market is typically a regular auction-based process to identify qualifying resources to meet a near-term demand for power. A forward auction or other market based equivalent is held for a specified period of time, for example one, three or five years ahead of when the capacity is required.

2.3.2 Real-time wholesale market and commodity price

In the Real-Time Wholesale Market, the price of the electricity commodity is determined by the availability of supply and changes in demand. The IESO runs a real-time market, meaning purchases of electricity are made as they are needed.

Each day, the IESO forecasts the demand for electricity and makes this information available to participants in the market. Generators and other energy suppliers send in their offers to provide energy. The IESO then matches the offers to supply electricity against the forecasted demand. It first accepts the lowest-priced offers and then “stacks” up the higher-priced offers until enough have been accepted to meet customer demands. Instructions are issued to power suppliers based on the winning bids, who then provide electricity into the power system for transmission and distribution to customers. All suppliers are paid the same Market Clearing Price based on the last offer accepted. A new price is set every five minutes depending on the supply and demand in the market. The five-minute prices are averaged to determine the Hourly Ontario Energy Price (commonly referred to as the HOEP).

While long-term projections still forecast growth in electricity demand, in the short term there is excess generating capacity in Ontario, which is driving down wholesale market prices. For example, in Ontario there has been surplus baseload generation causing “must-run” nuclear and large hydroelectric generators to bid in at prices resulting in negative pricing. This downward pressure on wholesale prices has not translated into downward pressure on the total price paid for the electricity commodity as most electricity consumers in Ontario also pay a charge known as the Global Adjustment which is used to pay for a variety of government programs, such as the guaranteed prices paid to generators under the FIT Program and other procurement contracts and for conservation and demand management programs.

The Global Adjustment rate varies monthly and it is determined by a formula imposed by a government regulation. It is typically inversely related to the IESO market price of electricity and usually a lower HOEP will result in a higher Global Adjustment rate.

The amount of Global Adjustment paid by residential and small business customers is calculated based on the amount of electricity consumed by the customer each month. However, certain large consumers pay based on their average peak demand when the use of system-wide electricity is the highest and not based on their actual consumption.

The Global Adjustment rate for large consumers – those with an average hourly peak demand greater than 5 megawatts (MW), or between 3 MW and 5 MW for certain industrial and commercial customers – varies individually depending on their energy use during coincident peak hours. For example, if a business on average uses one per cent of electricity demand during the five highest coincident peaks of the year, its Global Adjustment rate will represent one per cent of all Global Adjustment costs. Eligible large consumers can reduce their electricity costs by reducing their energy use during times of peak system-wide electricity demand.

In addition to the price of the electricity commodity, electricity customers in Ontario pay additional charges for the cost of transmission and distribution to the customers' location at regulated rates determined by the OEB.

2.3.3 Operating Reserve market

The IESO administers an Operating Reserve (OR) market which ensures that additional supplies of energy are available should an unanticipated event take place in the real-time energy market, such as a surge in demand or an unexpected equipment failure at a generating facility. The IESO can call on this spare energy capacity, which is offered into the OR market by dispatchable generators or dispatchable loads (e.g. to large-volume users who are able to cut consumption) who can respond quickly to dispatch instructions from the IESO.

2.3.4 Ancillary services

Ancillary services are required to maintain the reliability of the IESO-controlled grid, including: frequency control, voltage control, reactive power and black-start capability. The IESO procures ancillary services through contracts with Market Participants who provide such services in accordance with the performance standards articulated in the Market Rules.

2.3.5 Reliability must-run contracts

The IESO has authority to execute Reliability Must-Run (RMR) contracts which allow the IESO to call on the contracted facility to produce electricity if it is needed to maintain the reliability of the electricity system. Any costs which the IESO incurs for RMR contracts are recovered from all Market Participants as part of the IESO settlement process.

2.3.6 Transmission rights market

The Transmission Rights Market allows a Market Participant to sell and to purchase transmission rights associated with transactions between the IESO-administered Market and an adjoining electricity jurisdiction. The Transmission Rights Market allows Market Participants who import and export power to buy financial protection ahead of time to hedge their prices for power across interties. The IESO conducts auctions for transmission rights which are financial instruments that entitle a holder to a settlement amount based on the difference between energy prices in two different zones. The IESO determines which bids and offers are successful, given the clearing price for each transmission rights auction.

2.3.7 Day-ahead commitment process

The IESO's Day-Ahead Commitment Process requires dispatchable generators and dispatchable loads to submit offers and bids one day in advance, and generators are able to signal in advance any limits on their production for a given dispatch day. The Day-Ahead Commitment Process is intended to improve information regarding the operation of the market so as to allow the IESO and Market Participants to better gauge the adequacy of market resources and help to improve forecasts of next-day market prices.

2.4 Ontario Power Authority

The OPA was created in response to both the reluctance of investors to assume merchant risk and the need for long-term system development. It is a not-for-profit government-owned corporation which is primarily responsible for forecasting medium and long-term demand for and reliability of electricity resources; for planning adequate generation, demand management, conservation and transmission for Ontario; and, in the absence of a robust market that can support merchant generator investment, for procuring new generation through various forms of procurement processes. In 2013, the OPA managed and settled generation contracts accounting for two-thirds of Ontario's electricity system.

The OPA worked with the Ministry of Energy to develop Ontario's updated Long-Term Energy Plan which was released in December 2013. One of the focuses of the Long-Term Energy Plan is an emphasis on conservation and demand management before building new generation. The OPA administers a number of programs designed to promote energy efficiency, including the Industrial Accelerator program to assist eligible transmission-connected companies to fast-track capital investment in major energy-efficiency projects by providing financial incentives to encourage investment in innovative process changes and equipment retrofits.

2.4.1 Feed-In-Tariff Program

Enabled by the *Green Energy and Green Economy Act, 2009* and implemented by the OPA, Ontario's FIT Program was designed to support the development of renewable energy supply in the province. Under the FIT Program, homeowners, business owners and private developers could enter into long-term contracts (generally 20 years) with the OPA to generate and sell renewable energy produced by wind, waterpower, biomass and biogas, solar photovoltaic power or landfill gas at a guaranteed price for a fixed contract term.

Ontario's Energy Minister issued a directive to the OPA on June 12, 2013, cancelling the large FIT Program and replacing it with a proposed competitive procurement process for renewable projects over 500 kilowatts (kW). The directive also set annual procurement targets of 150 MW for the small FIT Program (greater than 10 kW, and 250 kW or less if connected to a less than 15 kV line, and 500 kW or less if connected to a 15 kV or greater line) and 50 MW for the microFIT Program (10 kW and under) for each year from 2014 to 2017.

2.4.2 Large Renewable Procurement Program

Ontario developed a Large Renewable Procurement (LRP) program to replace the large project stream of the FIT Program. The new procurement program applies to the development of new renewable generation projects generally over 500 kW. The provincial government was severely criticized over the way consultations with municipalities and local residents occurred with respect to the siting of generation projects. The new LRP process is intended to better meet the needs of communities by requiring energy planners and developers to work directly with municipalities to identify appropriate locations and site requirements.

The LRP program includes an initial Request for Qualifications process to qualify applicants, followed by a Request for Proposals process to evaluate projects proposed by the qualified applicants. Two procurements are proposed, commencing in 2014 and 2015 respectively, with the possibility of a third procurement in 2016 should any procurement capacity remain. Each procurement is expected to take between 12 and 16 months to complete.

The Minister of Energy has directed the following procurement targets for the LRP:

Directed Procurement Targets for the LRP

	Technology (MW)			
Year	**Wind**	**Solar**	**Bioenergy**	**Hydro-Electric**
2014	300	140	50	75
2015	300	140	50	45
2016	Any capacity that is left un-procured in 2014 and 2015 is to be made available for the LRP in 2016, along with any capacity from large renewable energy projects that expire or terminate prior to the launch of the 2016 procurement.			

2.5 Transmission and distribution

Hydro One Networks Inc. is the owner and operator of 97% of the transmission assets in Ontario. It is a wholly owned subsidiary of Hydro One Inc., which is a Crown corporation, wholly owned by the province. Hydro One Networks Inc. also operates a significant distribution business. It is the largest LDC in Ontario and serves approximately 1.2 million customers, primarily in the province’s rural areas. The remaining LDCs are mainly owned by municipalities. The province has taken steps started to encourage private developers to participate in the development of new large-scale transmission projects. Transmitters and distributors are licensed by the OEB and are subject to rate regulation by the OEB on a cost-of-service basis.

3. Alberta – Power Industry and Power Laws

Alberta operates a competitive wholesale power market that sets the price for electricity in each and every hour of the year. This market is commonly referred to as the ‘Power Pool’. It is operated by the Alberta Electric Systems Operator (AESO), which was established by provincial legislation known as the *Alberta Electric Utilities Act.* All electric energy bought and sold in Alberta must be exchanged through the Power Pool, and the hourly price determines the revenue for generators as well as the cost for consumers. A wide variety of contractual arrangements also exist such that the hourly price does not impact everyone at all times, but these contracts are influenced by the hourly price signal. It is this set of price signals, as opposed to a regulated structure based on “cost-of-service”, which makes Alberta’s power market deregulated and highly responsive to supply-demand dynamics.

3.1 Power Pool of Alberta

Alberta’s Power Pool is an independent, central, open-access pool that functions as a spot market, matching demand for power with the lowest-cost supply to establish an hourly pool price. The AESO, in its capacity as the Independent System Operator, manages power settlements under the Power Pool. The AESO is also the provincial transmission administrator responsible for the safe, reliable and economic operation of Alberta’s integrated bulk transmission system.

Three categories of sellers are eligible to offer and sell electricity through the Power Pool of Alberta: marketers (entities that trade electricity within Alberta); importers (who purchase electricity through interprovincial ties with Saskatchewan, British Columbia or the international tie with Montana and sell this electricity to the Alberta Power Pool); and generators (including independent power producers who own and operate generating capacity developed after 1996 and the buyers under Power Purchase Arrangements (PPAs) who are entitled to offer and dispatch the generation capacity of the formerly regulated utility power generation units).

Wholesale power generation in Alberta is deregulated and the development of new generation capacity, the supply mix and the price of electricity are determined on a competitive market basis, with the price of electricity determined through the Power Pool providing the “development signal”. To date there have been no government-sponsored procurement initiatives or policy requirements relating to development of new generation capacity or the generation supply mix. Facilities continue, however, to be subject to regulatory approval before the Alberta Utilities Commission (AUC) regarding siting, environmental, water usage and other facilities permitting requirements.

3.2 Bidding and purchasing electricity from the Power Pool

There are also three categories of eligible purchasers who may bid to acquire electricity from the Power Pool: retailers, who market and sell electricity to end-use consumers through the competitive retail market; direct access customers, generally large industrial customers who purchase their electricity on a wholesale basis through the Power Pool; and exporters, who purchase electricity from the Power Pool and export it to British Columbia, Saskatchewan or Montana. In order to become a Power Pool participant, retailers, direct access customers and exporters must obtain a licence from the AESO.

3.3 Supply mix

New generation capacity developed in Alberta after January 1, 1996 has been subject to market forces rather than rate regulation. Electricity produced by all new generation capacity is available to be traded through the Power Pool and is not subject to the traditional rate-making application process.

Some types of electricity generation facilities are considered “dispatchable”, in the sense that they are able to come online to dispatch electricity fairly easily, in order to increase generation during “peak” hours. Generally speaking, in Alberta, the dispatchable generation is represented by natural gas-fired generation facilities which are the price-determining units through the Power Pool’s price-setting mechanism during “peak” hours.

Coal-fired generation facilities represent lower marginal cost sources of generation and therefore carry much of the baseload generation requirements during both “peak” and “off peak” periods. As a result of carrying this baseload generation, coal-fired facilities are the price-determining units through the Power Pool’s price setting-mechanism during “off peak” hours.

Currently, Alberta has over 14,500 MW of installed electricity generation capacity and 21,000 km of transmission lines. Thermal sources account for the majority of Alberta’s installed generating capacity. Coal-fired plants provide about 43% of the province’s capacity, while natural gas-fired facilities provide about 41%. The remainder is hydro, wind and biomass (electricity produced from organic sources such as wood waste, garbage or animal matter).

Out of all Canadian provinces and territories, Alberta ranks third with an installed wind generation capacity of 1,120 MW; however, wind generation currently only constitutes about 7% of Alberta’s existing generation capacity. Due to the unpredictable nature of wind, there are large variations in electricity generation from wind power. AESO estimates that by 2024 Alberta’s wind energy capacity will double to over 2,200MW and comprise 11% of the province’s total generation capacity. Almost 2,000MW of wind power projects are currently listed on the AESO’s generation interconnection queue with another 15 wind projects proposed for development.

However, estimates of total future wind generation capacity within Alberta have declined from past predictions for various reasons. Due to wind power’s inherent nature as an unpredictable energy source, requiring certain transmission grid upgrades and additions, transmission capacity in Alberta has not kept pace with announced generation development. Furthermore, the relatively high cost of wind power development relative to the dominant and cheaper generation sources from coal and natural gas has resulted in fewer wind power generation facilities being developed. In addition, the development of generally more costly wind generation facilities is not supported in Alberta by a government-sponsored contracting initiative (such as Ontario’s FIT Program). Also, wind power is a less appealing source of electricity to energy producers because of the generally non-dispatchable nature of wind generation. For this reason, wind generation is excluded from the price-setting mechanisms for establishing the Power Pool price and suppliers of wind-generated electricity are “price takers”, receiving the price otherwise established by the Power Pool’s price-setting mechanisms.

3.4 The electricity market

The electricity market in Alberta can be divided into three distinct areas: generation; transmission and distribution; and load (including the retail market). Generally speaking, generation is completely deregulated, with the exception of facilities permitting requirements; transmission and distribution are almost fully regulated, with the exception of critical transmission infrastructure, and load is generally deregulated, with the notable exception of the retail market regulated rate option.

3.4.1 Generation

Following the deregulation of the power generation market, PPAs were introduced to govern the sale of power. These PPAs are "arrangements", not private agreements. They are not executed, but rather are imposed by Alberta's *Power Purchase Arrangements Determination Regulation*. Under a PPA, the owner of primarily baseload, coal-fired generation facilities has the right to own, operate and maintain generation facilities and receive a government-guaranteed stream of payments from the PPA buyer. The private buyer has the right to offer and sell the output from the facilities through the Power Pool taking on the merchant risk relative to the payments required to be made for acquiring the PPA and on an ongoing basis under the PPA.

The PPAs were put up for auction in 2000 and went into effect on January 1, 2001. They now govern approximately one-half of the power generated and sold in Alberta, and will expire over various terms, but generally by December 31, 2020. After they expire, any useful economic life in the underlying facilities will be returned to the original owner for dispatch into the competitive power market or for decommissioning.

3.4.2 Transmission

In Alberta, power transmission and distribution is entirely regulated under a cost-of-service model. Consumers pay for the full costs of operating the system (with the exception of line losses and interconnection costs, which are paid for by generators) plus a reasonable return, and transmission owners are guaranteed these costs and return. Electricity transmission and distribution, with the exception of the critical transmission infrastructure projects established by legislation, continue to be regulated based on both "need", with the costs of transmission and distribution paid by consumers on a regulated rate-of-return basis, and "facilities" requirements. Critical transmission infrastructure projects are specified bulk transmission development projects which the provincial government has excepted from having to establish a "need" requirement before the AUC.

The Alberta Interconnected Electric System has been built over the decades by regional utilities. There are three main transmission facility owners in the province: ATCO Electric Ltd., FortisAlberta and AltaLink, L.P., the latter of which owns more than half of Alberta's transmission system and serves 85% of its population. Owners of transmission facilities retain ownership of their respective components of the system, but the transmission system as a whole is managed by the AESO.

The system remains a natural monopoly and continues to be regulated, with the AESO setting the transmission tariff through applications to the AUC. All entities eligible to trade power through the Power Pool have open access to the grid. Transmission access will continue to be open to all suppliers and purchasers of power who will pay non-discriminatory tariffs.

3.4.3 Load – direct access and retail

Load is represented generally by two constituents: direct access customers (primarily large-volume industrial and commercial consumers of power who are registered Power Pool participants and who directly purchase their electricity requirements from the Power Pool on a wholesale basis) and the retail market (representing lower-volume commercial consumers of power and residential power consumers).

Direct access customers purchase their electricity directly through the Power Pool on a wholesale basis at a price established by the Power Pool's price-setting mechanism.

The retail power market is a competitive market with long-term contracts offered by licensed retailers, subject to the ongoing "regulated rate option" which, since 2001, has allowed low-volume residential power consumers the ability to elect to purchase their power at market-based rates established on a monthly basis by the AUC.

The retail market, primarily made up of residential customers, has access to contracts for electricity supply offered by competitive retailers, but also has access to default supply through the retail market regulated rate option providers in their service area. Customers who choose not to enter into a contract with a competitive retail supplier will receive power from a default retail market regulated rate option provider, determined by the customer's location within the province, at default market-based rates established monthly through the AUC. As a result, the market is fully deregulated for industrial and commercial customers who either act as self-retailers, interacting directly with the wholesale market, or who have access to competitive retailers as their electricity provider.

4. British Columbia – Power Industry and Power Laws

British Columbia has a regulated electricity market. The British Columbia Utilities Commission (BCUC) is an independent regulatory agency that regulates electricity utilities pursuant to the *Utilities Commission Act* (UCA). British Columbia has a provincially owned utility company, known as BC Hydro, that is responsible for delivering power generation and transmission to users in the province. As BC Hydro has a virtual monopoly over these activities in the province, the BCUC has the responsibility under the UCA to provide oversight of its activities, including approving rates charged to customers and BC Hydro's spending and capital programs. Further, BC Hydro or any other person must obtain a "certificate of public convenience and necessity" from the BCUC before beginning the construction or operation of a public utility plant or system, or an extension of either.

There are no significant subsidies or incentives for power generation entrants in British Columbia. There are no specific barriers to investment in the British Columbia power sector by non-resident individuals or corporations. However, in certain circumstances, the change of control of any utility regulated by the BCUC may require approval from the BCUC, which is charged with the responsibility to determine that such a change of control is in the public interest.

As the significant majority of the land base in British Columbia is owned by the province, anyone wishing to establish a power generation facility is likely to be constructing on provincial land, which may require leases or other forms of tenure and permits to construct and operate such facilities from provincial regulators. Depending on the nature of the project, a variety of environmental permits, approvals and assessments may also be required. Such requirements may also extend to projects on private land.

British Columbia has a large number of First Nations (aboriginal) groups that claim virtually all of the provincial land base as their traditional territory. As a result, legal requirements exist that may require a power developer to enter into consultations with relevant First Nations to determine the potential impact, if any, of the project on the First Nations people. Accommodation measures may be required to be undertaken by proponents for such impacts. Therefore, project proponents often reach "impact benefit agreements" with affected

First Nations. Similar consultations and accommodation measures are required in all of Canada's provinces if a project may affect a First Nations group.

Although BC Hydro has a near monopoly on power generation and transmission in British Columbia, it is possible to establish or acquire an independent power producer (IPP) in British Columbia that generates power from renewable or non-renewable sources. Energy supply contracts entered into by an IPP may be approved by the BCUC if it is in the public interest to do so. Given BC Hydro's near total control of the provincial transmission grid, virtually all IPPs enter into connection agreements and power sale/supply agreements with BC Hydro. Periodically, BC Hydro engages in a "call for power" process through which it identifies parties willing to become an IPP. The rates BC Hydro pays for such power are set by BC Hydro and are typically non-negotiable.

In 2008, BC Hydro launched the Standing Offer Program (SOP) to encourage the development of small and clean or renewable energy projects in the province. The SOP provides a streamlined process, simplified contract and decreased transaction costs to qualified energy project developers who sell electricity to BC Hydro.

There is no open power market in B.C. that is comparable to the markets in Ontario and Alberta. Thus, there are no market-entry requirements. In B.C., a power market entrant would enter as a generator or as a trader. Power traders are required to be regulated as a utility under the UCA for the trading of power within B.C., but not if they were to buy and sell power in B.C. for export outside B.C. As a regulated utility, they may or may not be required, depending on their level of activity, by the BCUC to meet certain requirements, such as capitalization level. They would be subject to regulation on rate of return, for example, which may make it less desirable to be a regulated utility in B.C.

The B.C. *Clean Energy Act*, introduced in 2010, sets out British Columbia's energy objectives and requires BC Hydro to achieve electricity self-sufficiency by the year 2016. Currently, BC Hydro's system generates about 95% of its power from clean or renewable sources. The *Clean Energy Act* also prohibits certain projects from proceeding, e.g., the development or proposal of energy projects in parks, protected areas or conservancies, ensures that the benefits of the heritage assets are preserved, and provides for the establishment of energy efficiency measures. The provincial government's interpretation and implementation of this Act remains the subject of ongoing internal and public discussion.

Currently, one of the most important economic opportunities for the province is the development of the liquefied natural gas (LNG) industry. There are approximately 17 publicly announced LNG projects proposed for Kitimat, Prince Rupert, and other areas of the province, including the north coast, Howe Sound and Vancouver Island. It is anticipated that not all of these projects will proceed. However, the emerging LNG industry is expected to place a strain on the power system. While most LNG producers will use direct-drive natural gas turbines to run the cooling process to convert natural gas to liquid form, many are expected to use electricity for ancillary requirements and others may choose electricity for all of their energy needs. BC Hydro intends to have sufficient supply to meet the initial LNG load and will meet further LNG requirements through energy from clean power projects.

As a means to meet future electricity demands, BC Hydro has proposed the building of the Site C Clean Energy Project (Site C), a third dam and hydroelectric generating station on the Peace River in northeast British Columbia. Site C would add 5,100 gigawatt hours of electricity each year and would provide 1,100MW of dependable capacity to the system for the earliest in-service date of 2024. As of the date of publication of this guide, the provincial government had not determined whether to proceed with Site C.

BC Hydro has deemed a number of renewable energy sources to be currently unviable, including offshore wind, geothermal, wave, tidal and solar, as no commercial projects harnessing these resources exist in the province at this time or they have not yet proven to be economically feasible.

XVII. Restructuring and Insolvency

Commercial restructuring and insolvency law in Canada is not memorialized in any single statute. Canadian restructuring and insolvency law refers to the complex matrix of statutory and common law rules that govern the rights and responsibilities of creditors and debtors in situations where the debtors are in financial distress. These insolvent debtors may become subject to a host of different formal or informal proceedings, with bankruptcy proceedings being only one such form.

Bankruptcy and insolvency are oftentimes thought to be – by laypersons, the media and legal professionals not practising in the area – one and the same thing. An enterprise that ceases operations or cannot meet its obligations is commonly said to have "gone bankrupt". A company that becomes subject to a court-supervised process as a result of some form of financial distress is often referred to as having become subject to "bankruptcy proceedings." Despite their colloquial use as synonymous terms, the distinction between bankruptcy and insolvency in Canada is a critical one.

Bankruptcy is a legal status. Insolvency is a financial condition. An insolvent company is unable to meet its obligations generally as they become due or its liabilities exceed the value of its assets. When a commercial entity becomes bankrupt, on the other hand, it loses the legal capacity to deal with its assets and a trustee in bankruptcy is appointed over those assets with a mandate to, among other things, liquidate the assets and distribute the proceeds of sale to creditors.

In addition to bankruptcy, an insolvent business may be rehabilitated by a restructuring of the corporation and its debts under one or more statutes governing commercial insolvencies. Such "debtor-in-possession" (DIP) proceedings may also result in the sale of some or all of the assets of the insolvent business.

Alternatively, the assets of a business may be liquidated or sold on a going-concern basis in creditor-initiated proceedings. Such proceedings may include the appointment of a receiver of the business (appointed privately or by a court), the exercise of other private remedies of a secured creditor under its security or some combination of the above.

Set out below is a summary of Canadian restructuring and insolvency law.

1. Canada's Insolvency Statutes

Canada has four key insolvency statutes:

- *Companies' Creditors Arrangement Act* (CCAA). The CCAA is the principal statute for the reorganization of a large insolvent corporation that has more than C$5-million of claims against it or which is part of an affiliated group of companies that has more than C$5-million of claims in the aggregate. The CCAA is a federal statute with application in every province and territory of Canada (and which purports to have worldwide jurisdiction). The CCAA is generally analogous in effect to Chapter 11 of the U.S. *Bankruptcy Code* (U.S. Code), although there are a number of important technical differences. As discussed below, the sale of a debtor's business and assets in a CCAA proceeding is permitted even in the absence of a formal plan of reorganization.

- The *Bankruptcy and Insolvency Act* (BIA). The BIA is also a federal statute that includes provisions to facilitate both the liquidation and reorganization of insolvent debtors. The liquidation provisions, which provide for the appointment of a trustee in bankruptcy over the assets of the insolvent debtor, are generally analogous to Chapter 7 of the U.S. Code, although there are a number of important technical differences. The reorganization provisions under the BIA, known as "proposal" proceedings, are more commonly used for reorganizations that are smaller and less complicated than those that take place under the

CCAA because the BIA proposal provisions have more stringent timelines and provide less flexibility than the CCAA. The BIA also provides for the appointment of an interim receiver to protect and preserve assets in certain circumstances and a receiver with national power and authority. A receiver appointed over all or substantially all of the assets of an insolvent company must be a licensed trustee in bankruptcy – typically the licensed insolvency professionals in an accounting or financial advisory firm.

- The *Personal Property Security Act* (PPSA). Each province of Canada except Quebec (which has its own unique *Civil Code of Québec*, modelled on the French Napoleonic Code) has enacted a version of the PPSA, which governs the priorities, rights and obligations of secured creditors, including a secured creditor's right, following a default by the debtor, to enforce its security and dispose of assets subject to its security (including on a going-concern basis). The PPSA is analogous to, and modelled on, *the Uniform Commercial Code* enacted in each U.S. state.

- Provincial *Rules of Court.* Each province, other than Quebec, has "Rules of Court" similar to Ontario's *Courts of Justice Act*, which allow courts to appoint a receiver and/or receiver and manager over a debtor's assets when it is "just or convenient" to do so. The receiver, by way of court order, can be granted the right to take possession of, and sell, the assets subject to the receivership. Receivership is an available remedy in Quebec under the federal BIA.

Proceedings under the CCAA and BIA are subject to the oversight of the federal government office known as the Office of the Superintendent of Bankruptcy. The federal government also appoints Official Receivers to carry out statutory duties in each bankruptcy jurisdiction across Canada. The Official Receivers report to the Superintendent of Bankruptcy.

2. Reorganizations Under the CCAA

2.1 Who qualifies for relief under the CCAA?

To qualify for relief under the CCAA, a debtor must:

(a) be a Canadian incorporated company or foreign incorporated company with assets in Canada or conducting business in Canada (certain regulated bodies such as banks and insurance companies are not eligible to file under the CCAA or BIA but instead may seek relief from creditors under the *Winding-Up and Restructuring Act*). Income trusts (business trusts established for commercial investments) also qualify for relief. Partnerships cannot apply for protection from creditors under the CCAA but, as discussed below, relief has been extended to partnerships in certain circumstances where the corporate partners have filed;

(b) be insolvent or have committed an "act of bankruptcy" as within the meaning set out in the BIA. The CCAA does not contain a definition of insolvency; however, courts have held that reference may be had to the definition of insolvency under the BIA. Accordingly, a company will qualify for relief under the CCAA if it is insolvent on a cash-flow basis (i.e., unable to meet its obligations generally as they become due) or on a balance-sheet test (i.e., has liabilities that exceed the value of assets). Further, the Ontario Superior Court of Justice has held that in determining whether a debtor is insolvent for the purposes of the CCAA, courts may use a "contextual and purposive approach". A debtor may be considered insolvent if the debtor faces a "looming liquidity crisis" or is in the "proximity" of insolvency even if it is currently meeting its obligations as they become due. It is sufficient if the debtor reasonably anticipates that it will become unable to meet its obligations as they come due before the debtor could reasonably be expected to complete a restructuring of its debt; and

(c) have in excess of C$5-million in debt or an aggregate in excess of C$5-million in debt for a filing corporate family.

Partnerships and solvent entities do not qualify as "applicants" under the CCAA, and cannot file plans of arrangement or compromise under the CCAA. Nonetheless, Canadian courts have routinely extended the stay of proceedings and other relief granted to the qualifying insolvent applicants, to partnerships (where the corporate partners themselves have filed) and even solvent entities affiliated with the applicants, where there is a finding that it is appropriate to do so in the circumstances. For example, relief has been extended to partnerships where the business of the partnership is inextricably entwined with the business of the applicants and granting certain relief to the partnership is required for an effective reorganization of the qualifying applicants.

2.2 How does a company commence proceedings under the CCAA?

Unlike Chapter 11, no separate legal bankruptcy estate is created upon a CCAA filing and the CCAA does not allow a debtor company to make an electronic filing to obtain a skeletal stay of proceedings and then subsequently obtain "first day" relief. Instead, a debtor company seeks the granting of a single omnibus initial order that provides the debtor with a comprehensive stay of proceedings and other relief. Proceedings under the CCAA are commenced by an initial application to the superior court of the relevant province and not a federal bankruptcy court as in the U.S. In some jurisdictions like Ontario, there are specialized commercial branches of the provincial superior courts before which these applications may be brought. In some provinces, there are recognized model orders, which establish the accepted framework for an initial order, subject to the modifications on a case-by-case basis as may be granted by the court. In most instances, the application is made by the debtor company itself (creditors may initiate the process, but this is uncommon).

2.3 Where must the application be brought?

Applications for relief under the CCAA may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the debtor company in Canada is situated, or, if the debtor company has no place of business in Canada, in any province in which any assets of the company are located.

2.4 What must be included in the initial application?

All CCAA applications must include:

- Weekly cash-flow projections for the weeks to which the initial stay of proceedings will apply
- A report containing certain representations of the debtor regarding the preparation of cash-flow projections
- Copies of all financial statements of the debtor, audited or unaudited, prepared during the year before the application.

2.5 What relief can the court provide?

The initial order granted by the court usually provides for the following key elements:

(a) Stay of Proceedings. Initial orders grant a comprehensive stay of proceedings that will apply to both secured and unsecured creditors, and a stay against terminating contracts with the debtor. The purpose of the stay is to prevent precipitous creditor action and prohibit any single creditor or group of creditors from achieving an unfair advantage over other creditors. The stay is designed to maintain the status quo and allow the debtor company sufficient breathing room to seek a solution to its financial difficulties. Stays may also be extended to directors of the debtor in order to encourage those individuals to remain in office and advance the restructuring process.

The stay is subject to certain prescribed limits. For example, (i) the stay cannot restrict the exercise of remedies under eligible financial contracts such as futures contracts, derivatives and hedging contracts; (ii) the stay cannot prevent public regulatory bodies from taking action against the debtor, although monetary fines and administrative orders framed in regulatory terms, but which are determined by a court to be monetary claims in substance can be stayed; (iii) there are restrictions on the length of stays for “aircraft objects” – airframes, aircraft engines and helicopters; (iv) no order granting a stay of proceedings can have the effect of prohibiting a person from requiring immediate payment for goods and services, or the use of leased property – pursuant to a true lease as opposed to financing lease – or licensed property; (v) nothing in the stay can have the effect of requiring the further advance of money or credit; and (vi) as noted above, partnerships do not qualify to apply under the CCAA, although there is case law that provides that the stay may be extended to partnerships, where the corporate partners themselves have filed for CCAA protection and the protection is required to facilitate the restructuring.

Unlike Chapter 11, the stay of proceedings is not automatic; however, the court will typically exercise its discretion to issue an initial stay for up to a maximum of 30 days. An application to the court is required for any extensions. Before an extension can be granted, the court must conclude that circumstances exist that make the extension appropriate and that the debtor is acting with due diligence and in good faith. Other than the initial 30-day stay, there is no statutory limit on the duration or length of extensions.

With respect to aircraft objects, Canada has implemented the Convention on International Interests in Mobile Equipment (known as the Cape Town Convention) and the associated Protocol to the Convention on Matters Specific to Aircraft Equipment (the Protocol). Canada adopted “Alternative A” of the Protocol, which is an enhanced version of section 1110 of the U.S. Code. Alternative A contains a 60-day stay limitation for aircraft objects during which period the debtor must cure all defaults and agree to perform all current and future contractual obligations or the aircraft objects must be returned to the secured creditor. Alternative A also requires the aircraft operator to maintain the aircraft objects pursuant to its contract and preserve the value of the aircraft objects as a condition of the continuing stay.

(b) The Monitor. As part of the initial order, the court appoints a monitor. The monitor’s basic duties are set out in the CCAA, but can be expanded by court order. Generally, the monitor plays both a supervisory and an advisory role in the proceeding. In its supervisory role, the monitor oversees the steps taken by the company while in CCAA proceedings, on behalf of all creditors, as an officer of the court. Further, the monitor will file periodic reports with the court and creditors, including reports setting out the views of the monitor as required by the CCAA in connection with any proposed disposition of assets or in connection with any proposed DIP financing (discussed below in section 2.5(c)).

Generally, the debtor's management will remain in control of the company throughout the proceedings, however, in its advisory role, the monitor will assist management in dealing with the restructuring and other issues that arise. In certain cases, such as where the board of directors has resigned or creditors have otherwise lost confidence in management, the monitor's powers can be expanded. By court order, the monitor can be authorized to sell assets, subject to court approval, and direct certain corporate functions. Monitors assuming this role are colloquially referred to as "super monitors". Initial orders may also approve the retention of a Chief Restructuring Officer with an extensive mandate to manage the debtor company, or a more limited mandate to assist management.

There are no statutorily mandated unsecured creditor committees in Canada although such committees have sometimes been formed on an ad hoc basis. There is no equivalent in Canada to the U.S. Trustee, which provides government oversight in Chapter 11 cases. However, the monitor fulfils certain of the functions that the U.S. Trustee and unsecured creditor committees would fulfil in Chapter 11 cases. The Superintendent of Bankruptcy has some general oversight powers as well.

(c) DIP Financing and DIP Charge. DIP financing refers to the interim financing required by the debtor company to fund its working capital needs, while under CCAA protection. In many cases, the court will authorize DIP financing to the debtor and grant super-priority charges over the assets of the debtor in favour of the DIP lender, if the court is of the view that additional financing is critical to the continued operations of the business during the restructuring. This may be done in the initial order at the time of the first application or subsequently, often by way of amendment and restatement of the initial order. Notice must be given to all pre-filing secured creditors that are likely to be affected by the priority of the DIP charge.

In determining whether to approve DIP financing, the CCAA requires courts to take into account, among other things:

- The expected duration of proceedings
- How the debtor's business and financial affairs are to be managed during the proceedings
- Whether the debtor's management has the confidence of major creditors
- Whether the DIP loan would enhance prospects of a viable plan
- The nature and value of the debtor's property
- Whether any creditor would be "materially prejudiced" as a result of the DIP charge
- The monitor's report on the cash-flow forecast.

The CCAA expressly prohibits the securing of pre-filing obligations with the DIP charge.

At the DIP approval hearing, the debtor company will submit a DIP term sheet or credit agreement for approval, together with cash flows and the monitor's report on those cash flows. The monitor will also typically advise the court of its view as to the appropriateness of the DIP, both amount and terms.

Canada has not adopted the U.S. concept of "adequate protection", which is intended to protect existing lien holders who have become subject to super-priority charges, although Canadian courts may order protective relief to address prejudice to other creditors. Canadian courts also do not need to grant "replacement liens." A pre-filing secured creditor's security, if granted over after-acquired property (as is typically the case), continues to apply and automatically extends to post-filing assets acquired by the debtor, such as inventory and receivables, since, as noted above, a CCAA filing does not create a separate legal estate.

(d) Other Priority Charges Granted in the Initial Order. Initial orders also routinely authorize priority charges, such as an administration charge to secure payment of the fees and disbursements of the monitor and the monitor's and debtor's legal counsel, and a directors' and officers' charge to secure the debtor's indemnity to the directors and officers against post-filing claims. The charge in favour of directors and officers is only available to the extent that these individuals do not have (or if the debtor cannot obtain) adequate insurance at a reasonable cost to cover such liabilities. Along with the DIP charge, these priority charges will typically rank ahead of claims of pre-filing secured creditors, provided that notice is given to any such secured creditors likely to be affected by the priority charges.

(e) Treatment of Contracts. The CCAA permits the disclaimer or resiliation (the equivalent of disclaimer under civil law in Quebec) of agreements. The debtor is not required to elect to accept or reject certain "executory contracts" (other than aircraft leases) or real property leases, as is the case under Chapter 11. Further, a standard initial order provides, among other things, that no counterparty to a contract may terminate the contract, alter, fail to renew or cease to perform its obligations under the contract.

Generally, the debtor will fulfil its post-filing payment obligations under all agreements unless the debtor disclaims the agreement in accordance with the process now set out in the CCAA. If the debtor fails to perform other covenants, which failure to perform would be a basis for the counterparty to terminate the agreement absent the stay, the counterparty may seek to lift the stay in order to exercise its termination rights. Any steps by counterparties to assert damage claims in respect of agreements that are disclaimed by the debtor are stayed by the initial order. As with rejected contracts under Chapter 11, counterparties to disclaimed agreements can assert a claim for damages on an unsecured basis and will be entitled to share in any distribution on a pro rata basis along with other unsecured creditors.

The monitor's or the court's approval is required to disclaim a contract. All disclaimers approved by the monitor are subject to review by the court if the counterparty objects. In deciding whether to approve a disclaimer, the court will take into account whether the disclaimer of the contract would enhance the prospects of a viable plan and whether it would likely cause the debtor's counterparty significant financial hardship. The CCAA provides protections for licensees of intellectual property, analogous to section 365(n) of the U.S. Code. The CCAA also provides a process for the assignment of contracts, with court approval, despite contractual restrictions on assignment. As part of any such forced assignment, pre-filing monetary defaults must be cured.

(f) Post-filing Supply of Goods. The initial order typically stays a party to any contract or agreement for the supply of goods or services from terminating the agreement. The initial order and the terms of the CCAA protect these suppliers by providing that no party is required to continue to supply goods or services on credit, or to otherwise advance money or credit to a debtor – that is, although a supplier cannot terminate its agreement as a result of the CCAA stay of proceedings, the supplier is not required to honour its obligations to supply post-filing unless it is paid for those post-filing obligations.

Unlike Chapter 11, which provides for an "administrative priority claim" for post-petition suppliers, if the supplier to a CCAA debtor elects to provide goods or services on credit and does not have the benefit of a critical supplier's charge (discussed below), that supplier is afforded no specific priority under the CCAA for its post-filing supply. Accordingly, it is important for post-filing suppliers to ensure that they receive cash on delivery (COD) payments or are otherwise fully protected by a court-ordered charge or some other form of security such as a deposit for payments or a letter of credit issued by a third party.

(g) Plans of Arrangement or Compromise. Initial orders in CCAA proceedings typically authorize the debtor to file a plan of arrangement or compromise with its creditors. CCAA plans are discussed below in section 2.7.

2.6 Can critical vendors be paid their pre-filing claims?

Where a vendor provides goods or services that are considered critical to the ongoing operation of the debtor, the court may declare the vendor a "critical supplier" and order the vendor to continue to provide goods or services on terms set by the court that are consistent with the existing supply relationship, or that are otherwise considered appropriate by the court. As part of the order, the court is required to grant a charge over all or any part of the debtor's property to secure the value of the goods or services supplied under the terms of the order, which charge can be given priority over any secured creditor of the debtor. Any creditors likely to be prejudiced by the court-ordered charge must be given notice of the application to declare a vendor a critical supplier.

Despite these provisions in the CCAA, a decision in Ontario authorized pre-filing payments to critical suppliers when continued supply could not be guaranteed without such authorized payments.

2.7 What is a plan of arrangement?

Essentially, the plan of arrangement or compromise is a proposal made to the debtor's creditors that is designed to provide creditors with greater value than they would receive in a bankruptcy. The plan is designed to allow the debtor to compromise its obligations and continue to carry on business, although the nature and/or scope of the business might be altered dramatically. Plans can, among other things: provide for a conversion of debt into equity of the restructured debtor – which may require a concurrent plan of arrangement under the applicable federal or provincial business corporations statute (depending on the jurisdiction of the debtor's incorporation) – or a newly created corporate entity designed to be a successor to the debtor's business; the creation of a pool of funds to be distributed to the creditors of the debtor; a proposed payment scheme whereby some or all the outstanding debt will be paid over an extended period; or some combination of the foregoing.

Plans may offer different distributions to different classes of creditors (discussed below in section 2.7.4). However, the plan must treat all members within a class equally.

2.7.1 Who may file a plan?

Plans may be filed by the debtor, any creditor, a trustee in bankruptcy or liquidator of the debtor. As a matter of practice, plans are almost always filed by a debtor, or filed by a creditor with the debtor's consent. The CCAA does not provide for an "exclusivity" period in which only the debtor may file a plan, as is the case under the U.S. Code.

2.7.2 Whose claims may be compromised?

The claims of both secured and unsecured creditors may be compromised in a plan. The CCAA requires Crown – the federal or applicable provincial government – approval of any plan that does not provide for the payment, within six months, of all amounts owed to the Crown in respect of employee source deductions. Plans must provide for the payment of certain pension and wage claims, discussed in more detail below in section 4.3.

The CCAA also provides that plans can compromise claims against directors, subject to certain limitations. For example, claims that relate to contractual rights of one or more creditors and claims based on allegations of misrepresentations made by directors to creditors or wrongful or oppressive conduct by directors are not subject to compromise.

Courts have also held that CCAA plans can provide for releases in favour of third parties, other than the CCAA debtor itself and its directors and officers, where, among other things, such third-party releases are necessary and essential to the restructuring of the debtor, the claims to be released are rationally related to the purpose of the plan, the plan could not succeed without the releases and the parties that are the beneficiaries of the releases contribute in a tangible and realistic way to the plan. However, there has been judicial caution expressed that third-party releases are the exception, not the rule, and should not be granted as a matter of course. Also, in a number of cases, plans have been sanctioned containing releases from a broad category of claims, with limited exceptions for claims arising from fraud and wilful misconduct. Releases often purport to bind the applicable creditor as well as its officers, directors, shareholders, affiliates and other parties that may not have received notice of the proceedings. Courts have also expressed some reservation as to the scope of the releases in a plan.

2.7.3 How do creditors prove their claims?

There is no mandatory time-frame in the CCAA in which affected creditors must prove their claims. If it is anticipated that a distribution will be made to unsecured creditors in a plan or following a sale of assets, the debtor will typically seek a claims procedure order which establishes a process to determine creditor claims and a "claims bar date", after which claims will be barred and extinguished forever. The claims procedure order also establishes a process to resolve disputed claims, typically including the appointment of a claims officer, to address any disputes in an arbitration-style summary process. The monitor typically administers the claims process.

While the U.S. Code provides that interest that is unmatured as of the filing does not form part of either a secured or unsecured claim, under the CCAA, post-filing interest accrues on secured claims and may, in some circumstances, accrue and form part of unsecured claims.

2.7.4 How does the plan get approved by creditors?

Creditors are separated into different classes based on the principle of "commonality of interest", which is analogous to the requirement in the U.S. Code that claims in a particular class be “substantially similar”. Although unsecured creditors will typically be placed in a single class, certain unsecured creditors, such as landlords, may be classified in a separate class based on a different set of legal rights and entitlements to other unsecured creditors. The plan must be passed by a special resolution, supported by a double majority in each class of creditors: 50% plus one of the total number of creditors voting in the class and 66-2/3% of the total value of claims voting in each class. Note that, unlike under Chapter 11, there is no concept of “cram-down” in Canada. Cram-down allows for the passing of a plan of arrangement in certain circumstances, even though the plan has been rejected by a subordinate class of creditors. In Canada, each class of creditors to which the plan is proposed must approve the plan by the requisite majorities.

2.7.5 What if the plan is not approved by creditors?

If the plan is not approved by the creditors, the debtor does not automatically become bankrupt (i.e., have a trustee in bankruptcy appointed over its assets). It is possible for the debtor or any party in interest to submit a new or amended plan. In the event the plan is not accepted, however, it is likely that the debtor’s significant secured or unsecured creditors will move to lift the stay to exercise the remedies against the debtor that are otherwise available to them, which may include seeking to file a bankruptcy application against the debtor or appointing a receiver.

2.7.6 How does the plan get approved by the court?

Once the plan is approved by the creditors, it must then be submitted to the court for approval. This proceeding is known as the sanction or the fairness hearing, and is the equivalent of the confirmation hearing under Chapter 11. The court is not required to sanction a plan even if it has been approved by the creditors. However, creditor approval will be a significant factor in determining whether the plan is “fair and reasonable”, and thus deserving of the court’s approval.

2.7.7 Who is bound by the plan and how is it implemented?

Once the court sanctions the plan, it is binding on all creditors whose claims are compromised by the plan. Although all necessary court approvals might have been obtained, the plan may not become effective until a number of subsequent conditions are met, such as the negotiation of definitive documentation, the completion of exit financing, the obtaining of regulatory approvals or the expiry of appeal periods. Once all conditions are satisfied, the plan can be implemented. The day on which the plan is implemented is commonly referred to as the “implementation date” and is evidenced by a certificate filed with the court by the monitor, confirming that all conditions to the implementation of the plan have been satisfied. At this point, the debtor officially emerges from the restructuring.

2.8 Can the debtor void certain pre-filing transactions?

The CCAA contains provisions for the review of certain pre-filing transactions, including preferences and “transfers at undervalue” (as discussed below in section 4.1.6), by incorporating by reference the avoidance concepts from the BIA that were previously only available in bankruptcies (i.e., in Chapter 7-type proceedings) into the CCAA. The monitor in CCAA proceedings (but not the debtor) is empowered to challenge preferential payments or dispositions of property made by the debtor for consideration that was “conspicuously less than fair market value”, unless a plan of arrangement provides otherwise.

3. Reorganizations Under the BIA

3.1 What is the difference between CCAA reorganizations and BIA reorganizations?

Insolvent debtors may also seek to restructure their affairs under the BIA's proposal provisions. There a number of similarities between the BIA's proposal provisions and the CCAA. The key elements of a proposal can be substantially the same as the key elements of a CCAA plan as both proposals and plans provide for the compromise and arrangement of claims against the debtor. The same basic restrictions and limitations that apply to CCAA plans, also apply to BIA proposals. DIP financing, DIP charges, the assignment of contracts, the disclaimer of contracts, the granting of other priority charges (including critical supplier charges) and the ability to sell assets, free and clear of liens and encumbrances, are all available in BIA proposal proceedings.

The essential difference between a restructuring under the CCAA and one conducted under the BIA is that a BIA proposal process has more procedural steps set out with strict time-frames, rules and guidelines. A CCAA proceeding is, relative to BIA proposal proceedings, more discretionary and judicially driven. The CCAA remains the statute of choice for restructurings of any complexity for debtors that exceed the minimum C$5-million debt threshold. Debtor companies and other key stakeholders that may support the restructuring process typically prefer the flexibility afforded by the CCAA over the more rigid regime of the BIA. In addition, a BIA proposal must be made to unsecured creditors whereas the CCAA can be used to compromise secured creditor claims, while leaving unsecured claims unaffected.

3.2 Who may make a proposal?

An insolvent person, a bankrupt, a receiver (in relation to an insolvent person), a liquidator of an insolvent person's property or a trustee of the estate of a bankrupt may make a proposal. An insolvent person is a person who is not a bankrupt and who is insolvent on a cash-flow or balance-sheet basis. Persons include corporations, partnerships and other legal entities.

3.3 Where can a proposal be filed?

The proposal is filed with a licensed trustee and, in the case of a bankrupt, with the trustee of the estate and copies of the relevant documents must be filed with the official receiver in the locality of the debtor. Locality of the debtor means the principal place (a) where the debtor has carried on business during the year immediately preceding the initial bankruptcy event; (b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event; or (c) in cases not coming within sections (a) or (b) above, where the greater portion of the property of the debtor is situated. The "initial bankruptcy event" is the earliest of the filing of the following: an assignment, a proposal, a notice of intention to file a proposal, a CCAA filing or the first application for a bankruptcy order against a person.

3.4 How are proposal proceedings commenced?

The proposal proceedings may be commenced by filing a proposal or a notice of intention to make a proposal (NOI) with the local office of the Official Receiver. Most debtors commence the proposal process with an NOI, which provides for an automatic stay of proceedings for an initial 30-day period (subject to extensions for additional periods of up to 45 days each, for an aggregate total of up to six months, upon a court determining that the debtor is acting in good faith and with due diligence). Once the proposal is filed, the stay continues until the meeting of creditors to vote on the proposal.

The stay applies to both unsecured and secured creditors (unless the secured creditor has delivered a notice under section 244 of the BIA of its intention to enforce security and the notice period provided for thereunder has expired).

The purpose of the NOI is to allow the debtor a period of stability to negotiate a proposal with its creditors, with the assistance of a proposal trustee which is appointed at the time the NOI is filed. The NOI must also contain a list of creditors with claims of C$250 or more. Once the NOI is filed, the trustee must send a copy of the NOI to every known creditor within five days. Within 10 days, the debtor must prepare a projected cash-flow statement.

3.5 What is the scope of the stay under an NOI?

The stay of proceedings under an NOI stays creditor action against the debtor and provides that no person may terminate an agreement because of the insolvency of the debtor or the filing of the NOI. Landlords cannot terminate leases because of rental arrears. Creditors can apply to lift the stay on demonstration of “material prejudice” or can oppose an extension of the stay if they can demonstrate, among other things, the debtor is not acting in good faith or with due diligence. The stay is also subject to substantially the same limitations as those discussed above in connection with a stay under the CCAA.

3.6 What if the stay extension is not granted?

If a stay extension is not granted, the debtor is deemed to have made an automatic assignment in bankruptcy.

3.7 What is the role of the proposal trustee?

The proposal trustee, selected by the debtor, has a number of statutory duties. These duties include giving notice of the filing of the NOI to all known creditors, filing a projected cash-flow statement accompanied by a report from the trustee on its reasonableness, and calling a meeting of creditors. At the creditors’ meeting, the trustee is required to report on the financial situation of the debtor and the cause of its financial difficulties. The trustee must also make the final application to the bankruptcy court for approval of the proposal if it is accepted by creditors.

In addition to its statutory obligations, the trustee plays both a supervisory and advisory role and will assist the debtor in the development of the proposal and its negotiations with creditors and other key stakeholders.

3.8 How do creditors prove their claims?

Pursuant to the terms of the BIA, all creditors must complete a statutory proof of claim form in order to prove their claim. Although there is no predetermined bar date, a creditor is not entitled to vote at a meeting of creditors to approve the proposal, or participate in distributions provided for under the proposal, if they have not submitted a proof of claim by the meeting time or prior to distributions.

3.9 How does the proposal get approved by creditors?

Proposals are voted on at a meeting or meetings of the creditors called for that purpose. The meeting to consider the proposal must be called by the proposal trustee within 21 days of the filing of the proposal and at least 10 days' notice must be given to each of the creditors.

Like a CCAA plan, in order to be binding on creditors, a proposal must be approved by a double majority of creditors (50% plus one in number of creditors, representing 66-2/3% in value of voting claims), in each class of creditors voting on a proposal; however, if the proposal is made to a class of secured creditors and rejected by that class, the proposal may still become effective provided that it is passed by the class or classes of unsecured creditors voting on the proposal. The proposal will not be binding on the dissenting class of secured creditors. These secured creditors would be entitled to enforce their security, if otherwise entitled to do so.

3.10 What if the proposal is not approved by unsecured creditors?

If the proposal is rejected by a class of unsecured creditors voting on the proposal, the debtor is deemed to have made an assignment in bankruptcy on the earliest of: (i) the date the debtor filed the NOI; (ii) the date of the earliest outstanding application for a bankruptcy order; and (iii) the date the debtor filed its proposal.

3.11 How does the proposal get approved by the court?

In addition to creditor approval, the proposal must be approved by the court. Within five days of the acceptance of the proposal by the debtor's creditors, the proposal trustee must apply for a court hearing to have the proposal approved. The proposal trustee must give 15 days' notice to the debtor, the Official Receiver and each creditor who has proven its claim against the debtor. The trustee must file a report regarding the terms of the proposal and the conduct of the debtor at least two days before the date of the hearing.

3.12 What if the proposal is not approved by the court?

If the proposal is not approved by the court, the debtor will be deemed to have made an assignment in bankruptcy on the earliest of: (i) the date the NOI was filed; (ii) the date the earliest application for a bankruptcy order was issued; and (iii) the date the debtor filed its proposal.

3.13 Who is bound by the proposal and how is it implemented?

If the proposal is approved, it is binding on all unsecured creditors and on the classes of secured creditors included in the proposal that voted in favour of the proposal by the requisite majorities. A proposal may be implemented in substantially the same manner in which a CCAA plan is implemented.

3.14 What if a debtor defaults under the proposal?

If a debtor defaults under the terms of its proposal, and such default is not waived by inspectors (creditor representatives that may be appointed by creditors in certain cases) or the creditors themselves (if there are no inspectors), the proposal trustee must inform the creditors and the Official Receiver. In these circumstances, a motion may be brought to the court to annul the proposal. If such order is granted, the debtor is automatically bankrupt.

4. Liquidations

The two most common ways to liquidate an insolvent company in Canada are either through a bankruptcy proceeding under the BIA, or by way of an appointment of a receiver. In recent years, the CCAA has also been used as a process for the self-liquidation of a debtor, without a plan being filed and, in most cases, with the support and co-operation of the debtor's main secured creditor(s).

4.1 Bankruptcy

4.1.1 How is a bankruptcy proceeding commenced?

The legal process of bankruptcy (generally analogous in effect to Chapter 7 of the U.S. Code) can be commenced in one of three ways:

1. Involuntarily, by one (or more) of the debtor's unsecured creditors filing a bankruptcy application against the debtor in the court having jurisdiction in the judicial district of the locality of the debtor (as defined in section 3.3). To bring a bankruptcy application, a creditor must have in excess of C$1,000 of unsecured debt and allege that the debtor committed an "act of bankruptcy" within six months of the date of the filing of the application. The acts of bankruptcy are enumerated in the BIA, with the most commonly alleged act being that the debtor has ceased to meet its obligations generally as they become due – it is not sufficient that the creditor allege that the debtor has failed to pay the obligations owing to such creditor, only. The debtor has the right to object to the application, in which case, a determination will be made by the court as to whether the bankruptcy order should be issued.

2. Voluntarily, by the debtor making an assignment in bankruptcy for the general benefit of its creditors to the Official Receiver in the locality of the debtor. To make a voluntary assignment, the debtor must be an "insolvent person" (i.e., insolvent on a cash-flow or balance-sheet basis). Companies, partnerships and income trusts are "persons" that may make an assignment if insolvent. To make an assignment a person must reside, carry on business or have property in Canada and have at least C$1,000 of debt.

3. On the failure of a BIA proposal process by the debtor to its creditors, including as a result of the rejection of the proposal by a class of unsecured creditors or by the court, or default under the proposal. This is discussed above in sections 3.6, 3.10, 3.12 and 3.14.

4.1.2 What is the effect of the commencement of the bankruptcy proceeding?

When a corporate debtor becomes bankrupt, the debtor ceases to have legal capacity to dispose of its assets or otherwise deal with its property, which vests in a trustee in bankruptcy (other than property held in trust). Such appointment is expressly subject to the rights of secured creditors. Trustees in bankruptcy are licensed insolvency professionals who, in almost all cases, are chartered accountants (unlike the U.S. where trustees are typically lawyers). They are not government officials but they are licensed and regulated by the Office of the Superintendent of Bankruptcy. In a voluntary proceeding, the debtor itself selects the trustee, however, the selection is subject to confirmation by unsecured creditors at the first meeting of creditors. In an involuntary proceeding, the applying creditor selects the trustee, also subject to confirmation at the first creditors' meeting. Unsecured creditors are to be provided with notice of the first meeting of creditors promptly after the trustee's appointment.

4.1.3 What are the trustee's duties?

A trustee is an officer of the court and, accordingly, must represent the interests of unsecured creditors impartially. It is the trustee's duty to collect the debtor's property, realize upon it and distribute the proceeds of realization according to a priority scheme set out in the BIA (discussed below in section 4.3). The trustee is required to give notice of the bankruptcy to all known creditors of the bankrupt. The trustee must also convene a first meeting of the creditors of the bankrupt within 21 days of its appointment, unless extended for a limited period by the Official Receiver or extended or waived by the court.

At the first meeting of creditors, creditors with proven claims must confirm the trustee's appointment. Proven creditors may also elect "inspectors" from their ranks who will then act in a supervisory role and instruct the trustee. There are certain actions that a trustee cannot engage in without inspector approval, such as carrying on the business of the bankrupt or the sale or other disposition of any property of the bankrupt. A trustee must obtain court approval if it wishes to undertake these actions prior to or in the absence of the appointment of inspectors. At the first meeting, the creditors can vote to dispense with inspectors. If there are no inspectors appointed at the first meeting of creditors, the trustee can exercise all of its power on its own accord, except dispose of assets to a party related to the bankrupt. This action can only be taken with court approval.

4.1.4 How does a creditor prove its claim?

Upon the commencement of bankruptcy proceedings, unsecured creditors are stayed from exercising any remedy against the bankrupt or the bankrupt's property and may not commence or continue any action or proceeding for the recovery of a claim (unless the creditor is granted special permission by the court). Generally, secured creditors are not subject to this stay of proceedings (discussed below in section 4.1.5).

A creditor can assert its claim against the debtor by completing a statutorily prescribed proof of claim and submitting it to the trustee in bankruptcy. A proof of claim form is attached to the notice of bankruptcy sent by the trustee to all known creditors. The creditor must submit the completed form before the first meeting of creditors if it wishes to vote on the motion to affirm the appointment of the trustee or vote for and/or act as an inspector in the bankruptcy. Otherwise, the creditor need only submit its proof of claim before the distribution of proceeds by the trustee (known creditors will be provided notice before distribution) unless otherwise ordered by the court.

A trustee can disallow the quantum of the amount set out in a proof of claim or the entire claim itself. Disputed claims may be resolved through a judicial process if the parties are not able to reach an agreement.

4.1.5 How does bankruptcy affect the rights of secured creditors?

The rights of a trustee in bankruptcy are expressly subject to the rights of secured creditors. Generally, a bankruptcy does not affect the rights of secured creditors except to the extent necessary to allow the trustee to realize on any value in the collateral subject to the security, above and beyond what is owed to the secured creditor. The BIA provides the trustee with a number of tools in this regard. The trustee can: require the secured creditor to prove its security; cause the secured creditor to value its security; inspect the collateral subject to the security – generally for the purpose of valuing it; and, redeem the collateral subject to the security by paying the secured creditor the amount of the assessed value of the security. On redemption, the collateral subject to the security becomes an asset of the bankruptcy estate. In addition, the court may make an order staying a secured creditor from realizing on its security, but the maximum period of such stay is six months. Such stay orders are not commonly granted. They may, however, be made in situations where the trustee requires some time to value the collateral and determine if it should exercise its right of redemption.

To the extent that the amount of a secured creditor's debt exceeds the value of the collateral subject to its security, a secured creditor may participate in the bankruptcy process and file a proof of claim in respect of the unsecured deficiency portion of its claim.

4.1.6 Can the trustee void certain pre-bankruptcy transactions?

The BIA establishes two types of pre-bankruptcy transactions that are subject to challenge: "transfers at undervalue" and preferences. A "transfer at undervalue" is a disposition of property or provision of services by the bankrupt for which no consideration was received by the bankrupt or for which the consideration received by the bankrupt was conspicuously less than the fair market value of the consideration given by the debtor. If the parties are dealing at arm's length, the trustee must establish that the transfer at undervalue took place within one year of the initial bankruptcy event, when the bankrupt was insolvent and where the bankrupt intended to defraud, defeat or delay a creditor. When the transferee and the bankrupt are not at arm's length, the relevant period of review is five years prior to the initial bankruptcy event (as defined in section 3.3).

If a court determines that a transaction was a transfer at undervalue, the transaction may be voided or the trustee may seek judgment for the difference between the value of consideration received by the bankrupt (if any) and the value of consideration given by the bankrupt.

A preference is a payment made to a pre-filing creditor that meets certain criteria. Where the creditor is dealing at arm's length with the insolvent person, the trustee must establish that the applicable transaction took place within three months prior to the initial bankruptcy event and that the insolvent person had a view to giving that creditor a preference over another creditor. Where the creditor is not dealing at arm's length with the insolvent person, the trustee must establish that the applicable transaction took place within one year prior to the initial bankruptcy event and that the insolvent person had a view to giving that creditor a preference over another creditor. If the transaction had the effect of giving a preference, there is rebuttable presumption that it was made with a view to giving the creditor a preference. If a court determines that a transaction was a preference, such transaction may be voided.

In addition to the above, various analogous provincial statutes provide mechanisms for challenging transactions that favour one creditor over others and/or are made while a company is insolvent, provided that the necessary intention requirements are satisfied.

Generally, Canadian trustees are much less aggressive in attacking pre-bankruptcy transactions than their U.S. counterparts and the technical requirements to void such transactions are more onerous in Canada than they are in the U.S. Where the trustee in bankruptcy refuses or neglects to pursue a preference claim or a transfer at undervalue, a creditor may seek a court order authorizing it to bring such an action. If the relief is granted, the creditor proceeds in its own name at its own expense and risk, although notice must be provided to other creditors, who may join the contemplated proceeding. Any benefit derived from a creditor-initiated proceeding belongs exclusively to the creditor(s) who instituted the proceeding and the surplus, if any, must be returned to the bankrupt's estate.

4.1.7 What repossession rights do unpaid suppliers have?

Suppliers have a limited right to recover inventory supplied to a bankrupt debtor. Unpaid suppliers have the right to repossess goods delivered 30 days before the date of bankruptcy or receivership. Written demand must be sent within 15 days of the purchaser becoming bankrupt or subject to a receivership. The goods must be identifiable, in the same state as on delivery, still in the possession of the purchaser, trustee or receiver, and not subject to an arm's-length sale. In practice, suppliers often find it difficult to satisfy these tracing requirements.

4.2 Receiverships

4.2.1 What is a receiver?

A receiver, or receiver and manager, may be granted the authority to deal with a debtor company's assets, including authority to operate and manage the business in place of the existing management, and to shut down the business if the receiver concludes the continued operations will likely erode the recoveries for creditors or there is insufficient funding to continue operations. The receiver does not become the owner of the debtor company's assets; however, the receiver may have the right (but not the obligation) in the instrument appointing it to take possession and custody of the assets and to sell them.

4.2.2 How is a receiver appointed?

A receiver may be appointed (i) privately by a secured creditor pursuant to the terms of a security agreement or (ii) by court order.

(a) Privately Appointed Receiver. A secured creditor may have the right to appoint a receiver under its security agreement. The receiver's duties are primarily to the secured creditor that appointed it. It also has a general duty to act honestly, in good faith and in a commercially reasonable manner, including the duty to attempt to maximize recoveries, and to obtain the best price for the debtor's assets in the circumstances.

    The secured creditor is mandated by section 244 of the BIA to provide a statutory 10-day notice of its intention to enforce its security and appoint a receiver, if such receiver is to be appointed over all or substantially all of the inventory, accounts receivable or other property of an insolvent debtor, to the extent acquired for, or used in the business carried on by the insolvent debtor. As a matter of practice, secured lenders typically issue a "section 244 notice" whenever enforcing security, out of an abundance of caution. A receiver appointed over all or substantially all of the assets in the categories set out in section 244 of the BIA must be a licensed trustee in bankruptcy who, as noted above, is typically an accountant. As discussed below, an interim receiver may be appointed prior to the expiry of the 10-day notice period.

(b) Court-Appointed Receiver. In the case of a court-appointed receiver, the receiver is appointed by a court order, typically on application by a secured creditor under the *Rules of Court* of the province where the debtor's business is based. Generally, the courts in the common law provinces (i.e., all provinces other than Quebec) have the authority to appoint a receiver when the court is satisfied that it is "just or convenient" to do so. Courts also have the authority to appoint receivers under the BIA, with authority across Canada (the BIA being a federal statute) as opposed to in a particular province, as is the case with receivers appointed under provincial *Rules of Court*. Court appointments usually occur in more complex cases, especially where there are disputes among creditors or between the creditor and the debtor or in cases where it appears likely from the outset that the assistance of the court will be required on an ongoing basis. The court appointment of a receiver is typically accompanied by a comprehensive stay of proceedings restraining creditor action against the debtor, the debtor's property and the receiver, and providing a more stable platform for the realization to occur (discussed below in section 4.2.4).

A receiver appointed by the court derives its powers from the court order and any specific legislation governing its powers. The receiver is an officer of the court and has duties to all creditors of the debtor. It takes directions and instructions from the court, not the creditor that first sought its appointment. In most cases, the court order appointing the receiver gives the receiver broad powers similar to those normally granted to a privately appointed receiver under a security agreement, although certain actions, such as major asset sales, usually require specific court approval. The court-appointed receiver is also typically permitted to borrow on a super-priority basis, akin to DIP financing in a CCAA case.

(c) Interim Receiver. An "interim receiver" may be appointed by the court during the 10-day window after a section 244 notice is issued, with a temporary and restricted mandate. The court may direct an interim receiver to take possession of all or part of the debtor's property, exercise such control over the property and the debtor's business as the court considers advisable, take conservatory measures, and summarily dispose of property. Interim receivers, however, are not authorized to borrow funds.

The appointment of the interim receiver expires on the earlier of: (a) the taking of possession by a receiver or a trustee in bankruptcy of the debtor's property, and (b) the expiry of 30 days following the day on which the interim receiver was appointed or any period specified by the court, or in the case where an interim receivership coincides with a proposal, upon court approval of the proposal.

4.2.3 What reporting requirements does a receiver have?

Both privately and court-appointed receivers have certain obligations mandated by their appointment. The receiver must provide notice of its appointment to all known creditors and, at various stages of administration of the receivership, prepare and distribute interim and final reports concerning the receivership. These reports are filed with the Office of the Superintendent of Bankruptcy and may be made available to all creditors. A court-appointed receiver must also report to the court, at such times and intervals as may be required, while carrying out its mandate.

4.2.4 How do creditors assert their claims in a receivership?

Where a receiver is court-appointed, the court will typically issue a stay of proceedings restricting creditors from exercising any rights or remedies without first obtaining permission from the court. This stay is generally analogous to the comprehensive stay of proceedings found in CCAA proceedings and it is much broader than the statutory stay of proceedings when a company becomes bankrupt.

Typically, once a receiver has realized on the assets of the debtor, it will seek to distribute proceeds to creditors in accordance with their entitlements and priority, following court approval. If the only recovery is to secured creditors, there may be no need for a claims process. If there are any surplus funds after satisfying all secured claims, the receiver may run a court-sanctioned claims process or seek the court's approval to assign the debtor into bankruptcy and have unsecured claims dealt with through bankruptcy proceedings (described in section 4.1 above).

4.3 Priorities in liquidation

4.3.1 What are the super-priority claims?

Secured creditors rank in priority to unsecured creditors in a liquidation; however, there are certain statutorily prescribed super-priority claims that will rank ahead of secured creditors.

The BIA provides a priority for certain workers (the priority does not apply to officers or directors of the debtor company), up to a maximum of C$2,000 per employee, for unpaid wages (including vacation pay but not including severance and termination pay) earned up to six months before the appointment of a receiver or initial bankruptcy event (as defined in section 3.3). The priority is secured by a charge over the debtor company's current assets, which are essentially inventory and receivables. To the extent that a receiver or trustee pays the worker's claim, the secured claim is reduced accordingly.

The *Wage Earner Protection Program Act* establishes a program run by the federal government through which employees entitled to claim a priority for unpaid wages are compensated directly by the government, to a maximum of the greater of C$3,000 in actual unpaid wages or an amount equal to four times the maximum weekly insurable earnings under the *Employment Insurance Act* (which currently equals approximately C$3,700). The government is subrogated to the rights of the unpaid employee for amounts paid under this program, and receives a priority claim against the current assets of the debtor company in the amount of the compensation actually paid out, to a maximum amount of C$2,000 per employee. Any balance over such C$2,000 priority claim does not have priority over secured creditors.

The BIA also provides a priority for amounts deducted and not remitted and for unpaid regularly scheduled contributions (i.e., not special contributions or the underfunded liability itself) to a pension plan by creating a priority charge, equal to the amount owing, over all of the debtor company's assets.

Unpaid wages and unpaid pension contributions effectively have the same priority against proceeds realized in a CCAA sale or sale pursuant to the proposal provisions of the BIA, as any proposal or plan of arrangement must provide that such priority claims are satisfied.

Before distributions are made to unsecured creditors in an insolvency proceeding, certain other statutorily mandated priority claims, such as employee deductions (i.e., income tax withholdings, unemployment insurance premiums and Canada Pension Plan premiums) must also be paid.

In addition to those listed above, there are also a number of other federal and provincial statutory liens and deemed trusts that have priority over secured creditors outside of bankruptcy, but which are treated as ordinary unsecured claims following bankruptcy (e.g., liens for unremitted federal and provincial sales tax). CCAA liquidations and receivership proceedings are often converted into bankruptcy proceedings, in part to achieve a reversal of these priorities.

4.3.2 What is the priority scheme after the super-priorities and secured creditors are satisfied?

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

1. The costs of administration of the bankruptcy

2. A Superintendent of Bankruptcy's levy on all payments made by the trustee to creditors (which is currently 5% on the first C$1-million of distributions, and a sliding scale on amounts in excess of C$1-million)

3. Preferred claims, which include wage claims in excess of the statutory C$2,000 charge, secured creditors' claims in the amount equal to the difference between what they received and what they would have received but for the operation of the wage and pension super-priorities, and landlords' claims up to the maximum amounts prescribed by statute

4. Ordinary unsecured claims on a *pro rata* basis.

5. Going-Concern Sales

5.1 Can an insolvent business be sold as a going-concern?

Although a going-concern sale can be affected by a trustee in bankruptcy or a privately appointed receiver, a sale of an insolvent business on a going-concern basis will typically be conducted by a court-appointed receiver or through the CCAA or BIA proposal process.

5.2 What is involved in a receivership sales process?

To sell a business on a going-concern basis, a court-appointed receiver will typically request that the court approve a detailed marketing process for the assets of the company. The requirements for and timelines of the marketing process will vary depending on the nature of the business, the value of the assets, the rate at which the assets will depreciate in value through a sales process, the available operating financing and the realistic pool of potential purchasers. The court-appointed receiver will select the bidder with the best offer, taking into account value offered, conditions of closing, timing of closing, the purchaser's ability to close and any potential purchase price adjustments, among other factors.

While there is no statutory requirement for a stalking-horse process in Canada, Canadian courts routinely establish a stalking-horse process by court order and stalking-horse sales are commonplace in Canada. However, unless specifically authorized by the court, the agreement of purchase and sale with the winning bidder will not be subject to overbids as is the case in the Chapter 11 stalking-horse process.

The receiver, on notice to interested persons, will then request that the court approve the agreement of purchase and sale and vest the assets in the purchaser free and clear of all liens and encumbrances. Liens and encumbrances that exist in the purchased assets will be preserved in the proceeds of sale with the same rank and priority as they had in the purchased assets. Net sale proceeds are typically held by the receiver pending the issuance of a “distribution order” of the court authorizing the receiver to disburse the funds to creditors in accordance with their entitlements. All interested parties are required to receive notice of the motion for the distribution order and disputes between creditors as to priority and allocation of funds are usually addressed at the distribution motion, rather than at the sale approval stage.

5.3 What is involved in a CCAA sales process?

Like sales conducted pursuant to section 363 of the U.S. Code, sales by the debtor while under CCAA protection have become a preferred method of realization in many cases. Sale approval and vesting orders are available to give the purchaser the necessary comfort that it will acquire the purchased assets free and clear of any liens and encumbrances.

The CCAA sales process is similar to the receivership process, except that the debtor itself controls the process, is the vendor, and is the party requesting the court’s approval of the process and eventually the sale itself. Generally, the sales process is supported by the key stakeholders including DIP lenders, who have significant influence over the debtor’s sales process. The debtor will also require the support of its monitor if the sales process and sale are to be approved by the court. Courts also frequently approve the retainer of a financial adviser or investment bank to conduct the sales process on behalf of the debtor.

The CCAA provides factors that a court is to consider in determining whether to approve a sale outside of the debtor’s ordinary course of business. These factors include:

- Whether the sales process was reasonable in the circumstances

- Whether the monitor approved the sales process and the sale, and determined that the sale would be more beneficial to creditors than a sale through a bankruptcy proceeding

- The extent to which creditors were consulted

- The effects of the proposed sale on creditors and other affected stakeholders

- Whether the consideration to be received for the assets is fair and reasonable, taking into account their market value

- If the sale is to a related party, whether good faith efforts were made to sell the assets to unrelated parties and whether the consideration to be received is superior to any other offer that would be received under the sales process.

The proceeds of the sale may be held by the monitor. As is the case with sales by court-appointed receivers, a vesting order will provide that creditors will have the same priority against the proceeds that they had against the assets prior to the sale. Following court approval and closing, the court will authorize the distribution of the proceeds to creditors in accordance with their priorities. If there are surplus funds available for unsecured creditors following payment to secured creditors, it is common to seek leave of the court to bankrupt the debtor and have any surplus proceeds distributed by a trustee in bankruptcy in accordance with the priorities set out in the BIA, discussed in section 4.3 above. Beneficiaries of deemed trusts (or their legal representatives), whose priority would be reversed on bankruptcy, should be given notice of any proceeding to bankrupt the debtor company. The debtor company may also elect to file a plan of arrangement or compromise that provides for the distribution of proceeds of sale to unsecured creditors.

5.4 Can a secured creditor credit bid in Canada?

There is no CCAA equivalent to section 363(k) of the U.S. Code, which expressly authorizes a secured creditor to credit bid its debt. However, courts have routinely authorized credit bids in Canada. Unlike in the U.S., there is no case law in Canada addressing a collateral or administrative agent's contractual right to credit bid on behalf of a syndicate of lenders and bind dissenting lenders.

6. Cross-Border Insolvencies

Like Chapter 11, the CCAA provides for the co-ordination of cross-border insolvencies. The CCAA and BIA contain comprehensive provisions for the recognition of foreign insolvency proceedings. These provisions, incorporated into both the CCAA and BIA, are based on the UNCITRAL Model Law on Cross-Border Insolvency, similar to Chapter 15 of the U.S. Code. The majority of co-ordinated cross-border proceedings for large commercial insolvencies are conducted under the cross-border provisions of the CCAA rather than the BIA. Accordingly, the CCAA provisions are summarized below.

6.1 What is the purpose of the Model Law?

The purpose of the Model Law, as adopted in the CCAA, is to promote:

- Co-operation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies
- Greater legal certainty for trade and investment
- The fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies
- The protection and maximization of the value of a debtor company's property
- The rescue of financially troubled businesses to protect investment and preserve employment.

6.2 Who may commence a recognition proceeding?

A foreign representative may apply to a Canadian court for recognition of a foreign proceeding in respect of which he or she is a foreign representative. Prior to such appointment, a proposed foreign representative may seek an interim order which provides for a stay of proceedings to protect the assets of the debtor company for the period of time between the commencement of a foreign proceeding and the date on which a foreign representative is appointed by the foreign court, after which it may seek full recognition of the foreign proceedings.

6.3 What is a foreign representative?

A foreign representative is a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor company, to: (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or (b) act as a representative in respect of the foreign proceeding.

As a result of the second criteria, a debtor company itself can be a foreign representative, provided it has been duly authorized to act as such by the supervising court in the foreign country. Among other things, a foreign representative is required to inform the Canadian court of any substantial change in the status of the recognized foreign proceeding and any substantial change in the foreign representative's authority to act.

6.4 What is a foreign proceeding?

A foreign proceeding is a judicial or an administrative proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

6.5 What evidence needs to be before the Canadian court in a recognition proceeding?

In connection with application for recognition, there are certain basic documentary requirements: (a) a certified copy of the instrument that commenced the foreign proceeding – typically a court order; (b) a certified copy of the instrument authorizing the foreign representative to act as foreign representative – typically a court order; and (c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative. In the absence of the evidence described above, the court has discretion to accept other evidence satisfactory to it.

6.6 What discretion does the Canadian court have in recognizing the foreign proceeding?

If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and the applicant is a foreign representative in respect of that foreign proceeding, the court *shall* make an order recognizing the foreign proceeding. There is no discretion in this regard. However, the court does have discretion as to what relief is granted in connection with the recognized proceedings (discussed below in section 6.9). In addition, the order granting recognition will specify whether the proceeding is a "foreign main proceeding" or a "foreign non-main proceeding".

6.7 What is a foreign main proceeding?

A foreign proceeding will be a "main" proceeding if it is taking place in the jurisdiction that is the centre of the debtor's main interests (the COMI). There is a presumption that the debtor company's registered office is its COMI. Provided there are no insolvency proceedings already commenced in Canada with respect to the debtor company, in recognizing a foreign main proceeding, the court "shall" make an order, subject to any terms and conditions it considers appropriate, granting a stay of proceedings until otherwise ordered by the court, and restraining the debtor company from selling assets in Canada outside the ordinary course of business. Such recognition orders must be “consistent” with any order that may be made under the CCAA.

6.8 What is a foreign non-main proceeding?

A foreign non-main proceeding is defined in the negative: a foreign non-main proceeding is a foreign proceeding that is not a foreign main proceeding. If the court recognizes the foreign proceeding as a “non-main” proceeding, the stay is not automatic, but the court may, at its discretion, order a stay if it is necessary for the protection of the debtor’s property or the interests of creditors.

6.9 What obligations does the Canadian court have once recognition has been granted?

If an order recognizing a foreign proceeding is made, the court is required to co-operate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of co-operation include, among other things, the appointment of a person to act at the direction of the court – typically referred to as an “information officer” having similar reporting obligations as a monitor in a CCAA case – and the co-ordination of concurrent proceedings regarding the same debtor company.

6.10 What rules can the court apply?

Nothing in the CCAA prevents the court, on application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of the CCAA.

Also, nothing in the CCAA prevents the Canadian court from refusing to do something that would be contrary to public policy. Under Chapter 15 of the U.S. Code, the analogous provision refers to anything that is “manifestly” contrary to public policy. This suggests that the U.S. courts are directed to be even more accommodating than their Canadian counterparts, when called upon to determine what is contrary to public policy.

XVIII. Dispute Resolution

The Canadian court system is quite similar to the systems of both the United States and Great Britain. There are two parallel court systems in Canada – federal and provincial. Accordingly, in the 10 provinces and three territories of Canada, there are both federal and provincial courts. The province of Quebec is unique from the rest of the country in that it administers civil law, while the courts of the remaining provinces and territories administer the common law.

Unless a matter has been assigned by statute to the Federal Court of Canada, the Provincial Superior Courts have inherent jurisdiction to hear matters. Matters over which the Federal Court of Canada has jurisdiction include those relating to the *Income Tax Act* (Canada) and intellectual property rights. Both the Provincial Superior Courts and the Federal Courts have two levels – a trial division and an appeal court. The Supreme Court of Canada is the final court of appeal for all decisions made by either federal or provincial courts. A more detailed discussion of dispute resolution is contained in the Blakes *Litigation and Dispute Resolution Guide*.

1. Independence of the Courts

Canadian courts are completely independent from other branches of government. Accordingly, any government action is subject to review by the courts and, in particular, subject to scrutiny under the Constitution of Canada including our *Charter of Rights and Freedoms*. The *Charter of Rights and Freedoms* includes guiding principles for judicial process that include rules of fairness and equality, and protect the rights of accused persons. Canada's courts are generally open to the public unless there are compelling reasons for a closed hearing.

2. Litigating Through the Courts

For civil disputes, each of the provinces and territories has rules of procedure for the conduct of matters that come before the courts. For example, prior to trial, all parties to civil litigation are required to produce documents that are relevant to the issues in litigation. Documents are broadly defined and now include such things as emails, computer files, tape recordings or videos. In most provinces, the primary onus is on each party to produce all relevant documents. However, in Quebec, parties need only produce the documents they rely on at first instance, or are asked to produce pursuant to a specific request. Following documentary disclosure, the parties are entitled to examine one representative of an opposing party. Unlike the American system, provincial rules often do not provide for automatic rights of discovery of more than one person or of non-parties.

For example, in Ontario, if a party wishes to examine more than one representative of a corporation or witnesses in an action, it needs leave of the courts to do so.

Some provinces have special rules to manage the litigation process. These case management rules provide for greater involvement by the judiciary in the conduct of an action and make things such as timetables mandatory.

3. Costs

The Canadian court system generally uses the loser pays principle of costs following litigation. (In some provinces, this principle is not applied to all aspects of class actions.) Many provinces have a system similar to Ontario whereby there are two scales of costs that can be awarded. The most common scale of costs is called partial indemnity in Ontario, which means the successful party will receive approximately 25-35% of its legal costs from the unsuccessful party. Where one party's behaviour has been particularly egregious, or the plaintiff has effectively used an offer to settle, the court may award a higher scale of costs, called substantial indemnity, which are 1.5 times partial indemnity costs. While most fixed costs like disbursements are generally fully reimbursed, experts' fees are subject to a similar review as lawyers' fees and the compensable amount may be reduced. The courts ultimately have the discretion as to whether and how much to award for costs and, while rare, it is possible for the losing party to be awarded costs against the winning party depending on the circumstances, offers to settle and the successful party's behaviour during the litigation. In some cases, where the subject of the litigation has a public interest component, the parties may be ordered to bear their own costs.

Contingency fees are permitted in all provinces subject to local rules and, sometimes, court approval. In some provinces, public funding is available for class actions.

4. Class Actions

Most Canadian provinces and the Federal Court now have legislation or rules expressly permitting class proceedings. In addition, the Supreme Court of Canada has opened the door to class proceedings throughout the country, even where there is no express legislation. In a class proceeding, a person or persons who are representative of the potential class take on the role of plaintiff, representing the interests of the class. It is also possible but rare for a representative defendant to defend the action on behalf of a class of defendants. Early in the litigation, the action must be certified by the court as a class proceeding. Generally, the certification order will identify common issues to be tried together in a common issues trial, and any individual issues will be resolved thereafter by way of separate proceedings to be established by the common issues trial judge. Otherwise, the action will proceed as a regular action. Class actions are case managed by one judge in most provinces. The case management judge, however, will typically not be the trial judge if the action proceeds through to trial, with the exception of Quebec.

Plaintiff's counsel in Canada are increasingly bringing class actions in a number of areas, particularly *Competition Act* (antitrust), product liability and *Securities Act* matters, mass torts, consumer disputes and more recently, digital privacy cases. To date, very few class proceedings have proceeded through to trial and judgment. The vast majority of cases are either disposed of early through preliminary motions, or settled early in the process or following certification. Class actions have become a concern for commercial businesses in that they are time-consuming and expensive to defend and run the risk of substantial settlements or court awards.

5. Alternative Dispute Resolution

Because of the expense and time-consuming nature of litigation, alternative dispute resolution is firmly established in Canada. Alternative processes to litigation, such as mediation and arbitration, are increasingly being used to resolve both commercial and non-commercial disputes. Most often, such alternative mechanisms are voluntary. However, Ontario has introduced mandatory mediation for certain types of cases, thereby requiring parties to litigation to engage in a mediation session prior to trial, and British Columbia has a procedure whereby one party to litigation can require all parties to attend a mediation.

In the right case, alternative dispute resolution can be highly effective and much less expensive than traditional litigation. It may also help the parties to achieve a reasonable solution that will enable them to continue their business relationship.

Mediations are presided over by a neutral third party who facilitates a resolution to the dispute. Mediation is not binding and parties enter into it willingly on the understanding that if they do not reach an agreement, they can walk away and continue the litigation process. In contrast, arbitration is a more formal process and is often binding.

Many commercial agreements in Canada now provide for binding arbitration or other forms of alternative dispute resolution as an alternative to the courts for disputes arising out of the agreement. In arbitration, an arbitrator who has expertise in the area of disagreement will hear evidence and legal argument, much like a hearing in court. Arbitration can sometimes (though not always) be less formal and expensive than court proceedings, and can usually be completed more quickly and privately. Prior to entering into an arbitration or mediation, the parties will generally sign an arbitration or mediation agreement that sets out the parameters of the process.

LATHAM & WATKINS LLP

The Directors Roundtable

Wednesday, June 10, 2015

2014 Energy Capital Markets Year in Review and 2015 Capital Markets Outlook

Charles E. Carpenter
Partner, Latham & Watkins LLP

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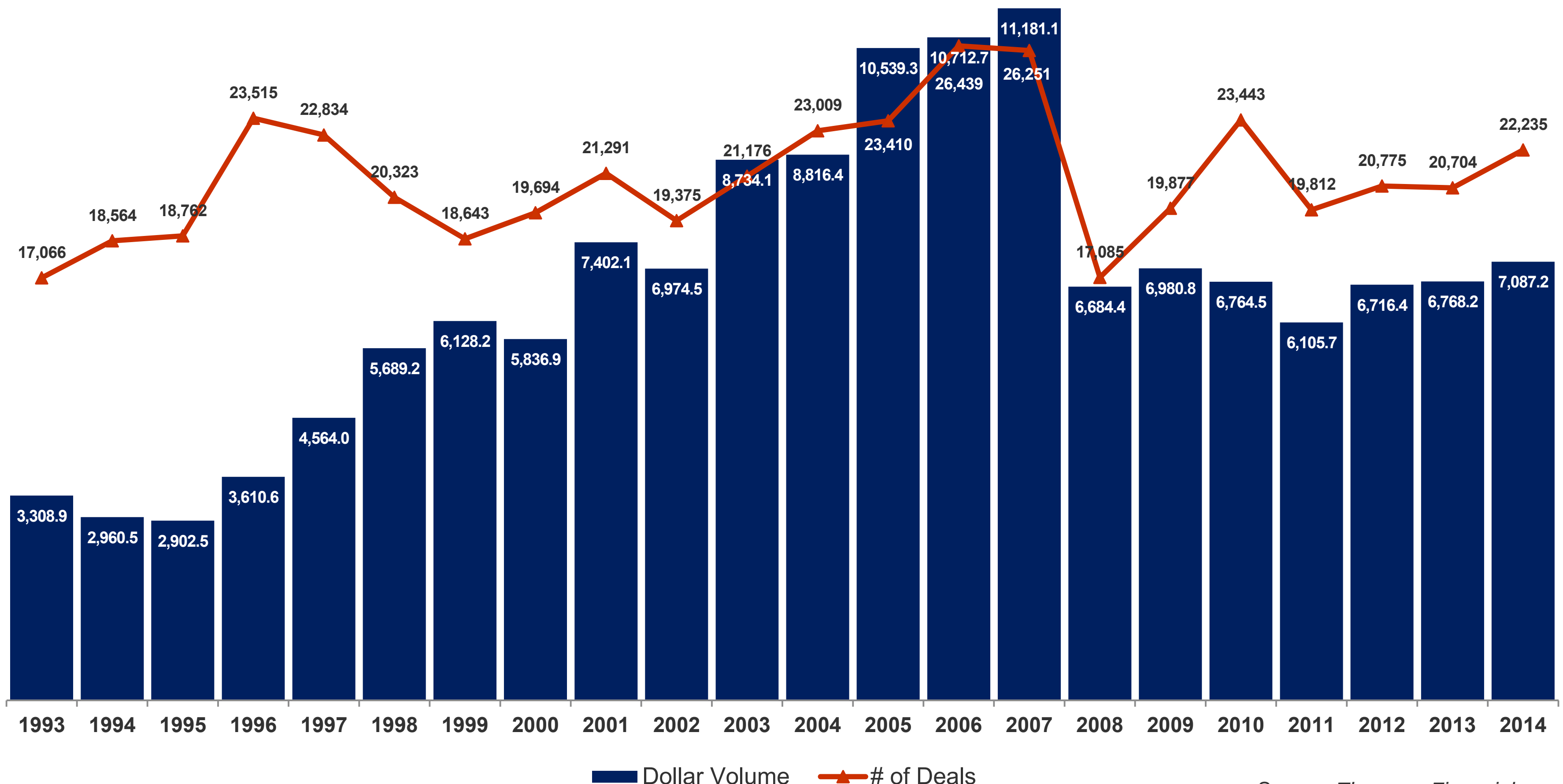
Market Conditions – Global Capital Markets

Announced global transactions

($ in billions)

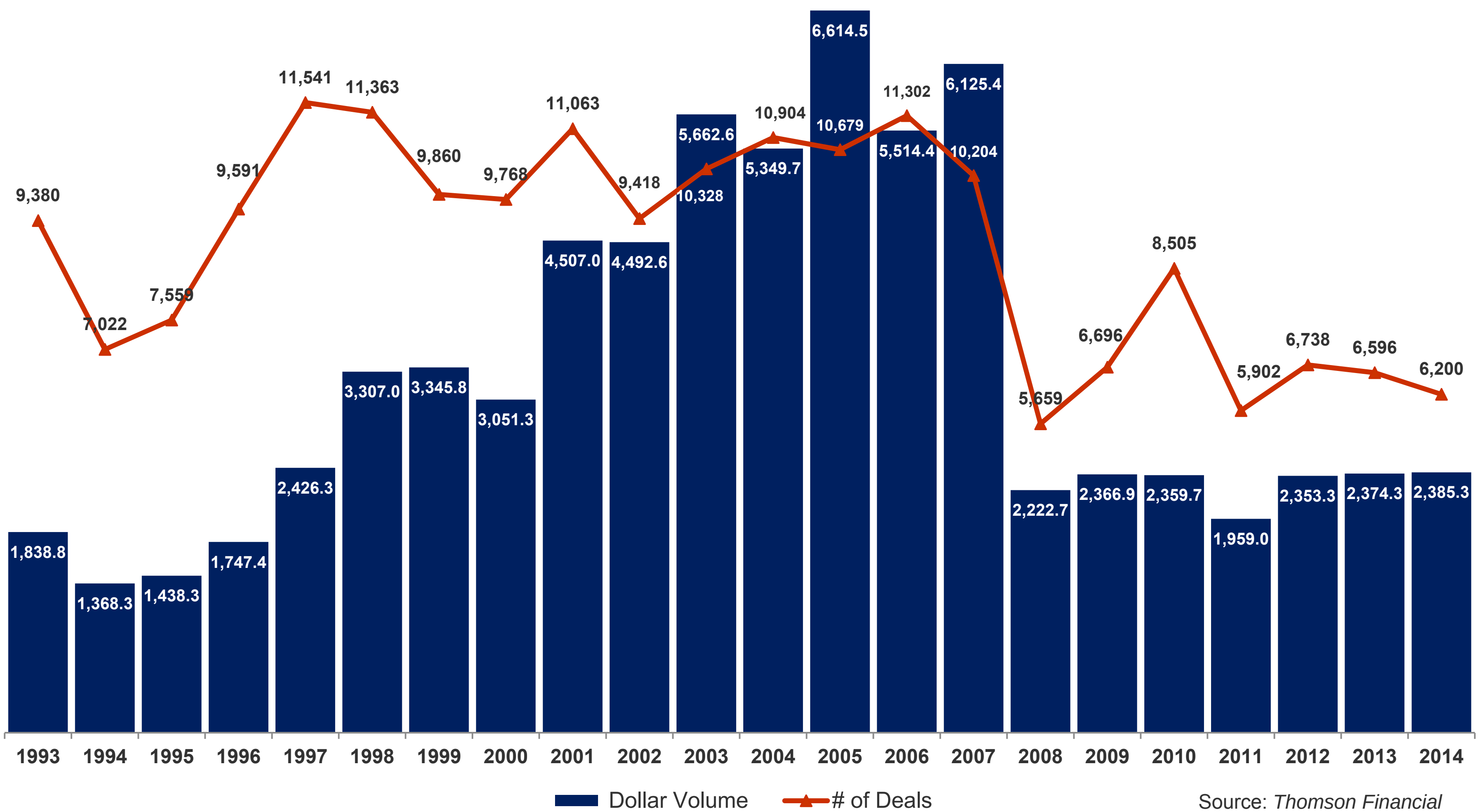


Source: *Thomson Financial*

Market Conditions – US Capital Markets

Announced US transactions

($ in billions)



Source: *Thomson Financial*

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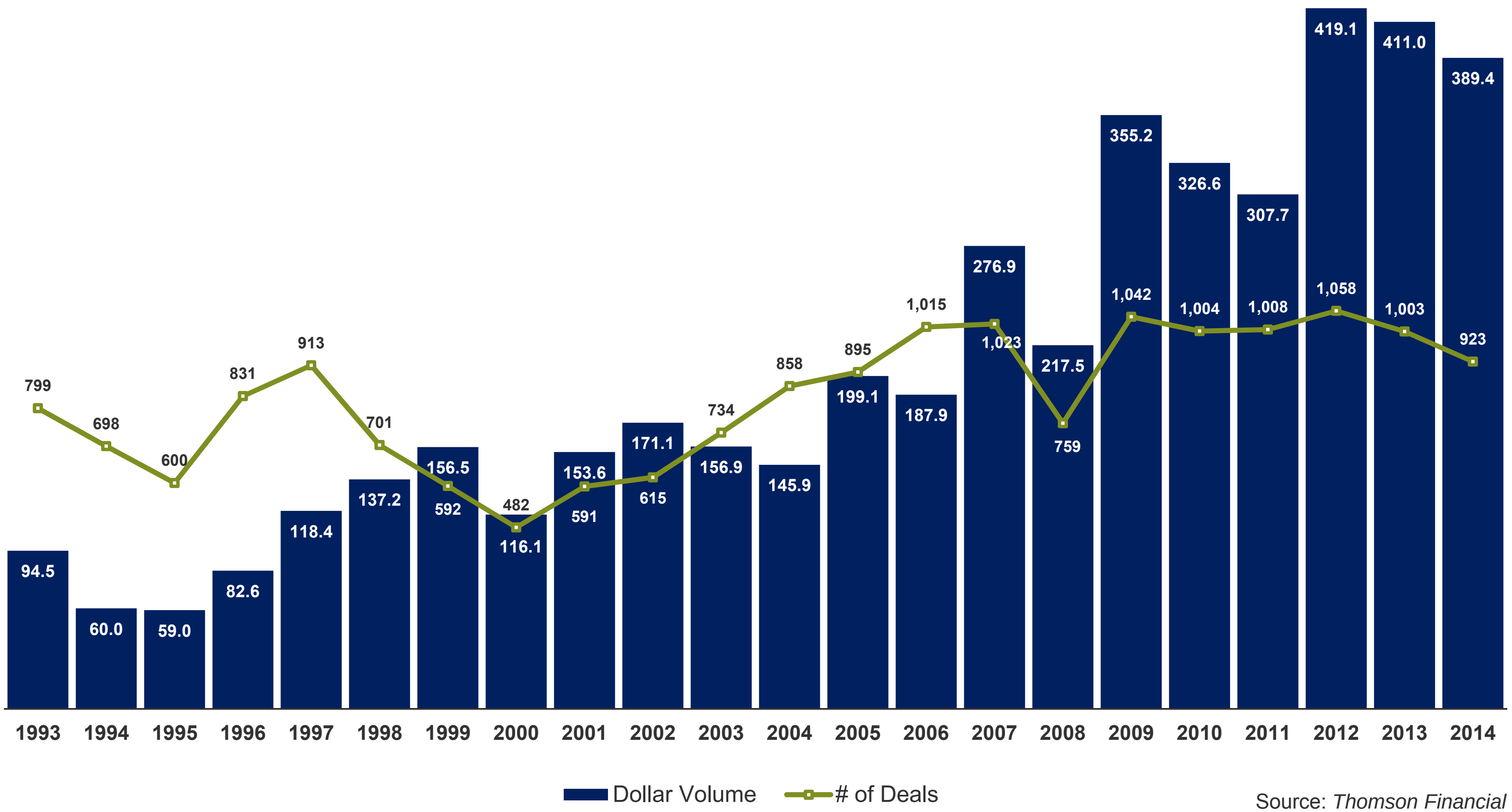
Market Conditions – Global Oil and Gas Capital Markets

Announced global oil and gas transactions

(US$ in billions)



Source: *Thomson Financial*

Market Conditions – US Oil and Gas Capital Markets

Announced US oil and gas transactions

(US$ in billions)

Source: *Thomson Financial*

Capital Markets Industry

Upstream

- **2014:** 8 IPOs raising US$4.7 billion in proceeds and 62 follow-on offerings raising US$11.1 billion in proceeds
- **2013:** 4 IPOs raising US$2.1 billion and 45 follow-on offerings raising US$10.3 billion in proceeds

Midstream

- **2014:** 13 IPOs raising US$5.1 billion in proceeds and 37 follow-on offerings raising US$17.3 billion
- **2013:** 9 IPOs raising US$4.8 billion and 45 follow-on offerings raising US$13.2 billion in proceeds

Downstream

- **2014:** 1 IPO raising US$270 million in proceeds and 20 follow-on offerings raising US$3.9 billion
- **2013:** 7 IPOs raising US$1.9 billion and 16 follow-on offerings raising US$3.4 billion in proceeds

Oilfield Services

- **2014:** 5 IPOs raising US$1.1 billion in proceeds and 10 follow-on offerings raising US$1.1 billion
- **2013:** 2 IPOs raising US$787 million and 4 follow-on offerings raising US$629.8 million in proceeds

Coal

- **2014:** 1 IPO raising US$350 million

Source: *Thomson Financial, IPO Vital Signs*

Capital Markets Industry Trends – 2014

- **2014 was a busy period for IPOs and the energy sector specifically**
- The broad US market saw **307 IPOs raise US$100 billion** as well as **714 follow-on offerings raising US$157.9 billion** in proceeds
- The energy sector saw **30 IPOs** raise US$11.9 billion in gross proceeds and **133 follow-on offerings** raise US$34.5 billion
- Since 2012, there has been a step-change in the overall level of MLP equity issuance due to increased institutional investor demand
- MLP equity issuance continues to represent a significant portion of the U.S. equity capital markets, representing ~15% of all equity issued in the U.S. in each of the past three years
- 52 MLP IPOs have priced since 2012, raising $16.9 billion of total proceeds
- The 2014 MLP IPO market saw **19 transactions for over US$7 billion** in gross proceeds
- **20% increase in energy IPOs closed in 2014 (30) compared to 2013 (25)**
- **Increased IPO diversity** – 2014 energy IPOs were 63.33% MLP and 36.66% C-Corp vs 84% MLP and 16% C-Corp in 2013
- The US **IPO backlog has remained robust throughout 2014**, with over 140 companies currently in the publicly filed backlog (15 energy) and many confidential filings

Source: TPH Capital Markets Update, BAML Equity 2014, IPO Vital Signs, Thomson Reuters

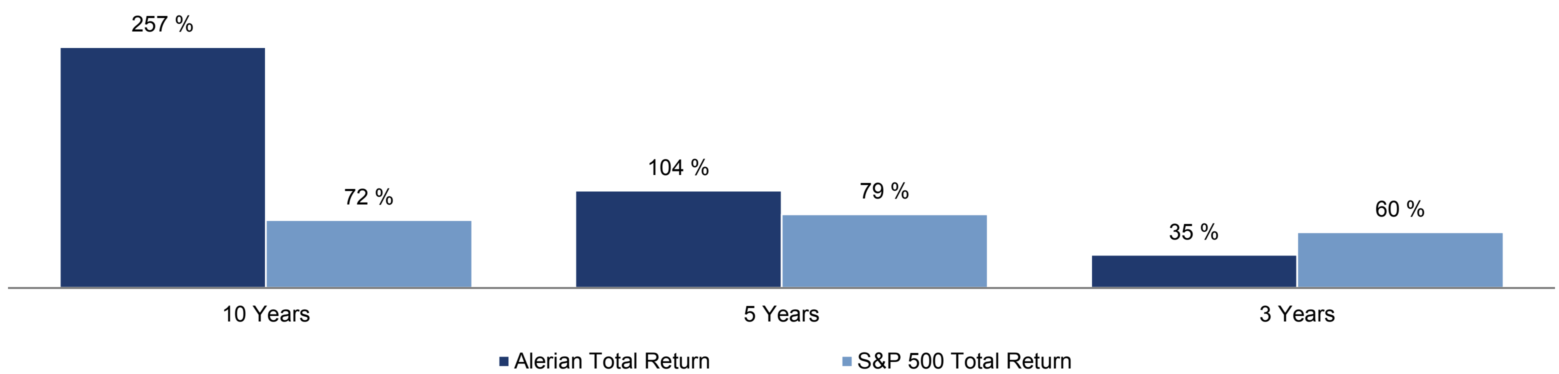
Energy IPOs 2014

Issuer	Prelim Prospectus Price Range	IPO Price	Days in Registration (First filing/submission to IPO closing date)	Recent Trading Price
PennTex Midstream Partners, LP	$19.00-$21.00	$20.00	280	$19.41
Enviva Partners, LP	$19.00-$21.00	$20.00	508	$19.75
Black Stone Minerals, L.P.	$19.00-$21.00	$19.00	204	$17.85
Columbia Pipeline Partners LP	$19.00-$21.00	$23.00	129	$26.86
Rice Midstream Partners LP	$19.00-$21.00	$16.50	74	$15.13
Navios Maritime Midstream Partners LP	$19.00-$21.00	$15.00	85	$14.38
Landmark Infrastructure Partners LP	$19.00-$21.00	$19.00	99	$16.87
Antero Midstream Partners LP	$19.00-$21.00	$25.00	270	$22.41
Shell Midstream Partners, L.P.	$19.00-$21.00	$23.00	132	$37.54
Dominion Midstream Partners, LP	$19.00-$21.00	$21.00	196	$33.28
FMSA Holdings Inc.	$19.00-$21.00	$20.00	83	$5.94
USD Partners LP	$19.00-$21.01	$16.00	117	$14.50
JP Energy Partners LP	$19.00-$21.01	$20.00	455	$13.09
CONE Midstream Partners LP	$19.00-$21.00	$22.00	102	$19.98
Hoegh LNG Partners LP	$19.00-$21.00	$20.00	128	$20.60
Independence Contract Drilling, Inc.	$14.00-$16.00	$11.00	86	$4.79
VTTI Energy Partners LP	$19.00-$21.00	$20.00	106	$22.22
Westlake Chemical Partners LP	$19.00-$21.00	$24.00	91	$25.10
Transocean Partners LLC	$19.00-$21.00	$22.00	85	$13.59
Eclipse Resources Corp	$27.00-$30.00	$27.00	118	$5.69
Viper Energy Partners LP	$19.00-$21.00	$26.00	41	$17.47
Foresight Energy Partners LP	$19.00-$21.01	$20.00	866	$15.72
Memorial Resource Development Corp	$16.00-$18.00	$19.00	69	$18.36
Dorian LPG Ltd.	$18.00-$20.00	$19.00	107	$12.21
Parsley Energy Inc.	$15.00-$18.00	$18.50	153	$15.72
PBF Logistics Partners LP	$19.00-$21.00	$23.00	35	$20.63
GasLog Partners LP	$19.00-$21.01	$21.00	29	$22.51
Enable Midstream Partners LP	$19.00-$21.00	$20.00	135	$18.71
GeoPark Ltd	$8.00-$10.00	$7.00	150	$4.68
North Atlantic Drilling	$8.50-$10.00	$9.25	412	$1.45

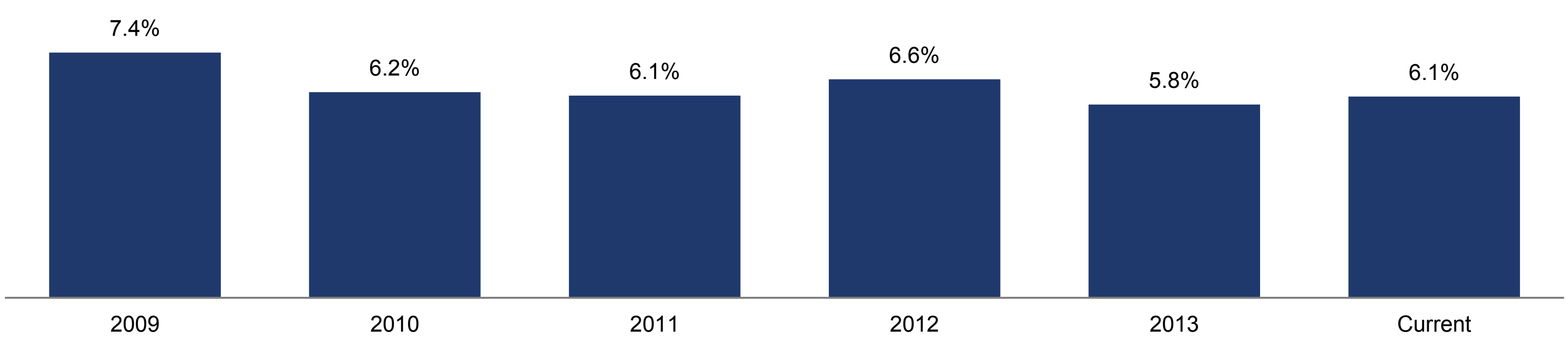
Handled by Latham & Watkins Attorneys

MLP Sector Outperformance Being Widely Noted

MLP Sector[1] Has Outpaced the Broader Market Over the Long Term…



…And Seen Its Yield Compress



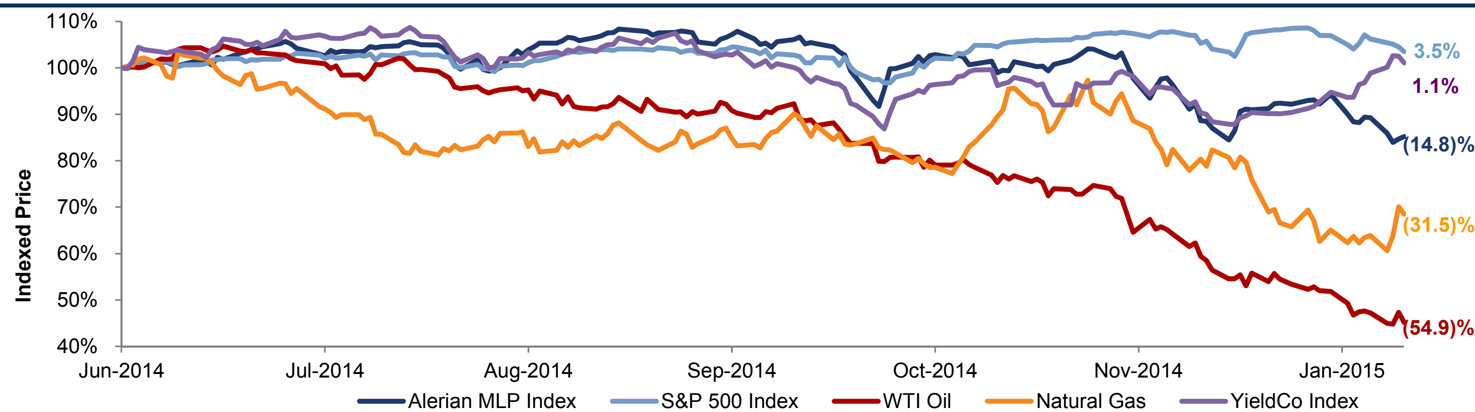
Source: Bloomberg

[1] *As represented by the Alerian MLP Index, an index of large- and mid-cap energy Master Limited Partnerships.*

Source: *Bloomberg*

MLPs Have Recently Been Resilient

Price Performance Since June 2014



Key Drivers of Performance

Macro Factors

- Decline in crude oil and impact on capital budgets / drilling activity / production
  - — Timing of MLP / infrastructure impact
- Interest rates
  - — QE concluded in October 2014, investors now expect rate hikes to start Q2/Q3 2015

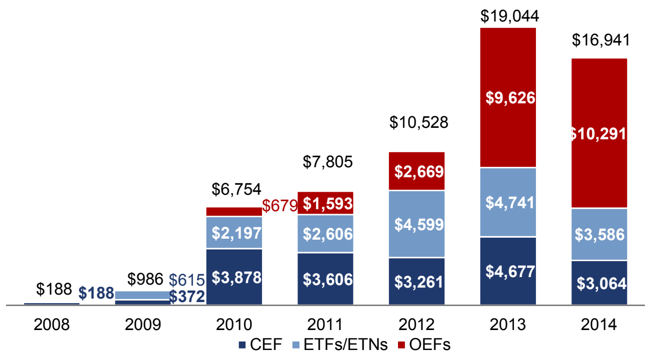
Technical Factors

- Capital inflows / outflows
  - — Continued record capital raising by MLP funds including recent $1.5bn GSAM MLP fund
  - — Underperformance by hedge funds driving redemptions / selling pressure in certain stocks
- Increased short activity
  - — As MLP market and liquidity has grown, increased instances of shorting

- *Note: Yieldco Index includes NRGY, PEGI, RNW, ABY, NEP, and TERP*

Institutional Investors Have Become a Crucial Component of Successful MLP IPOs

MLP Markets Becoming Institutional Driven by Uptick in MLP-Dedicated Funds…

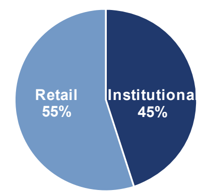
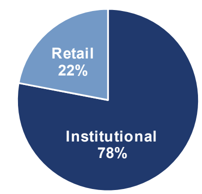


…And Increasing Sector Participation from Blue Chip Institutions and Hedge Funds

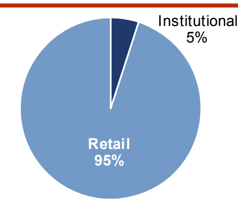
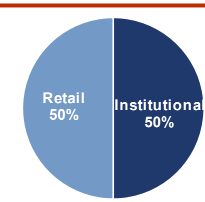
SOROBAN · Fidelity Investments · SOROS Soros Fund Management · Moore Capital Management LP · millennium · Carlson · American Century Investments · Passport Capital · Alyeska · Och-Ziff · RREEF Real Estate Investment Managers · Magnetar Capital · Mason Investments · Pictet 1805 · Waddell & Reed

Allocations in MLP Offerings Have Evolved

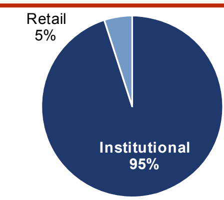
IPOs

5 Years Ago	Today
	

Overnights / 1 Day Marketed

5 Years Ago	Today
	

Blocks

5 Years Ago	Today
[No Block Market]	

Source: U.S. Capital Advisors, LLC, Factset, GS Internal Data, Dealogic

Leading to a Changing Emphasis on Growth and the Valuation Landscape

As MLPs Have Sought to Increase Their Distribution Growth Rates, Investors Have Responded by Rewarding Them With Lower Yields

2yr Price Performance[1]

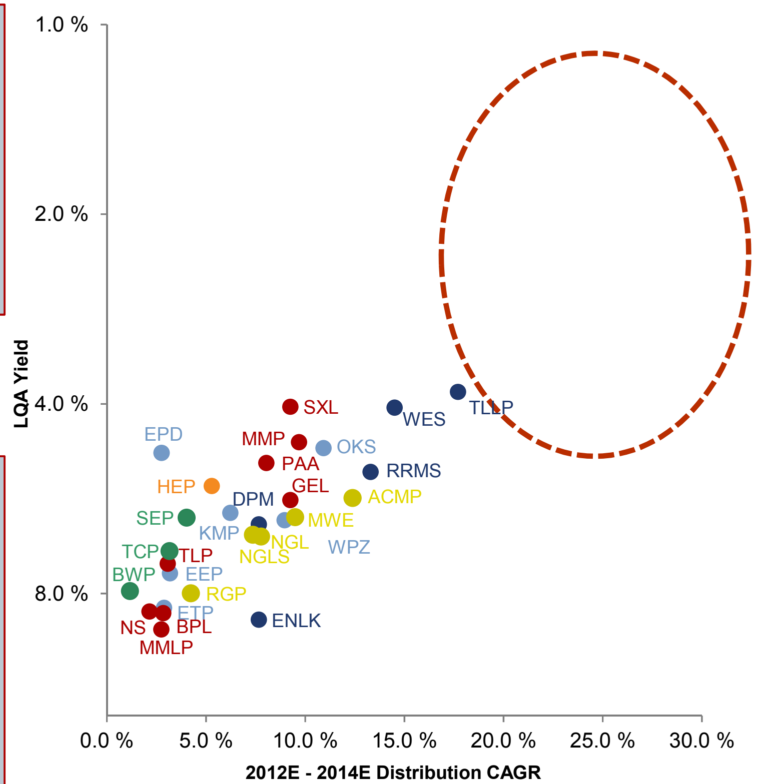
Drop-Down MLPs – 63 %

High Growth MLPs – 48 %

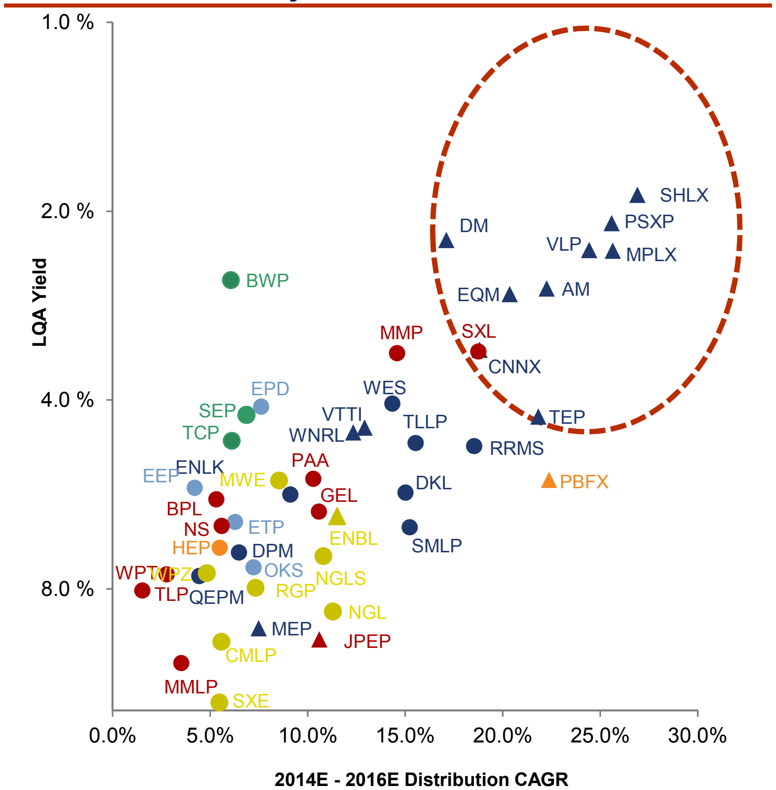
Medium Growth MLPs – 11 %

Low Growth MLPs – 18 %

MLP Universe 2 Years Ago



MLP Universe Today Shows a New Valuation Frontier



● Drop Down ● Diversified ● Crude & Refined Products ● Refinery Logistics ● Gathering & Processing ● Gas Infrastructure

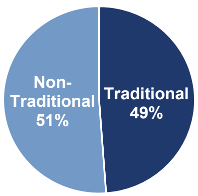
Note: Triangles denote recent IPOs.

[1] Includes companies that were public prior to 01-Jan-2014; Drop Down includes DKL, DPM, ENLK, EQM, MEP, MPLX, PSXP, QEPM, RRMS, SMLP, TEP, TLLP, VLP, WES, and WNRL; High Growth includes ACMP, ENBL, MMP, PBFX, and SXL; Medium Growth includes EPD, GEL, MWE, NGL, NGLS, OKS, PAA, and TLP; Low Growth includes BPL, BWP, CMLP, EEP, ETP, HEP, MMLP, NS, RGP, SEP, SXE, TCP, and WPT.

Source: U.S. Capital Advisors, LLC, Factset, GS Internal Data, Dealogic

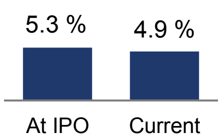
Recent MLP IPOs Mixed Between Traditional and Non-Traditional Assets

Traditional vs. Non-Traditional Breakdown

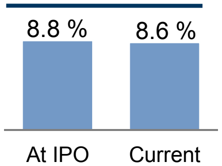


Median Yields

Traditional



Non-Traditional



Traditional MLP IPOs

				% Change Price		Yield	
Date	Issuer	Size	% Co. Sold	File / Offer	Offer / Current	IPO	Current
16-Dec-14	RMP	$ 413	43.5 %	(17.5)%	1.0 %	4.5 %	4.5 %
4-Nov-14	Antero	1,150	28.7	25.0	9.6	2.7	2.5
28-Oct-14	Shell Midstream Partners	1,058	32.0	15.0	82.6	2.8	1.5
14-Oct-14	Dominion	423	30.2	5.0	83.7	3.3	1.8
8-Oct-14	USD Partners LP	155	42.2	(15.0)	(15.2)	6.8	8.0
1-Oct-14	JP Energy Partners	275	37.8	0.0	(33.6)	6.5	9.8
24-Sep-14	CONE	443	69.0	10.0	15.5	3.9	3.3
31-Jul-14	vtti energy partners	423	49.0	5.0	23.1	5.0	4.1
8-May-14		364	46.7	15.0	(2.3)	5.2	5.3
10-Apr-14	ENABLE	575	6.9	0.0	(1.3)	5.8	6.1
10-Dec-13	VALERO	397	28.3	15.0	83.4	3.7	2.3
12-Nov-13		259	48.0	(10.0)	(4.3)	8.1	8.5
6-Nov-13	MIDCOAST ENERGY PARTNERS	383	43.5	(10.0)	(20.4)	6.9	9.4
5-Nov-13	Arc	129	52.4	(5.0)	1.2	8.2	8.5
9-Oct-13	Western Refining Logistics	348	32.3	10.0	38.7	5.2	4.2
8-Aug-13		201	29.4	0.0	1.0	6.0	5.9
8-Aug-13	CEPM	483	40.0	5.0	(19.4)	4.8	7.1
25-Jul-13	Marlin Midstream	138	38.6	0.0	(7.7)	7.0	7.9
22-Jul-13	Phillips 66	434	25.4	15.0	201.5	3.7	1.8
13-May-13	TALLGRASS	314	26.1	(2.3)	111.2	5.3	3.6
6-Dec-12	Western Gas	435	9.1	10.0	187.4	3.0	1.8
1-Nov-12	Delek	193	37.6	5.0	75.9	7.1	5.3
1-Nov-12	SouthCross Energy	207	39.4	0.0	(19.1)	8.0	9.9
25-Oct-12	MPLX	438	25.5	10.0	245.0	4.8	1.9
27-Sep-12	SUMMIT	288	27.8	0.0	95.4	8.0	5.5
26-Jun-12	EQT Midstream	302	38.6	5.0	323.5	6.7	2.5
Mean		$ 393	35.7 %	3.5 %	56.0 %	5.5 %	5.1 %
Median		373	37.7	5.0	12.6	5.3	4.9

Note: Includes recent MLP issuance for US exchange listed issuers greater than $50mm.

Non-Traditional MLP IPOs

				% Change Price		Yield	
Date	Issuer	Size	% Co. Sold	File / Offer	Offer / Current	IPO	Current
7-Aug-14		$ 221	39.8 %	0.0 %	(16.8)%	6.8 %	8.1 %
31-Jul-14	Transocean	443	29.2	10.0	(29.7)	6.6	9.4
29-Jul-14	Westlake Chemical	311	47.8	20.0	21.6	4.6	3.8
17-Jun-14		350	13.5	0.0	(22.0)	5.5	7.1
17-Jun-14	VIPER	150	7.5	30.0	(42.6)	4.2	7.4
6-May-14		203	46.2	5.0	22.5	7.1	5.8
14-Jan-14	CYPRESS	86	34.8	0.0	(15.6)	7.8	9.6
24-Oct-13	Sprague	153	42.2	(10.0)	27.7	9.2	7.7
3-Oct-13	OCI	315	21.7	(10.0)	(13.1)	11.8	6.6
12-Sep-13	OCI	95	25.1	(5.0)	21.1	10.5	9.1
8-May-13	EMERGE	131	32.9	(15.0)	157.4	16.5	12.6
9-Apr-13	KNOT	180	46.1	5.0	0.2	7.1	9.3
7-Feb-13	new source	85	54.8	0.0	(58.7)	10.5	28.3
17-Jan-13	SXCP	257	42.1	(5.0)	41.0	8.7	7.9
16-Jan-13	CVR refining	690	18.3	0.0	(21.9)	18.9	11.1
14-Jan-13	USA Compression	198	37.1	(10.0)	(5.0)	9.4	11.8
19-Nov-12	ALON USA	184	18.0	(20.0)	(18.3)	32.5	31.2
24-Oct-12		138	43.3	0.0	70.6	8.8	6.2
18-Oct-12	Seadrill	221	23.6	4.8	(26.4)	7.0	13.6
19-Sep-12	SUSSER	224	49.9	2.5	122.0	8.5	4.6
15-Aug-12	HI CRUSH	220	47.4	(15.0)	84.6	11.2	8.0
25-Jul-12	Northern Tier Energy	262	24.6	(30.0)	63.9	18.6	17.4
3-May-12	PetroLogistics	595	25.2	(15.0)	0.0	11.9	NA
Mean		$ 248	33.5 %	(2.5)%	15.8 %	10.6 %	10.8 %
Median		220	34.8	0.0	0.0	8.8	8.6

What Makes MLPs and YieldCos So Attractive?

Benefits to the Sponsor

1 Implied Premium Valuation

- MLP and YieldCos generally trade at a premium EV / EBITDA multiple
- More valuable acquisition currency and/or capital recycling advantage

2 Retained Control

- Public investors have limited voting rights in MLPs and YieldCos

3 Sponsor Promote / Carry

- Sponsor retains very attractive "promote" (IDRs) that generates value as MLP / YieldCo cash flows grow

4 Built-in Growth

- MLP / YieldCo sponsors can contribute retained assets to MLP / YieldCo to fuel growth

Benefits to Public Investors

1 Total Return Profile

- Current MLP and YieldCo investors evaluate on a total return basis (current yield + distribution growth)
- A lower current yield can be achieved if there are higher growth expectations

2 Stable, long-dated cash flows

- Stability can also be created by putting specific revenue streams / contracts into the MLP or YieldCo

3 Visible, transparent, low-risk growth

- Organic growth
- Accretive acquisitions from Sponsor ("drop-downs")
- Accretive acquisitions from third parties

Capital Markets Case Studies

Selected Capital Markets Deals 2014

E&Ps ISSUE MIDSTREAM IPOS

RMP – Rice Midstream Partners	US$474,375,000
Antero Midstream Partners LP	US$1,000,000,000
Shell Midstream Partners	US$920,000,000
Dominion Midstream Partners	US$367,500,000

OFFSHORE MLPS

vtti energy partners	US$367,500,000

YIELDCOS

NextEra energy Partners	US$406,250,000
TerraForm Power – a SunEdison company	US$501,650,000

Capital Markets Activity: E&Ps Create Midstream MLPs

- The trend of public companies creating publicly traded MLP subsidiaries continued in 2014
- 9 of the 19 MLP IPOs in 2014 were MLPs created by publicly traded companies
- Of these 9 MLPs, four were midstream MLP affiliates of publicly traded E&P companies
  - Rice Midstream Partners
  - Shell Midstream Partners
  - Antero Midstream Partners
  - Dominion Midstream Partners
- E&P sponsors seek the cost of capital advantage and attractive yields that have been available to midstream MLPs, particularly those with long-term, fixed-fee contracts with their sponsors and other features designed to ensure future cash flows and growth, such as minimum volume commitments and acreage dedications
- These midstream MLP subsidiary IPOs included the largest MLP initial public offerings of the year, with the lowest-ever yields

RICE MIDSTREAM PARTNERS LP

initial public offering case study

RMP
RICE MIDSTREAM PARTNERS

US$474,375,000
28,750,000 Common Units
Initial Public Offering
December 16, 2014

TRANSACTION OVERVIEW

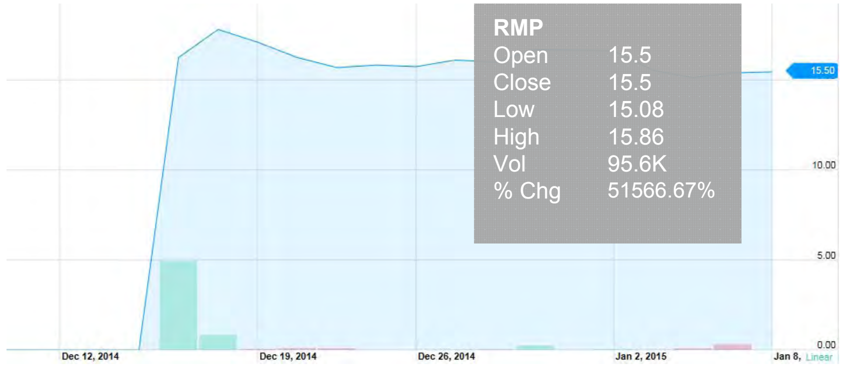
ISSUER	Rice Midstream Partners LP (“Rice”)
TICKER	RMP
UNDERWRITER	Barclays
COMMON UNITS FILED	28,750,000 Common Units
INITIAL FILING RANGE	$19.00-$21.00
PUBLIC OFFER PRICE	$16.50

STRATEGIC HIGHLIGHTS

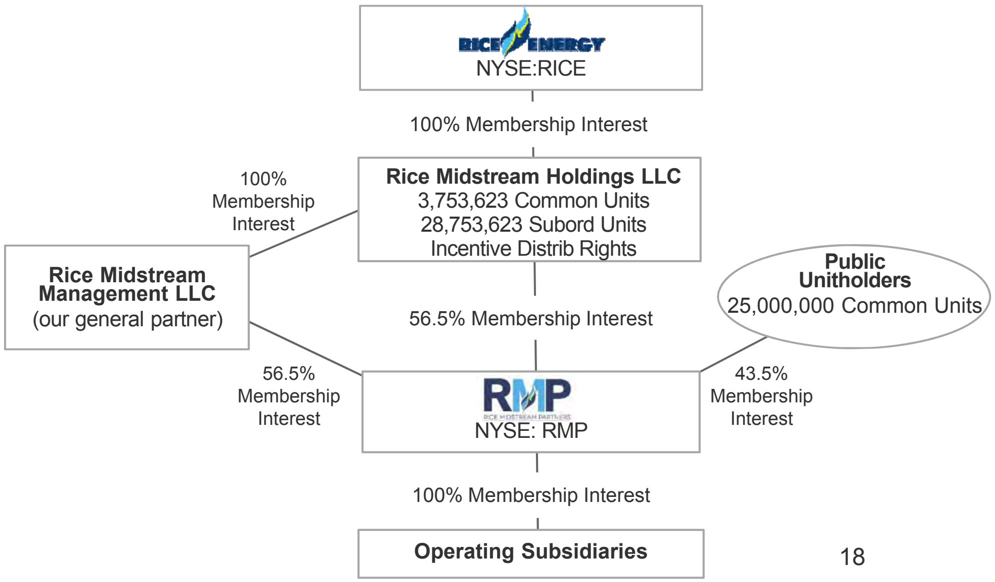
- RMP has secured dedications from Rice Energy under a 15 year, fixed-fee contract for gathering and compression services covering:
  - approximately 63,000 gross acres of its acreage position as of September 30, 2014 in Washington and Greene Counties, Pennsylvania, and
  - any future acreage it acquires within these counties, other than in select areas subject to pre-existing third-party dedications and subject to the terms of RMP’s gas gathering and compression agreement
- Use of proceeds:
  - Reimburse Rice Energy for $195.3 million of capital expenditures incurred on our behalf prior to the closing of this offering
  - Make a $160.7 million distribution to Rice Energy
  - Fund $25.0 million of our 2015 expansion capital expenditures and
  - Pay approximately $2.7 million of origination fees related to our new revolving credit facility.

ADDITIONAL INSIGHT

Market Performance Since IPO



Rice Org Chart



Source: *Company Investor Presentation*

ANTERO MIDSTREAM PARTNERS LP

initial public offering case study

US$1,000,000,000
40,000,000 Common Units
Initial Public Offering
November 4, 2014

TRANSACTION OVERVIEW

ISSUER	Antero Midstream Partners LP ("Antero")
TICKER	AM
UNDERWRITER	Barclays
COMMON UNITS FILED	40,000,000 Common Units
INITIAL FILING RANGE	$19.00-$21.00
PUBLIC OFFER PRICE	$25.00

STRATEGIC HIGHLIGHTS

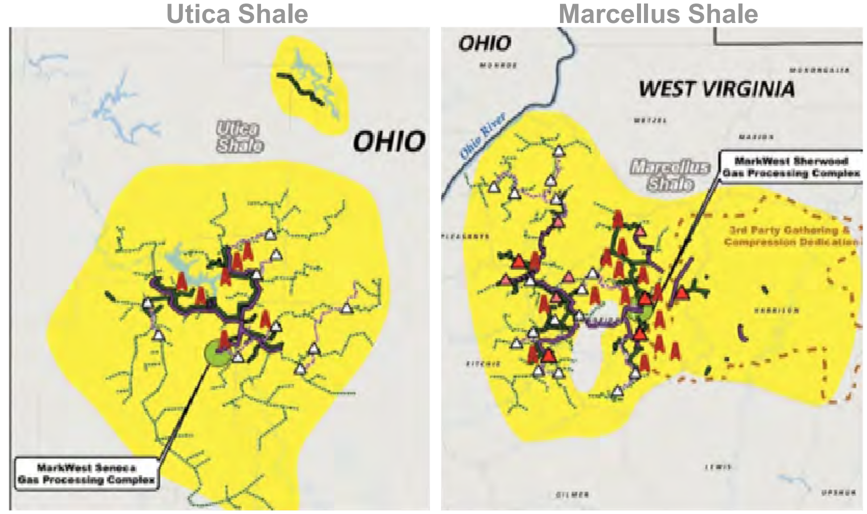
- Largest-ever MLP IPO in terms of amount raised ($1 billion),
- Lowest-ever yield at IPO for an MLP
- Largest energy IPO of 2014
- Use of proceeds:
    - Pay $1.0 million of financing costs in connection with our new revolving credit facility
    - Repay in full $458.0 million of indebtedness that we will assume from Antero in connection with the contribution of Midstream Operating to us by Antero which indebtedness was incurred by Antero to fund capital expenditures with respect to the Predecessor
    - General partnership purposes

ADDITIONAL INSIGHT

Market Performance Since IPO

Antero Midstream Asset Overview

Utica Shale — Marcellus Shale



Source: *Company Investor Presentation*

SHELL MIDSTREAM PARTNERS, L.P.

initial public offering case study

US$920,000,000
40,000,000 Common Units
Initial Public Offering
October 28, 2014

TRANSACTION OVERVIEW

ISSUER	Shell Midstream Partners, L.P. ("Shell")
TICKER	SHLX
UNDERWRITER	Barclays
COMMON UNITS FILED	40,000,000 Common Units
INITIAL FILING RANGE	$19.00-$21.00
PUBLIC OFFER PRICE	$23.00

STRATEGIC HIGHLIGHTS

- Use of proceeds:
  - Approximately $579.5 million of the net proceeds of this offering to make a cash distribution to SPLC
  - Approximately $194.0 million of the net proceeds of this offering to make a cash distribution to SPLC and a contribution to Zydeco, which will then make a cash distribution to SPLC, both to reimburse SPLC for capital expenditures incurred prior to this offering related to Zydeco
  - Approximately $100.0 million for general partnership purposes, including to fund potential expansion capital expenditures and acquisitions

ADDITIONAL INSIGHT

Market Performance Since IPO

Shell Midstream Asset Overview

Source: *Company Investor Presentation*

DOMINION MIDSTREAM PARTNERS, LP

initial public offering case study

US$367,500,000
17,500,000 Common Units
Initial Public Offering
October 14, 2014

TRANSACTION OVERVIEW

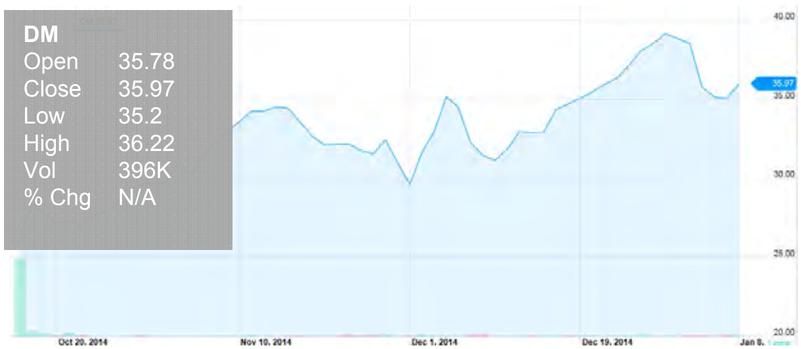
ISSUER	Dominion Midstream Partners, LP (“Dominion”)
TICKER	DM
UNDERWRITER	Barclays
COMMON UNITS FILED	17,500,000 Common Units
INITIAL FILING RANGE	$19.00-$21.00
PUBLIC OFFER PRICE	$21.00

STRATEGIC HIGHLIGHTS

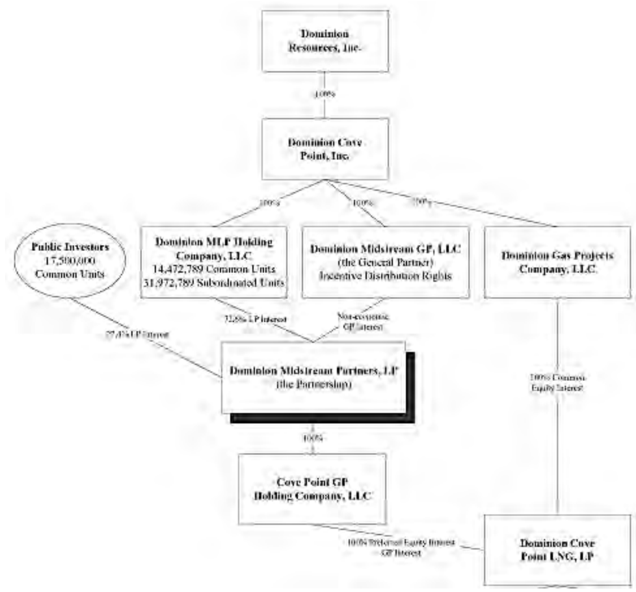
- Use of proceeds:
  - Make contribution to Cove Point in exchange for a portion of the Preferred Equity Interest
  - Intention to cause Cove Point to use the net proceeds contributed to it in connection with this offering to fund a portion of development and construction costs associated with the Liquefaction Project.
  - Pending underwriters exercise to purchase common units, the net proceeds from any exercise of such option will be used to make a distribution to Dominion

ADDITIONAL INSIGHT

Market Performance Since IPO



Dominion Org and Ownership Structure



Source: *Company Investor Presentation*

Capital Markets Activity: Offshore MLPs

- Although historically dominated by US companies, more and more non-US companies are seeking to access the yield-oriented market to fund their capital needs
  - **International shipping companies** were the first non-US companies to identify the potential of this market
    - Ships or "floating assets" can be great candidates for a yield-oriented structure because these assets typically traverse the globe under long-term contracts with creditworthy counterparties and incur little if any US tax because they either do not have any US ports of call or qualify for an exemption from US taxes
  - In August 2014, **VTTI Energy Partners LP** went public as the first MLP with fixed assets (refined products terminals) substantially outside the US (in Europe, the Middle East and Asia)
  - Other offshore MLPs include:

HÖEGH LNG PARTNERS LP | vtti energy partners | Transocean PARTNERS LLC | GASLOG PARTNERS | Seadrill Partners LLC | KNOT Offshore Partners LP

Golar LNG Partners LP | N | CAPITAL PRODUCT PARTNERS L.P. | TEEKAY OFFSHORE PARTNERS | TEEKAY LNG PARTNERS L.P.

- Most offshore MLPs are organized as partnerships or limited liability companies under the laws of the Marshall Islands but elect to be treated as corporations for US federal income tax purposes
  - The election to be treated as a corporation for US federal income tax purposes eliminates the need to satisfy the Qualifying Income Test
  - Even if taxed as a corporation, unless the MLP is domiciled in the US or earns income in the US, it will not pay a material amount of US tax

VTTI ENERGY PARTNERS LP

initial public offering case study

US$367,500,000
17,500,000 Common Units
Initial Public Offering
August 1, 2014

TRANSACTION OVERVIEW

ISSUER	VTTI Energy Partners LP (“VTTI”)
TICKER	VTTI
UNDERWRITER	Citi
COMMON UNITS FILED	17,500,000 Common Units
INITIAL FILING RANGE	$19.00-$21.00
PUBLIC OFFER PRICE	$21.00

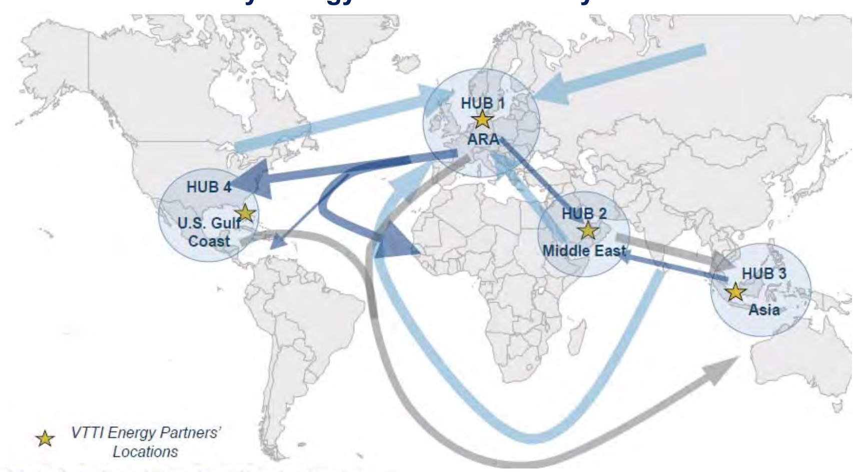
STRATEGIC HIGHLIGHTS

- Use of proceeds:
  - VTTI will not receive any proceeds from the sale of common units by the selling unitholder in this offering.
  - The selling unitholder will pay all offering expenses, underwriting discounts and commissions and structuring fees incurred in connection with this offering and any exercise by the underwriters of their option to purchase additional common units.

ADDITIONAL INSIGHT

Market Performance Since IPO

Key Energy Hubs and Flow Dynamics



Global Refined Product Trade Routes

Gasoline
Diesel
Fuel Oil

Source: Wood Mackenzie

Source: *Company Investor Presentation*

Capital Markets Activity: Yieldcos

A Yieldco owns assets, that are not "MLP-able" assets.

In 2013, a new type of vehicle went public with a story very similar to an MLP but without possessing assets that would qualify for pass-through tax treatment. Like MLPs, Yieldco and similar companies are positioning themselves as vehicles for investors seeking stable and growing dividend income from a diversified portfolio of lower-risk high-quality assets. More of these types of vehicles are in the planning stages.

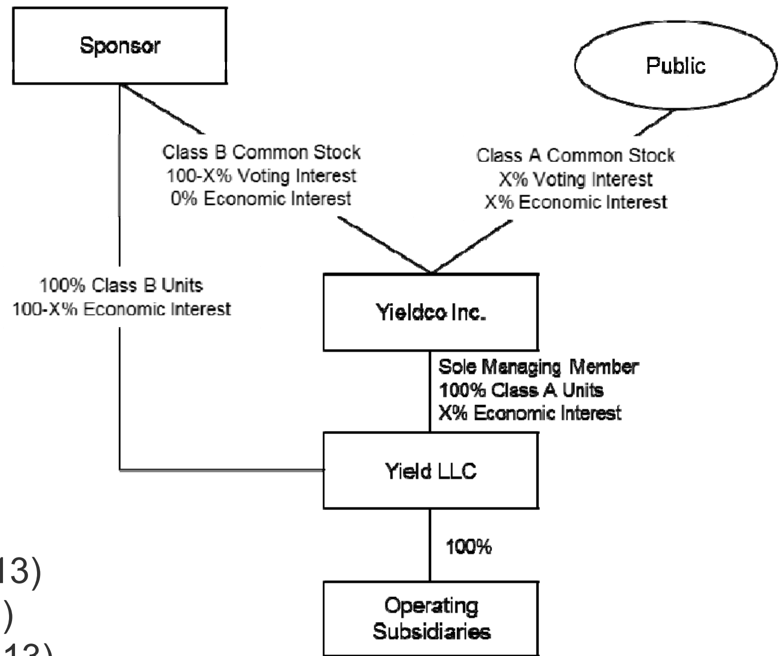
2013

- **NRG Yieldco** – US$495 million IPO, **the first-ever**
- **renewable company to go public as a Yieldco** (July 2013)
- **TransAlta Renewables** – US$200 million IPO (Aug. 2013)
- **Pattern Energy Partners** – US$404 million IPO (Sept. 2013)

2014

- **NextEra Energy Partners LP** – US$406.2 million IPO (June 2014)
- **Abengoa Yield PLC** – US$720.6 million IPO (June 2014)
- **TerraForm** – US$501.6 million IPO (July 2014)

TYPICAL YIELDCO ORGANIZATIONAL STRUCTURE



NEXTERA ENERGY PARTNERS LP

initial public offering case study

US$406,250,000
16,250,000 Common Units
Initial Public Offering
June 27, 2014

TRANSACTION OVERVIEW

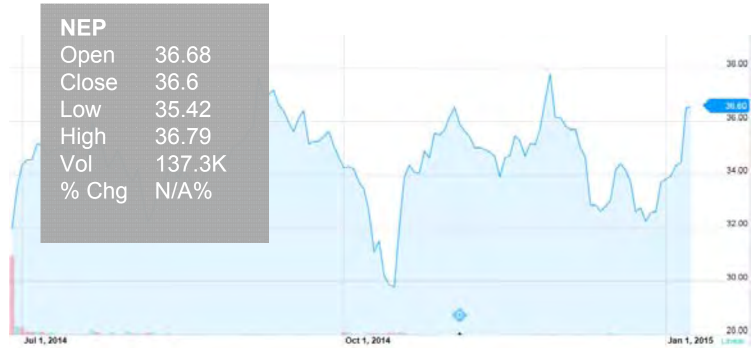
ISSUER	NextEra Energy Partners LP ("NextEra")
TICKER	NEP
UNDERWRITER	BAML
COMMON UNITS FILED	16,250,000 Common Units
INITIAL FILING RANGE	$23.00-$25.00
PUBLIC OFFER PRICE	$25.00

STRATEGIC HIGHLIGHTS

- Use of proceeds:
  - Approximately $150.0 million of the net proceeds from this offering to purchase 6,395,907 NEE Operating LP common units from NEE Operating LP. NEE Operating LP will use such net proceeds for general corporate purposes, including to fund future acquisition opportunities
  - Approximately $231.1 million of the net proceeds of this offering to purchase 9,854,093 NEE Operating LP common units
  - After the application of the net proceeds from this offering, we will own a 17.4% limited partner interest in NEE Operating LP

ADDITIONAL INSIGHT

Market Performance Since IPO



NextEra Asset Overview

Asset Location	Initiative
Ontario	• 10,700 MW of renewable energy capacity by 2018
British Columbia	• Maintain minimum threshold of 90% of total capacity from clean or renewable British Columbia energy sources
Saskatchewan	• Target to double wind capacity to 9% of total capacity by 2017
Quebec	• 4,000 MW of installed capacity by 2015
Prince Edward Island	• Policy target of 30% of total capacity from renewable energy
Nova Scotia	• Legislated renewable portfolio standard of 40% of total capacity from renewable energy by 2020
Alberta	• $380 million green technology fund • Alberta carbon offset program • No current targeted capacity or generation mix standard
New Brunswick	• Legislated renewable portfolio standard of 10% of total capacity from renewable energy by 2016 • Policy commitment to increase renewable portfolio standard to 40% by 2020
Manitoba	• Target of 1,000 MW of wind power by 2014

Source: *Company Investor Presentation*

TERRAFORM POWER, INC
initial public offering case study

US$501,650,000
20,065,000 Common Units
Initial Public Offering
July 21, 2014

TRANSACTION OVERVIEW

ISSUER	TerraForm Power, Inc. ("TerraForm")
TICKER	TERP
UNDERWRITER	Goldman Sachs
COMMON UNITS FILED	20,065,000 Common Units
INITIAL FILING RANGE	$23.00-$25.00
PUBLIC OFFER PRICE	$25.00

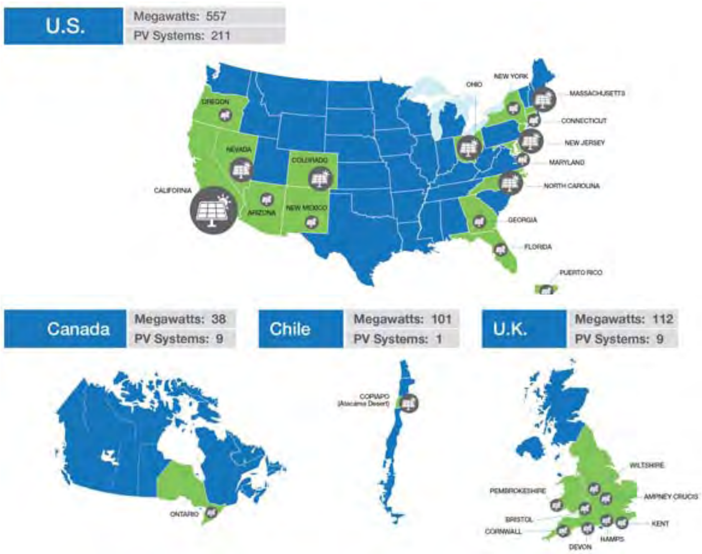
STRATEGIC HIGHLIGHTS

- Use of proceeds:
  - We will use $436.2 million of the net proceeds from this offering and the Private Placements to acquire newly-issued Class A units of Terra LLC directly from Terra LLC
  - Remaining net proceeds used to purchase Class B units from our Sponsor at a price equal to the price per share in this offering, less underwriting discounts and commissions and a pro rata portion of the structuring fee, following which those Class B units (and the related shares of Class B common stock) will be cancelled and Terra LLC will issue to us an equal number of Class A units.

ADDITIONAL INSIGHT

Market Performance Since IPO

TerraForm Project Overview



Source: *Company Investor Presentation*

Spin-offs

COMPANY	EXTERRAN PARTNERS	Chesapeake	OXY	CAMERON
Announcement Date:	11/17/2014	2/24/2014	2/14/2014	1/20/2014
Completion Date:	Pending	6/30/2014	pending	6/3/2014
ProForma Entities:	**RemainCo:** Exterran Partners LP **SpinCo:** Pending	**RemainCo:** Chesapeake (NYSE: CHK) **SpinCo:** Seventy Seven Energy (NYSE: SSE)	**RemainCo:** Occidental Petroleum Corp. (NYSE: OXY) **SpinCo:** California Resources Corp. (NYSE: CRC)	**RemainCo:** Cameron (NYSE: CAM) **SpinCo:** Reciprocating Compression
Key Objectives:	Separate its North American contract operations and aftermarket services businesses from its fabrication and international services businesses	Separate its oilfield services operations into an independent, publicly traded company	Separate its oil and gas assets in CA into an independent, publicly traded company	Sell its Reciprocating Compression business to GE
Stated Rationale:	1. Creates two industry-leading energy infrastructure companies 2. Enhances overall long-term growth potential 3. Provides strategic clarity, focus, customer alignment and organizational simplification 4. Enhances capital efficiency and allocation 5. Results in two well-capitalized entities with solid balance sheets positioned for growth	1. Shareholder alignment 2. More tailored growth opportunities 3. Recover from year's worth of aggressive spending under co-founder and former CEO	1. Move its headquarters from Los Angeles to Houston, where it will be closer to its largest U.S. operations 2. Allows each business to be highly focused allowing each to be competitive industry leaders 3. Creates strategically focused oil and natural gas E&P company concentrated on conventional and unconventional assets exclusively in California	1. Optimize asset base and focus on core markets 2. Streamline operations 3. Allows for greater financial flexibility 4. Added value to shareholders 5. Strategically build strong sales and orders momentum in core markets while selectively expanding product and service offerings in strategic growth areas
Activist Driven:	NO	YES	YES	NO

Spin-offs

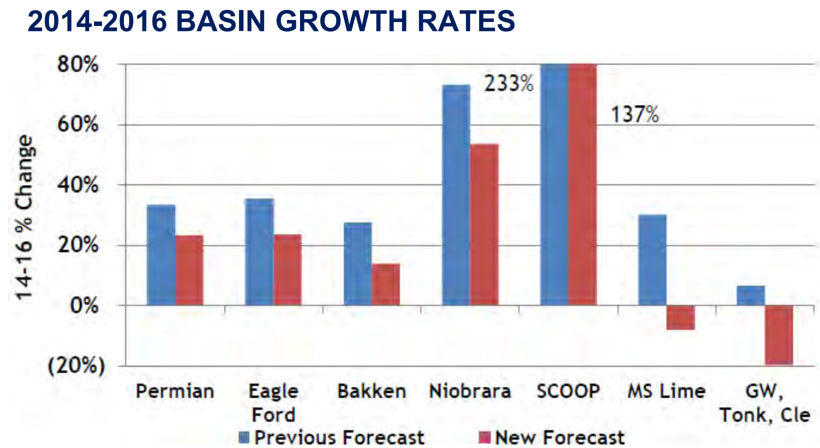
COMPANY	QEP	NOV	NOBLE	ONEOK	OIL STATES
Announcement Date:	12/2/2013	9/24/2013	9/24/2013	7/25/2013	7/30/2013
Completion Date:	6/26/2014	6/1/2014	pending	2/4/2014	6/2/2014
ProForma Entities:	**RemainCo:** QEP Resources, Inc. (NYSE: QEP) QEP Field Services Co. ("QEPFS") **SpinCo:** Entrada Midstream, Inc. (NYSE: EMID)	**RemainCo:** National Oilwell Varco, Inc. (NYSE: NOV) **SpinCo:** NOW, Inc. (NYSE: DNOW)	**RemainCo:** Noble Corporation (NYSE: NE) **SpinCo:** Paragon Offshore (NYSE: PGN)	**RemainCo:** ONEOK, INC. (NYSE: OKE) **SpinCo:** ONE Gas, Inc. (NYSE: OGS)	**RemainCo:** Oil States (NYSE: OIS) **SpinCo:** Civeo Corp. (NYSE: CVEO)
Key Objectives:	Separate its midstream field services business into an independent, publicly traded company	Separate its distribution business into an independent, publicly traded company	Separate its drilling business into an independent, publicly traded company	Separate its natural gas distribution business into an independent , publicly traded company. Highlight GP / LP Structure	Separate services business from sales business into an independent, publicly traded company
Stated Rationale:	1. Focus on capital needs and growth 2. Valuation 3. More tailored growth opportunities	1. Provide long-term value to shareholders 2. More tailored growth strategies 3. Improved capital deployment 4. Valuation	1. Maximize profitability of operations and focus on standard specification drilling operations 2. Capitalize on increased exploration and development activity 3. Leverage strategic relationship with high-quality, long-term customers 4. Pursue strategic growth opportunities 5. Remain financially disciplined, maximize return to shareholders	1. Efficient return of capital to shareholders 2. Shareholder alignment 3. Improved capital deployment 4. Valuation 5. Transparency 6. More tailored growth strategies 7. Help ONEOK focus more on its strategic goals and core operations	1. Created better focused entities with right size and scale 2. Improved resource allocation 3. Strong balance sheet 4. Value creation for shareholders
Activist Driven:	YES	NO	NO	NO	YES

LATHAM & WATKINS LLP

2015 Capital Markets Outlook

2015 Energy Capital Markets Outlook

- Major basins see cut back in growth due to shifting commodity prices



- Pace of organic project announcement slows, providing **less need for capital**
- Majority of participants view the Middle East's high production as primary catalyst for lower prices, oil price decline may also be resulting from decreasing demand due to an **overall slowdown in the global economy, specifically in emerging markets**
- During 2015, the implications of **low commodity prices for midstream operators will be less pronounced** than for U.S. upstream operators
  - Analysts appear to be comfortable that distribution levels at most of the larger midstream MLPs are secure for 2015, even in the current commodity price environment
- **Yield spreads continuously improve** but don't guarantee solid performance

Source: *Jefferies, BAML, TPH*

2015 Energy Capital Markets Outlook (cont’d.)

- The current magnitude of **decline in operator activity levels is unknown** and will continue to evolve
- 2015 is projected to see an onshore **rig count of less than 1,300 by year end**
- Financial pressure is expected to be most significant for smaller operators, but **larger operators will also be impacted**
- U.S. independent producers announced 2015 budget adjustments reflecting a **~US$7.5 billion (15-20%) reduction in capital** spending versus 2014

PRELIMINARY 2015 CAPITAL BUDGET DISCLOSURE ($MM)

Operator	Date	'15E Capex (MM)	% Change (YoY)	Commentary
REX ENERGY	12/22/14	$180 - $220	(43%)	▪ Revised plan is 43% lower than previous budget (Nov. 4) and 44 % less than '14 ▪ 2015 production growth of ~33%
Continental	12/22/14	$2,700	(41%)	▪ Revised plan is 41% lower than previous $4.6 B budget announced November 5th ▪ 2015 production growth of 16-20%, even with operated rigs dropping to 34 by Q1 '15
Comstock Resources	12/18/14	$307	(39%)	▪ 2015 production growth ~22%; suspending oil drilling (South/East TX EF, Miss. TMS) ▪ Currently running 4 rigs in EF; however, will move 2 rigs to Haynesville (50% of budget)
Approach	12/16/14	$180	(55%)	▪ 2015 production growth 10-14%
Rosetta	12/16/14	$700 -$800	(38%)	▪ 2015 production 76 – 82 MBoe/d (21% growth)
Laredo	12/16/14	$525	(53%)	▪ 2015 production growth of 12% ▪ 2015 budget includes $100 MM related to 2014 drilling activity
encana	12/16/14	$2,700 - $2,900	+10%	▪ Plans to deliver ~70% YoY growth in liquids production ▪ 2015 budget based on $70 / $4 NYMEX; focus on Montney, Duvernay, EF, Permian
Range Resources	12/15/14	$1,300	(18%)	▪ 2015 production growth of 20-25%
Oasis	12/10/14	$750 - $850	(46%)	▪ 2015 production growth of 5-10% ▪ Contract flexibility enables 10 rigs running by Jan '15 to ramp to 6 by March
Goodrich Petroleum Corporation	12/10/14	$150 - $200	(46%)	▪ 2015 oil growth of 30-42%; 5% of capex is gas development drilling ▪ Announced plan to divest EF position in 2015 to enhance financial position
PDC Energy	12/8/14	$557	(14%)	▪ 2015 production growth of 45-55% (assuming $67 / $3.80 base case) ▪ Expects $165 MM capital outspend and debt/EBITDAX of less than 2.0x for 2015
EQT	12/8/14	$2,500	+9%	▪ 2015 production growth of ~25%
ConocoPhillips	12/8/14	$13,500	(20%)	▪ 2015 production growth of ~3%, but expecting ~22% CAGR through 2017 ▪ Deferral of Permian, Niobrara, Montney and Duvernay operations
Apache	11/20/14	$4,000	(25%)	▪ 2015 N.A. onshore production growth of 8-12% (assuming $80 / $4 base case)
Denbury	11/14/14	$550	(50%)	▪ Flat 2015 production growth, but 60% dividend increase (assuming $75 / Bbl) ▪ Announced new 5-yr $3.5 B facility, $3.0 B borrowing base (Dec 10), ~2x increase
Halcón	11/10/14	$750 - $800	(30%)	▪ 2015 production growth of 15-20% ▪ 2015 budget reflects 6 rigs operated, 5 less than originally planned
Concho	11/5/14	$3,000	+15%	▪ 2015 production growth of 28-32%
Cabot Oil & Gas Corporation	10/24/14	$1,530 - $1,600	+2%	▪ 2015 production growth of >20%; capex allocated equally between EF and Marcellus

Source: *Jefferies, BAML, TPH*

2015 Energy Capital Markets Outlook (cont'd.)

- Although overall energy capital markets activity could be down in 2015 compared to record issuances in 2013 and 2014, high quality issuers are **continuing to pursue the MLP path** given the time frame required for the IPO process (6 to 9 months) and a continued **robust market for growth-oriented yield-oriented securities**
- The differences between MLPs and their Yieldco cousins will continue to narrow, as can be seen in **recent Yieldco IPO filings** and those in the planning stages
- The **second half of 2015 is expected to be more robust** in terms of energy capital markets activity
- Given market volatility, **private placements to institutional investors could increase** during the first half of the year (e.g., Eclipse Resources Corporation)
- Until greater stability returns to the capital markets, energy **companies will likely pursue joint venture-type** of financing activities (e.g., Linn Energy)
- **M&A activity could increase** as capital raising activities prove more difficult and revenues fall. Latham will address these trends in our upcoming M&A webcast on January 29th

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LATHAM & WATKINS LLP

The Directors Roundtable

Wednesday, June 10, 2015

Getting the Deal Done: Public and Private Company M&A in Today's Market

Charles E. Carpenter
Partner, Latham & Watkins LLP

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M&A Activity Overview

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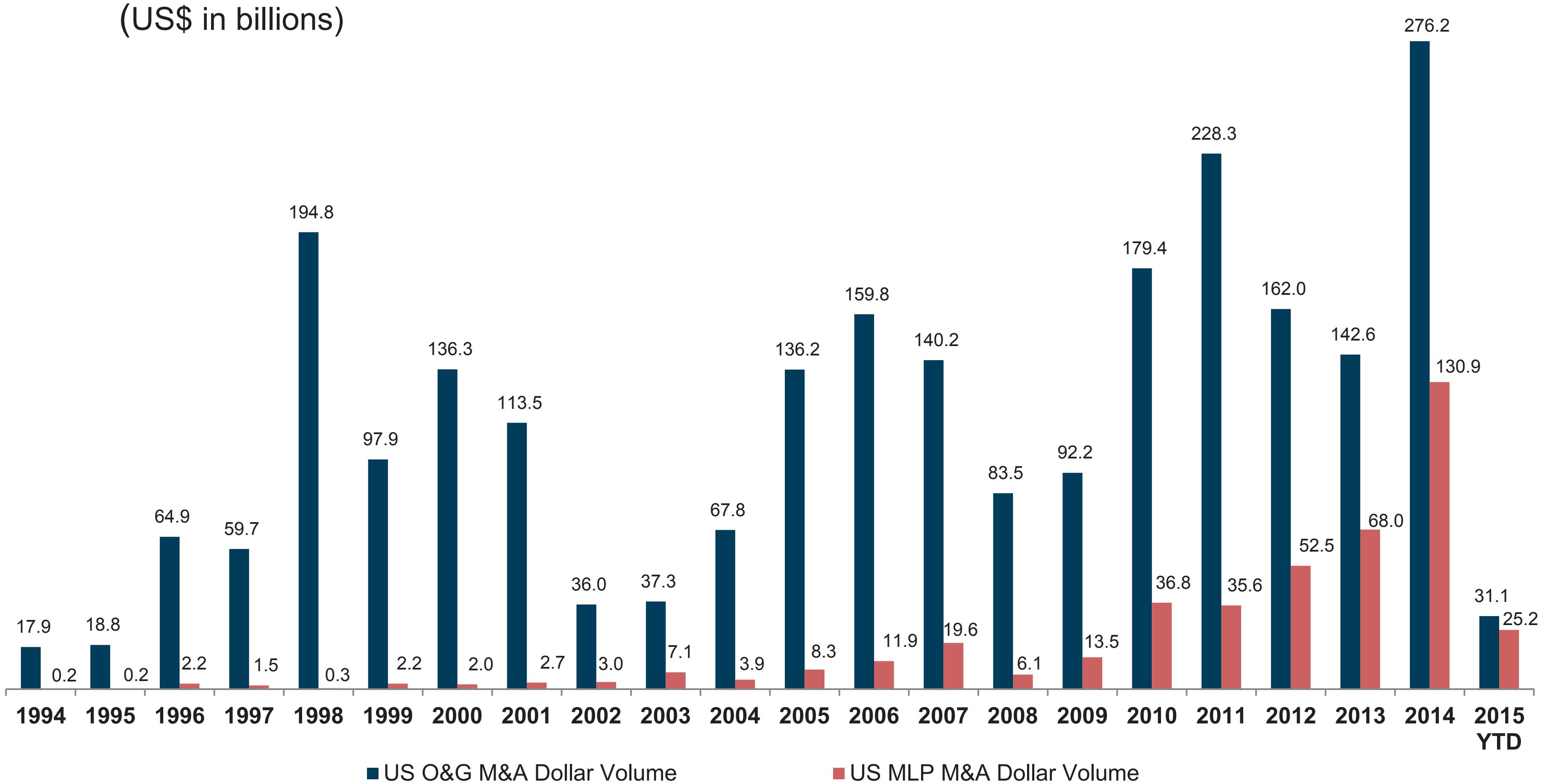
US Oil & Gas M&A Activity

ANNOUNCED US O&G M&A AND US MLP M&A TRANSACTIONS BY DEAL VALUE
(US$ in billions)

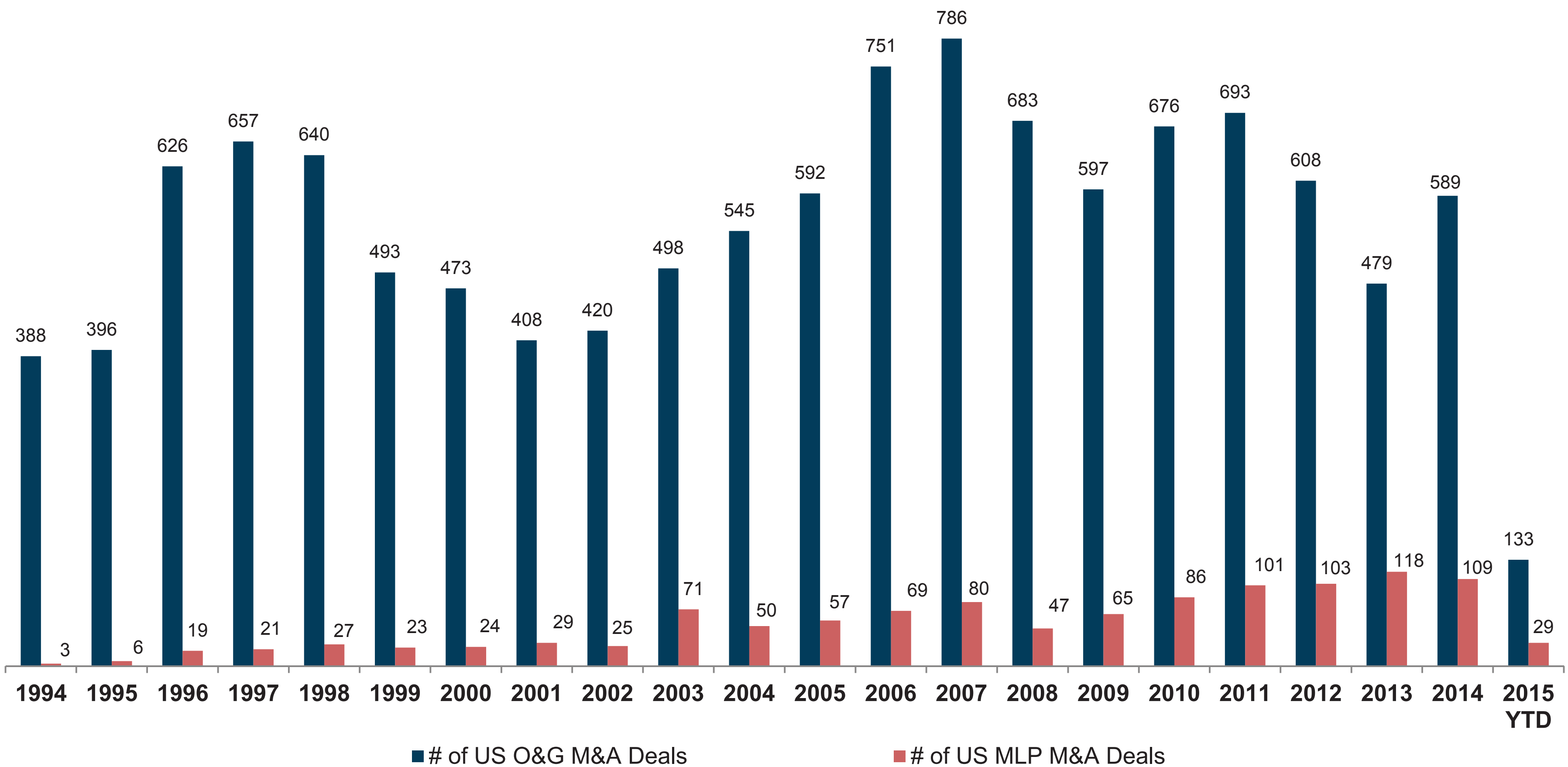


LATHAM&WATKINS LLP

Source: Thomson Financial, Capital IQ; as of 5/8/2015

US Oil & Gas M&A Activity

ANNOUNCED US O&G M&A AND US MLP M&A TRANSACTIONS BY DEAL COUNT



LATHAM&WATKINS LLP

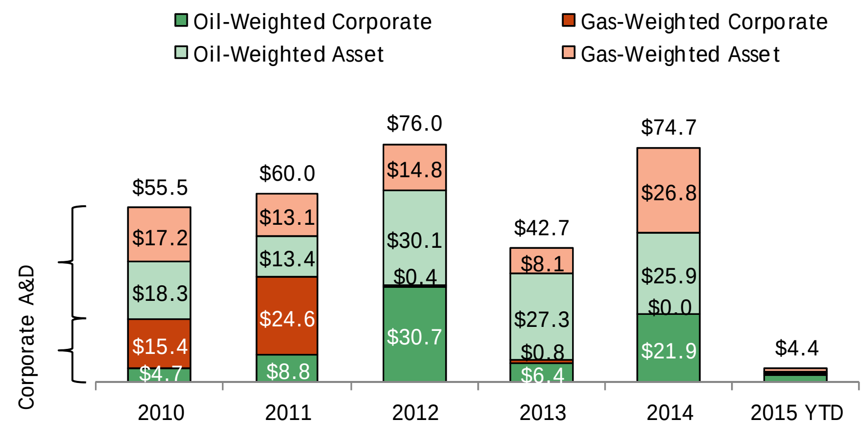
Source: Thomson Financial, Capital IQ; as of 5/8/2015

Upstream M&A Market Overview
Activity Has Slowed in Wake of Commodity Price Declines

Summary Observations

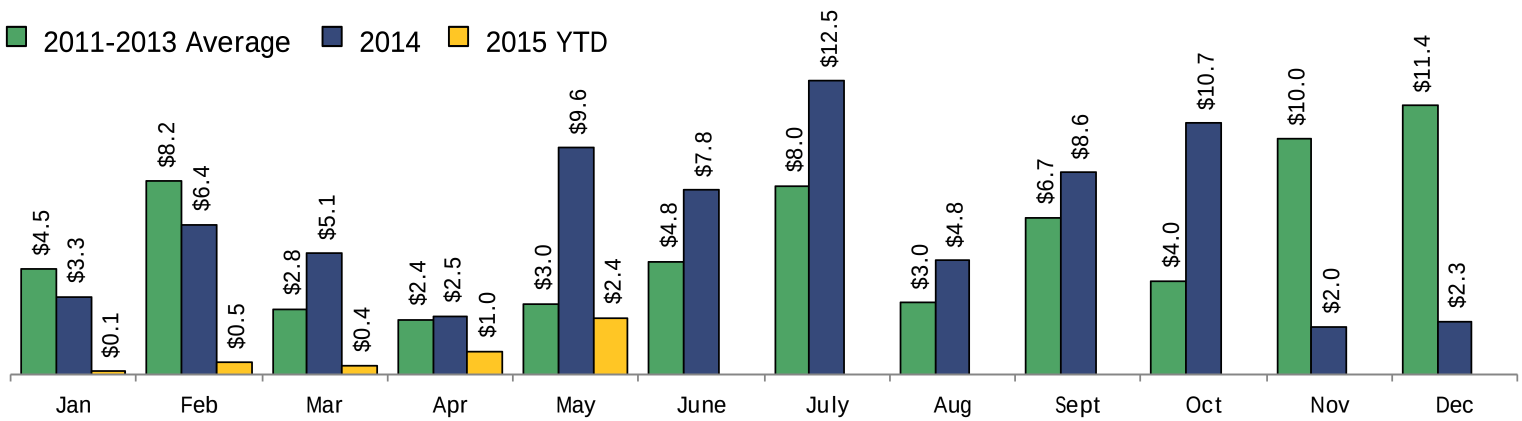
- 2014 deal volume in-line with 2013 driven primarily by Jan – Oct
  - Permian and Bakken were most active areas accounting for 35% of volumes
  - Corporate M&A accounted for 30% of strategic deal volume(1)
    - Baytex/Aurora $2.3 Bn (Feb)
    - EXXI/EPL $2.3 Bn (Mar)
    - WLL/KOG $6.0 Bn (Jul)
    - BBEP/QRE $2.9 Bn (Jul)
    - ECA/ATHL $7.1 Bn (Sep)
- Commodity price downturn resulted in decreased activity
  - Uncertainty generated bid-ask differentials for cash transactions
  - Many buyers seeking to preserve cash / liquidity
- Recent issuances have alleviated near term concerns

2014 Was an Active Year: *Annual Deal Volumes ($Bn)*



# of Deals:	2010	2011	2012	2013	2014	2015 YTD
	99	102	107	110	123	12

Volume Down Materially Since October: *Monthly Deal Volumes ($Bn)*



Sources: IHS Herold, PLS, Company press releases.
Note: M&A volumes include U.S. deals with announced transaction values >$50 million.
(1) Excludes private equity transactions.

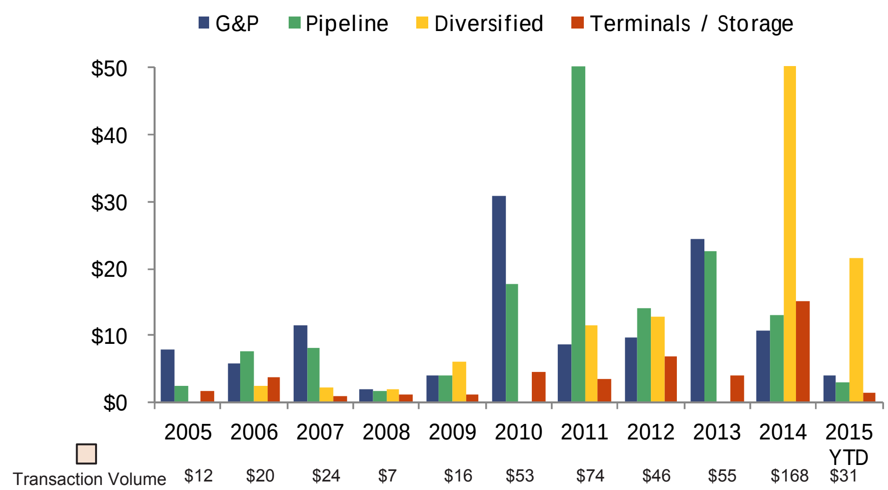
What About Midstream?
Activity Holding Up after Record 2014

($ in billions)

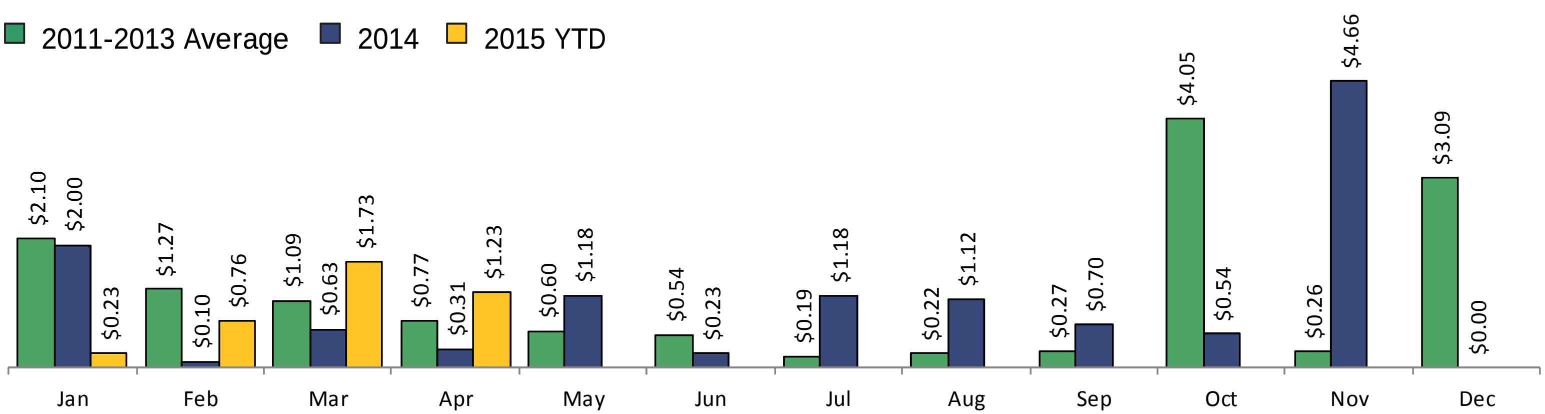
Summary Observations

- 2014 was the most active year on record for midstream M&A in terms of both deal volume and total transaction value
- While asset level activity remained robust, the continued increase in corporate level deals was the true driver for 2014's record activity
  - Over $100bn of transaction value from KMI buy-in and Williams / Access deals alone
- MLP mergers remained an appealing option for both acquirers and targets
  - Smaller MLPs continued to find that limited access to capital and relatively small scale made meaningful growth a perpetual challenge

Total Midstream Annual Activity(1)



Volumes Holding up Through the Commodity Price Downturn: *Monthly Deal Volumes ($Bn)*

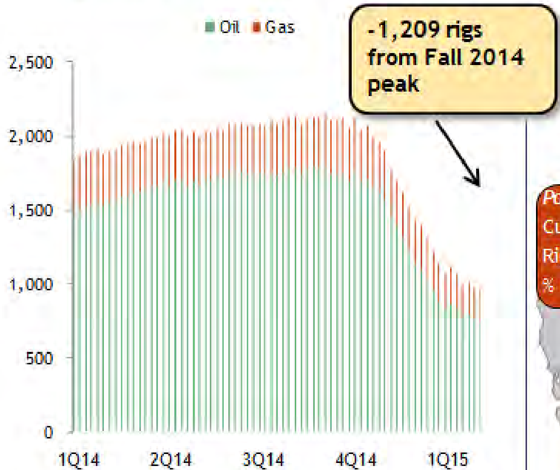


Source: Dealogic, IHS Herold

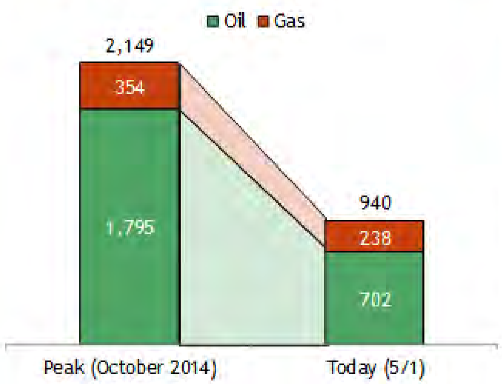
(1) Includes corporate and asset transactions. Deals with disclosed value of >$50 million. Reflects transactions where United States listed as primary country.

How Are the Various Areas Being Impacted?

Rig Count Throughout 2014

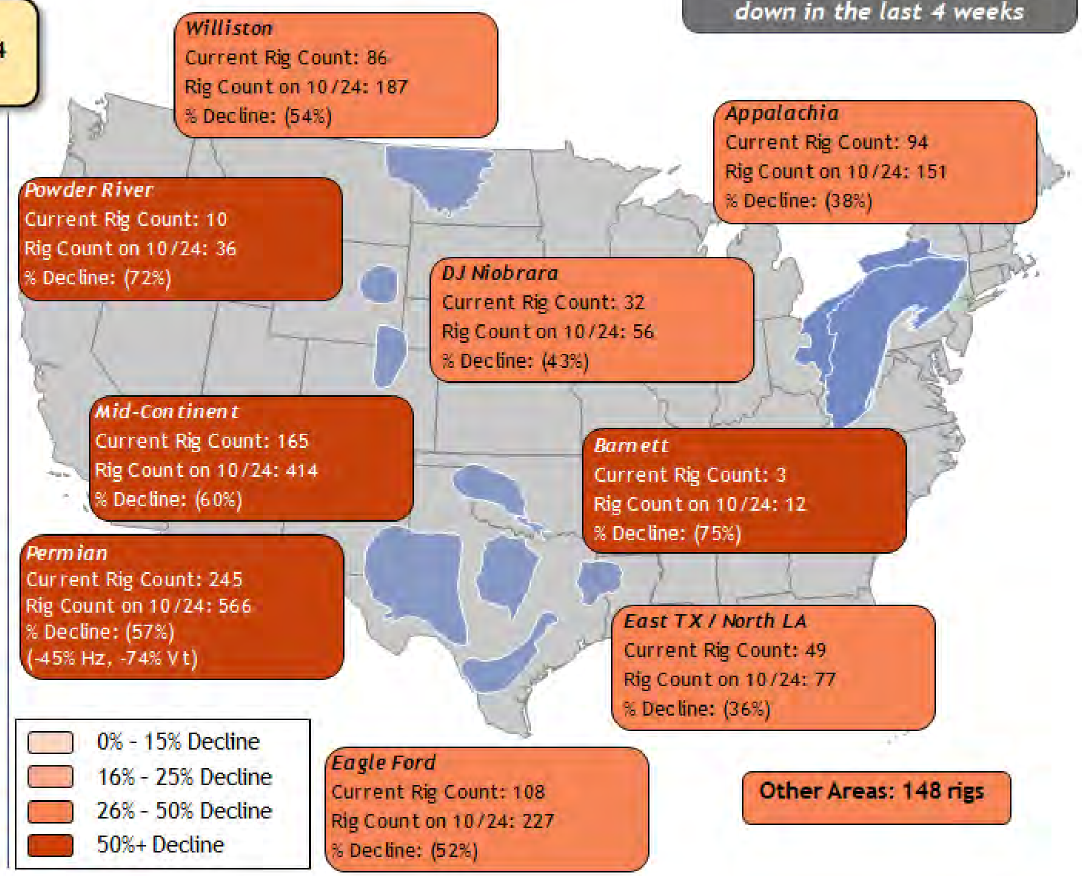


Peak Count vs. Today



Where Are Rigs Dropping?

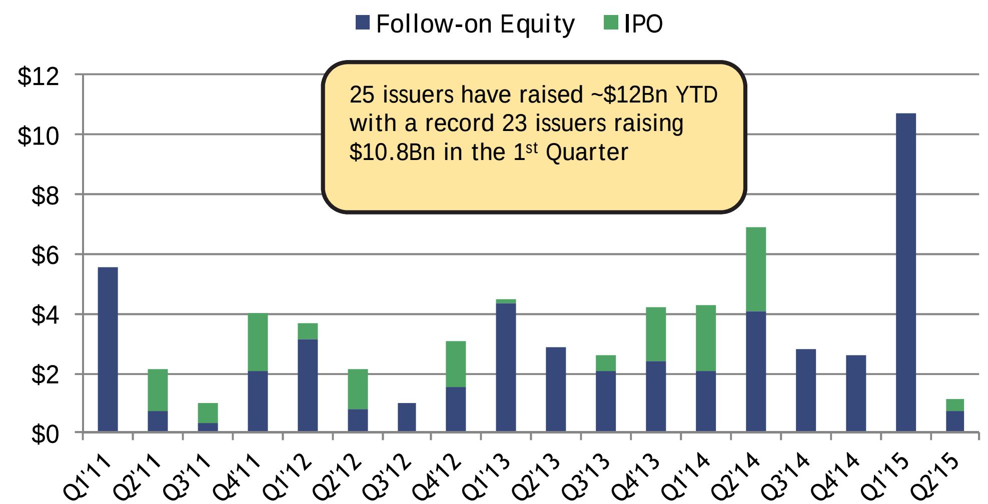
U.S. land rig count continues to decline with 78 rigs laid down in the last 4 weeks



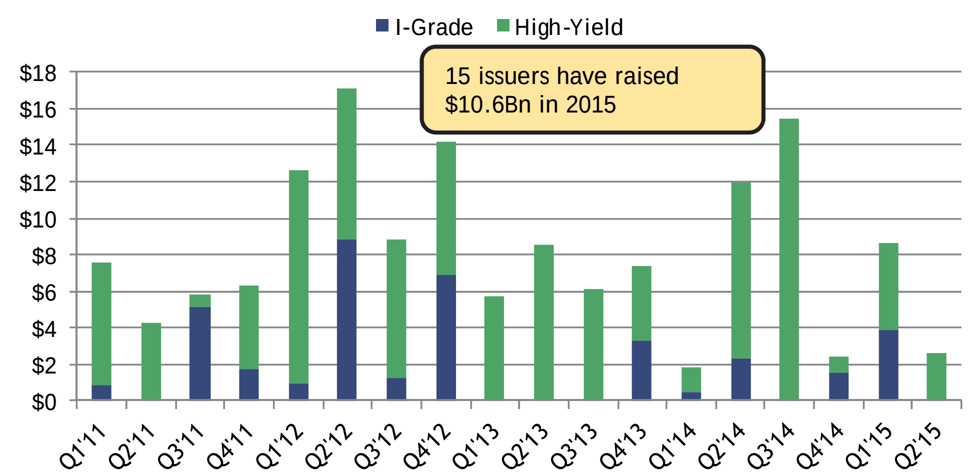
Source: RigData, TPH Research; as of 5/8/2015

Capital Markets Funding E&P Companies at Record Pace

- Trend of companies issuing equity despite depressed share prices
  - Repaying credit facilities to improve leverage
  - Replacing cash flow as hedges roll off
  - Improving liquidity to make opportunistic acquisitions
- Perception that companies with strong balance sheets positioning for potential acquisitions; investors reading as positive message
- Companies with weaker balance sheets looking past dilution to stabilize leverage in the short term



- High yield energy spreads have tightened ~200bps since mid-December and selective issuers are again accessing the market
  - The high yield market was effectively closed for upstream issuers in January
- Trend of companies issuing debt despite higher coupon rates than recent years
  - Repaying credit facilities to extend maturities
  - Short dated maturities with early refinancing options

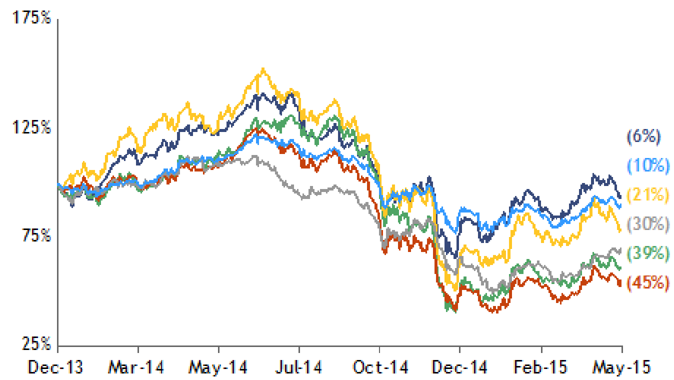


Source: Dealogic, Factset. Note: Includes U.S. offerings only.

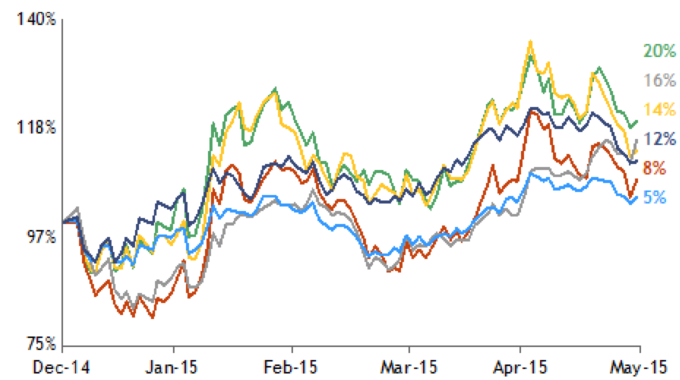
How Have Upstream Companies Performed?
Tracking Relative Performance & Valuation Among Major Areas

Appalachia Bakken Eagle Ford Oil Diversified Permian S&P 1500 E&P

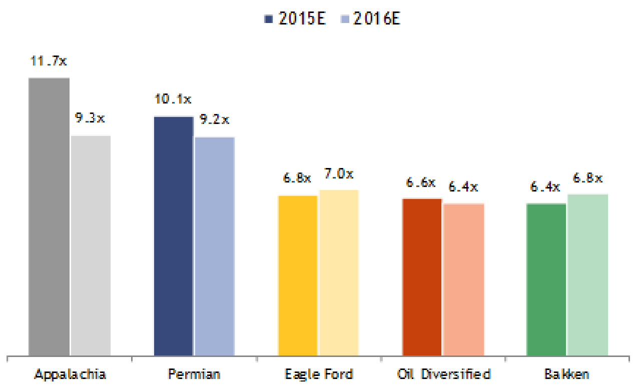
Equity Performance: 2014 - 2015 YTD



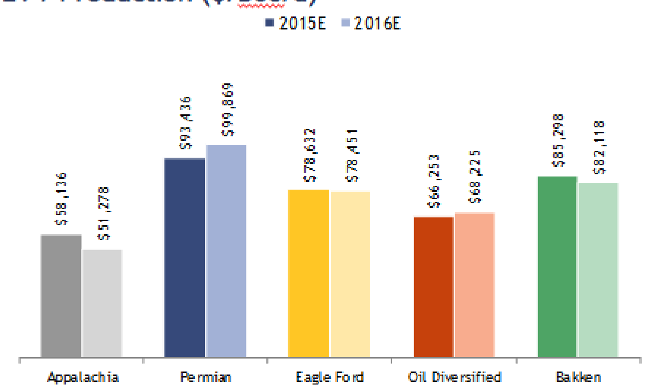
Equity Performance: 2015 YTD



EV / EBITDA



EV / Production ($/Boe/d)



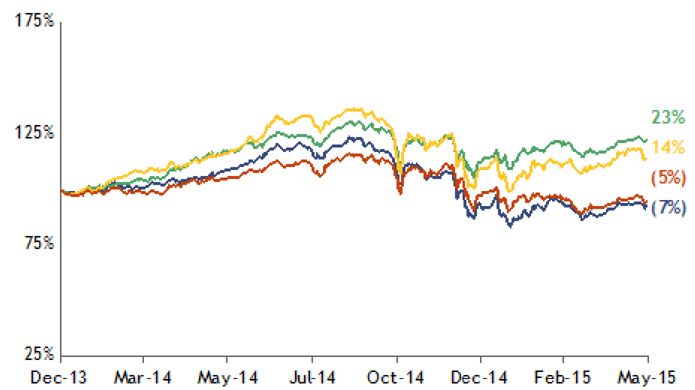
% Gas(1)	78%	34%	26%	36%	12%

Sources: Company filings, Company press releases and FactSet as of 5/8/2015.
Index constituents: Appalachia: AR, COG, CNX, ECR, EQT, GST, GPOR, RRC, REXX, RICE; Permian: AREX, CPE, XEC, CWEI, CXO, EGN, FANG, LPI, PE, PXD, RSPP; Bakken: CLR, NOG, OAS, TPLM, WLL); Eagle Ford: CRZO, MTDR, PVA, ROSE, SN; Diversified Oil: BBG, BCEI, CRC, DNR, EPE, HK, JONE, MHR, MPO, NFX, PDCE, QEP, REN, SD, SM.
(1) Based on 1P reserves.

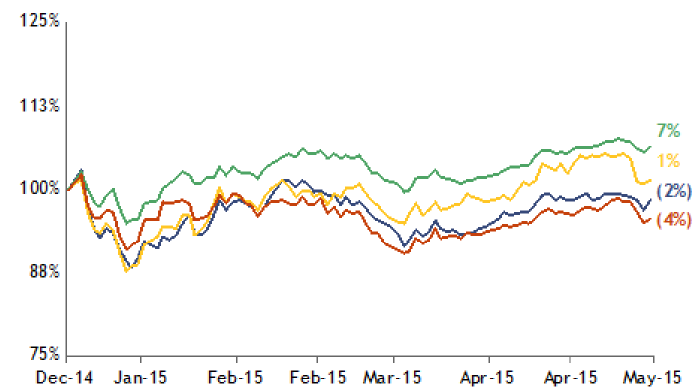
How Have Midstream Companies Performed?
Tracking Relative Performance & Valuation Among Major Areas

Transportation & Logistics | Gathering & Processing | GPs | Alerian MLP Index

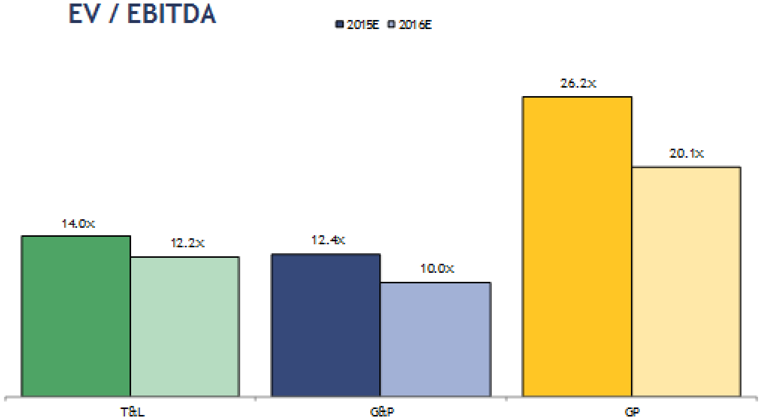
Equity Performance: 2014 - 2015 YTD



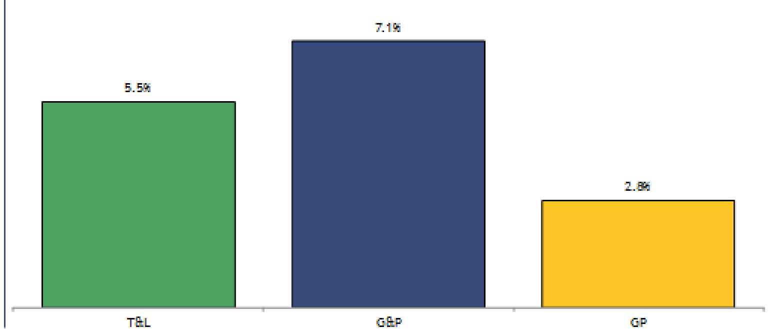
Equity Performance: 2015 YTD



EV / EBITDA



Current Yield



Sources: Company filings, Company press releases and FactSet as of 5/8/2015.
Index constituents: Transportation & Logistics: BWEP, CQP, NKA, TEP, TCP, WPZ, BKEP, GEL, JPEP, PAA, RRMS, SHLX, SXL, ARCX, DM, MMLP, NS, PBFX, SRLP, TLLP, TLP, VLP, WNRL, WPT, USDP, VTTI, BPL, CAPL, DKL, GLP, HEP, MMP, MPLX, PSXP, SGU, SUN, EEP, OKS, SEP, EPD and ETP; Gathering & Processing: : AM, APL, AMID, ACMP, CMLP, CNNX, DPM, ENLK, FISH, MEP, MWE, NGLS, QEPM, RMP, RGP, SMLP, SXE and WES; GPs: AHGP, CEQP, ETE, ENLC, NSH, OKE, PAGP, SEMG, TRGP and WGP.

M&A Activity – E&P

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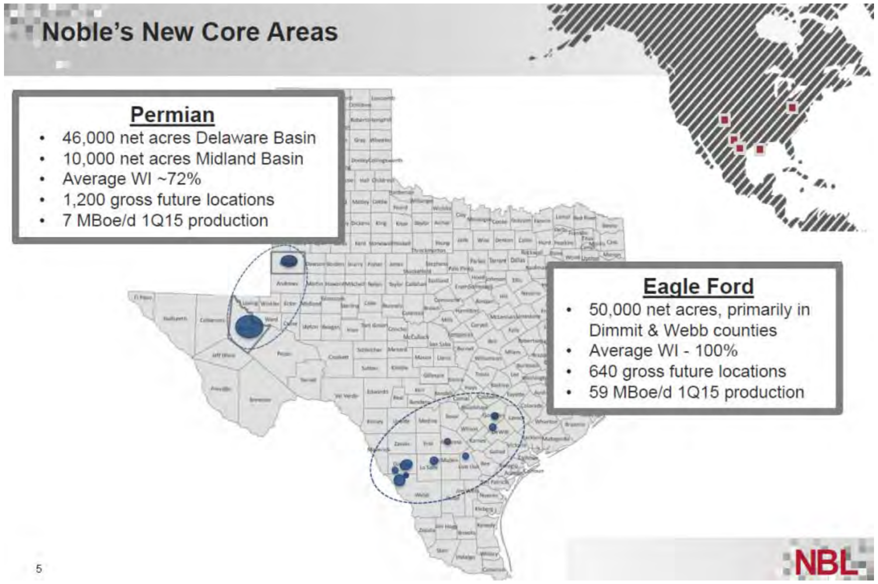
Noble/Rosetta
m&a case study

US$2.1 billion
Signed May 2015

TRANSACTION OVERVIEW

ACQUIRER	Noble Energy
TARGET	Rosetta Resources
CONSIDERATION	Noble Energy will acquire all of the common stock of Rosetta in an all-stock transaction valued at $2.1 billion, plus the assumption of Rosetta's net debt of $1.8 billion
TRANSACTION VALUE	US$2.1 billion
DATE SIGNED	May 10, 2015

ADDITIONAL INSIGHT



STRATEGIC HIGHLIGHTS

- **Material U.S. Onshore Position:** Establishes footprint in Eagle Ford and Permian, complementing the DJ Basin and Marcellus; Premier U.S. resource plays with attractive economics
- **Significant Benefit to Shareholders:** Transaction immediately accretive to per share production, reserves, earnings and cash flow; All-stock transaction allows all shareholders to participate in substantial upside
- **Positioned for Growth:** Substantial production growth within cash flow; Potential to expand Eagle Ford and Permian through bolt-on opportunities
- **Greater Portfolio Balance:** Material positions with running room; enhances regional and commodity diversity; Strengthens global portfolio with the addition of over 1,800 gross liquids-rich locations
- **Synergies:** Integration approach maintains momentum in the Eagle Ford and Permian; Leverages technical expertise across four U.S. areas
- **Strong Balance Sheet:** Remain committed to investmetn grade rating; Strong financial position and robust liquidity

Source: Company Investor Presentation

Royal Dutch Shell PLC/BG Group PLC
m&a case study

BG GROUP

US$70 billion
Signed April 2015

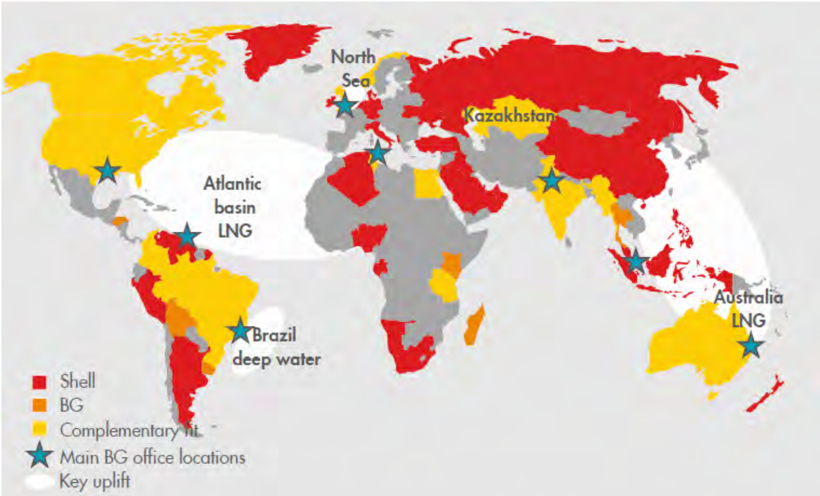
TRANSACTION OVERVIEW

ACQUIRER	Royal Dutch Shell PLC
TARGET	BG Group PLC
CONSIDERATION	0.4454 Shell B shares and 383p in cash per BG share Represents a value per BG ordinary share of 1350p, a premium of 52% Values BG equity at £47.0 billion BG shareholders to own 19% of Shell Transaction underpinned by intrinsic asset value of BG Mildly accretive to earnings per share in 2017 and strongly accretive from 2018 Accretive to cash flow from operations per share from 2016
TRANSACTION VALUE	US$70 billion
DATE SIGNED	April 8, 2015

STRATEGIC HIGHLIGHTS

- Accelerates deep water + LNG strategy
- Accretive to earnings and cash flow per share
- Complementary portfolios: synergy opportunity
- Enhanced portfolio: springboard to high-grade Shell + BG
- Improved cash flow enhances future dividends + buyback potential

ADDITIONAL INSIGHT



- Enhanced position in our growth priorities: LNG + deep water
- Complementary fit in 15 countries
- ~$2.5 billion/year synergies* identified + further potential

Source: *Company Investor Presentation*

ENCANA CORPORATION / ATHLON ENERGY INC.
m&a case study

US$7.1 billion
Closed November 2014

TRANSACTION OVERVIEW

ACQUIRER	Encana Corporation ("Encana")
TARGET	Athlon Energy Inc. ("Athlon")
SUMMARY	Acquisition of all issued and outstanding Athlon common shares at a price per share of $58.50 and assumption of Athlon's senior notes Structured as an all cash tender offer under Delaware's Section 251(h)
TRANSACTION VALUE	US$7.1 billion
DATE CLOSED	November 13, 2014

STRATEGIC HIGHLIGHTS

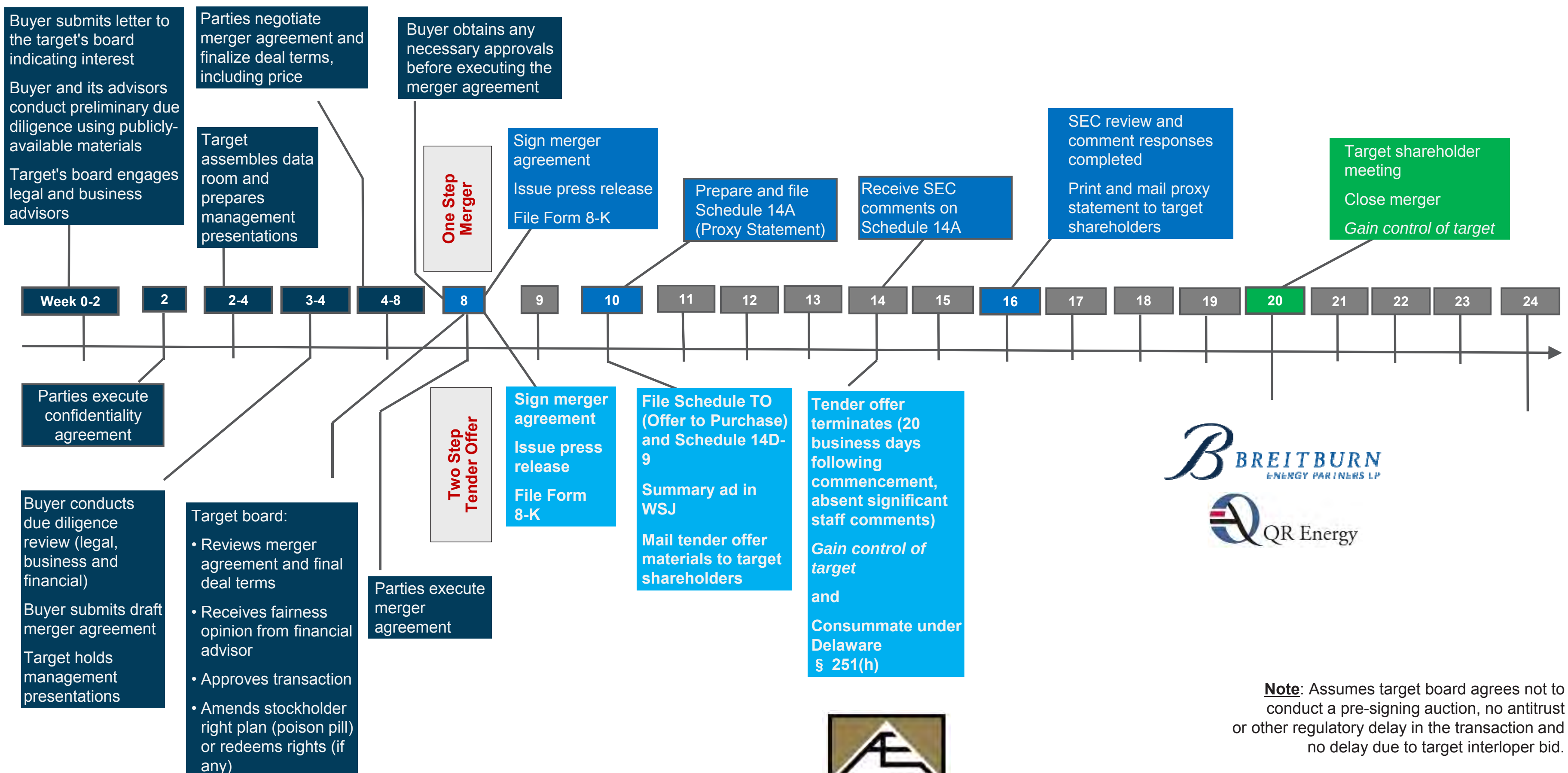
- Acquisition in core of North America's largest unconventional oil play
- Additional geographic diversity to Encana asset portfolio
- Accelerates rebalancing of Encana portfolio by two years
- Lower margin natural gas production being replaced with higher margin oil and NGLs
- Immediately accretive to cash flow per share
- Assets expected to become free cash flow positive in 2016
- Close proximity to market & competitive infrastructure environment contribute to top tier netbacks
- Large contiguous acreage blocks in core of basin viewed as highly conducive to further downspacing

ADDITIONAL INSIGHT

- 140,000 net acres
- 1,121 producing vertical wells, 17 horizontal producing wells as of Q2 2014
- Approximately 30,000 boe/d (~80% liquids) production as of June 2014
- 173MMboe in net proven reserves as of YE2013
- ~ 3.0 billion boe resource potential (net)
- ~ 5,000 potential gross horizontal well locations
- Large contiguous blocks acreage blocks in the core of the basin

Source: Company Investor Presentation

Transaction Structures / Illustrative Timeline (US process)



Note: Assumes target board agrees not to conduct a pre-signing auction, no antitrust or other regulatory delay in the transaction and no delay due to target interloper bid.

BREITBURN ENERGY PARTNERS, L.P. / QR ENERGY, L.P. *m&a case study*

BREITBURN ENERGY PARTNERS LP

QR Energy

US$3 billion

Closed November 2014

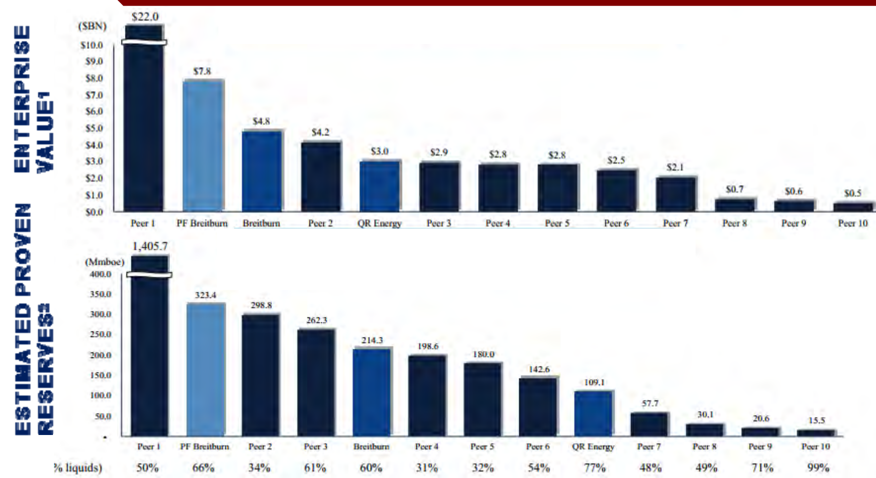
TRANSACTION OVERVIEW

ACQUIRER	Breitburn Energy Partners, L.P. ("BBEP")
TARGET	QR Energy, L.P. ("QRE")
SUMMARY	QRE common and Class B unitholders receive BBEP common units at an exchange ratio of 0.9856, subject to a maximum of 72,001,686 new Breitburn common units issued (valued at US$22.48 per QRE unit)
PREMIUM	~19%, based on July 23, 2014 closing prices
TRANSACTION VALUE	US$3 billion (including assumed net debt)
DATE SIGNED	July 23, 2014

STRATEGIC HIGHLIGHTS

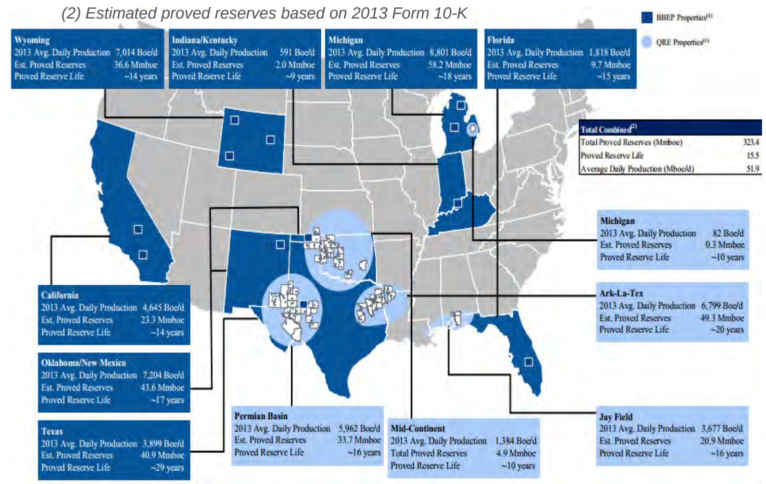
- MLP will have high quality combined portfolio, with high margin oil-weighted properties (67% liquids)* and over 15-year proved reserve life
- Substantial scale advantages, with combined reserves of 323Mmboe and estimated combined production of 57.3 Mboepd*
- Provides a broad inventory of low risk development opportunities
- Significant synergies and enhanced access to capital and acquisition opportunities

ADDITIONAL INSIGHT



(1) Enterprise value based on unit prices as of 07/23/14

(2) Estimated proved reserves based on 2013 Form 10-K



LATHAM&WATKINS LLP

Source: Company Investor Presentation

SABINE/FOREST
m&a case study

sabine oil & gas

Confidential
Closed December 2014

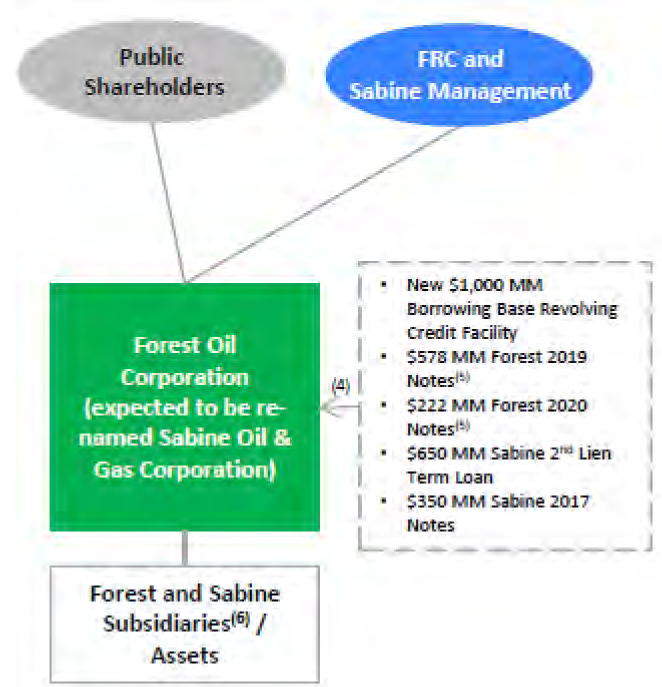
TRANSACTION OVERVIEW

ACQUIRER	Sabine Oil & Gas LLC ("Sabine")
TARGET	Forest Oil Corp. ("Forest")
CONSIDERATION	Certain Legacy Sabine Investors contributed the equity interests in Sabine O&G to Forest Oil Corporation (renamed Sabine Oil & Gas Corporation). In exchange, the Legacy Sabine Investors received shares of Sabine common stock and Sabine Series A preferred stock collectively representing approximately a 73.5% economic interest in Sabine and 40% of the total voting power in Sabine. Holders of Sabine common stock immediately prior to the closing continued to hold their Sabine common stock following the closing, which immediately following the closing represented approximately a 26.5% economic interest in Sabine and 60% of the total voting power in Sabine.
DATE CLOSED	December 16, 2014

STRATEGIC HIGHLIGHTS

- Revised transaction terms require no refinancing of Forest and Sabine outstanding bonds, reducing transaction costs and interest expense by more than $100 million over the next three years
- Complementary acreage positions create an upstream industry leader in East Texas

ADDITIONAL INSIGHT



Source: Company Investor Presentation

LATHAM & WATKINS LLP

M&A Activity – MLPs

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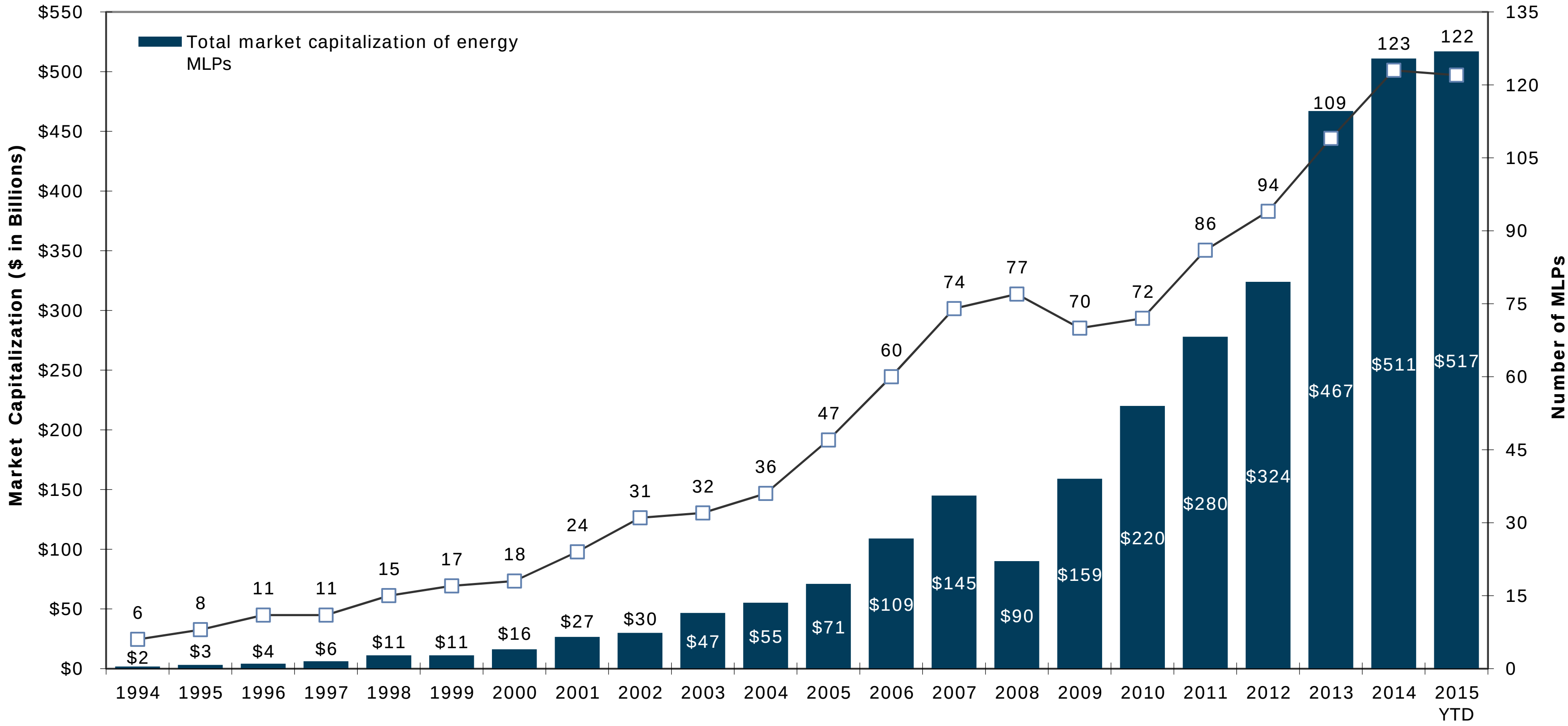
Evolution of the MLP Market



LATHAM&WATKINS LLP

Source: FactSet, National Association of Publicly Traded Partnerships, and Wells Fargo Securities, LLC; as of 5/8/2015

Consolidation of Public Companies in the Oil & Gas Space – MLPs

MLPs

- Pace of master limited partnership (MLP) acquisition activity has increased over the past several years as size and number of MLPs have grown
- A number of MLPs have significantly increased the size and scope of their operations through public company M&A activity
- MLPs have not only been buyers - on occasion, MLPs have been the targets of other third party acquisition activity
- Current MLP trend: MLPs in the high splits to buy MLPs below the high splits in order to supercharge accretion to the general partner (GP)
- Trend in reverse mergers proves to be solution for a GP to address a growth challenged LP
- Scale and improving asset profile and access to capital a factor in consolidation of E&P MLPs

BUYER	TARGET	VALUE	ANNOUNCEMENT	C-CORP	MLP	C-CORP	MLP
Vanguard Natural Resources LP	LRR Energy LP	US$539 million	May 2015		✓		✓
Crestwood Equity Partners LP	Crestwood Midstream Partners	US$3.5 billion	May 2015		✓		✓
Energy Transfer Partners, LP	Regency Energy Partners LP	US$18,8 billion	January 2015		✓		✓
Williams Partners LP	Access Midstream Partners LP	US$50 billion	October 2014		✓		✓
Tesoro Logistics LP	QEP Resources Inc.	US$2.5 billion	October 2014		✓		✓
Westmoreland Coal Company	Oxford Resource Partners LP	US$30 million	October 2014		✓		✓
Targa Resources Corp.	Atlas Energy, LP	US$1.9 billion	October 2014		✓		✓
Enterprise Products Partners LP	Oiltanking Partners LP	US4.41 billion	October 2014		✓		✓
Breitburn Energy Partners	QR Energy	US$1.6 billion	August 2014		✓		✓
Kinder Morgan, Inc	EPB, KMP, KMR	US$70 billion	August 2014	✓			✓
The Williams Companies, Inc	Access Midstream Partners LP	US$5.9 billion	June 2014	✓			✓
Koch Industries	Petrologistics	US$1.8 billion	May 2014	✓			✓
Energy Transfer Partners, LP	Susser Holdings	US$1.8 billion	April 2014		✓	✓(1)	

Consolidation of Public Companies in the Oil & Gas Space – MLPs (cont.)

MLPs

- With few notable exceptions, the average MLP is relatively small when measured by market capitalization

SIZE OF MLP	NUMBER OF MLPS
Less than US$500 million	20
US$500 million to US$1 billion	25
US$1 billion to US$2 billion	24
US$2 billion to US$3 billion	13
US$3 billion to US$5 billion	12
More than US$5 billion	25

- Smaller MLPs that are unaffiliated with a large sponsor may find it more difficult to raise cash for future growth and, more generally, to compete against their larger and more well-capitalized peers
- Considering all factors, the MLP market is ripe for further consolidation

DEVON ENERGY CORPORATION / CROSSTEX ENERGY, INC.
m&a case study

devon CROSSTEX

US$4.8 billion
Closed March 2014

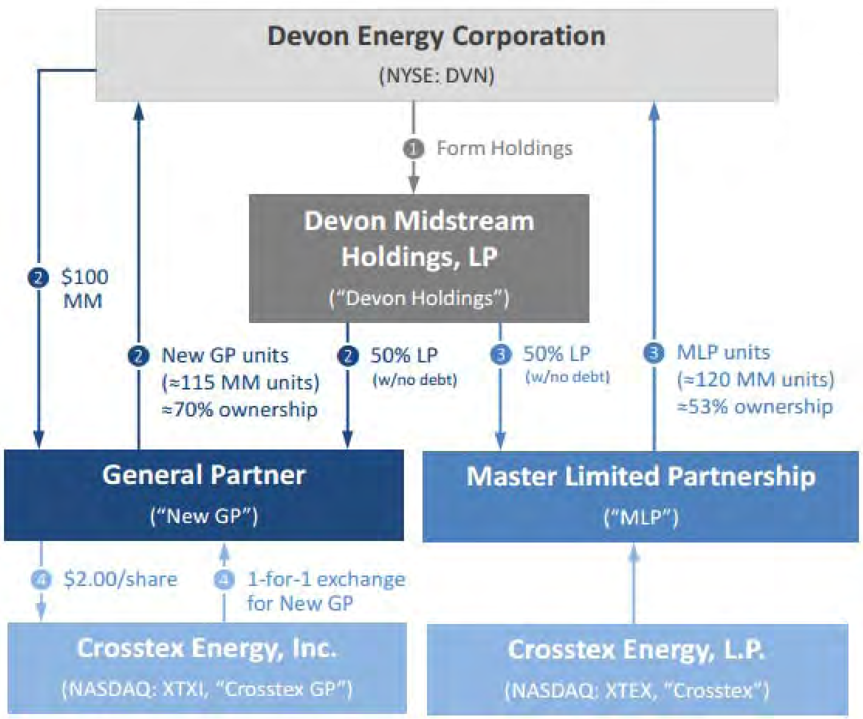
TRANSACTION OVERVIEW

ACQUIRER	Devon Energy Corp. ("Devon")
TARGET	Crosstex Energy Inc. and Crosstex Energy L.P. (collectively "Crosstex")
CONSIDERATION	Cash ($2.00/share) and equity (exchange ratio: 1.000 common unit of New Public Rangers, L.L.C., a newly formed holding company wholly-owned by Devon)
TRANSACTION VALUE	US$4.8 billion
DATE CLOSED	March 7, 2014

STRATEGIC HIGHLIGHTS

- Immediate value accretion for both Devon and Crosstex equity holders as both MLP and GP will benefit from increased capacity to pay higher cash distributions and dividends to holders
- Increased scale and diversification as combination creates a geographically diverse portfolio of midstream assets, a broad range of predominately fee-based services and an increasing focus on liquids-based growth projects
- Strong sponsorship through Devon's majority ownership, as Devon will dedicate nearly 800,000 net acres to the New Company in areas where it expects to develop liquids-based upstream opportunities
- Enhanced financial strength as the New Company's investment-grade credit profile will provide access to low-cost capital
- Enhanced growth outlook with the New Company positioned to capitalize on opportunities supporting Devon's upstream growth needs

ADDITIONAL INSIGHT



Source: Company Investor Presentation

WILLIAMS COMPANIES OF GP & LP / ACCESS MIDSTREAM PARTNERS, L.P.
m&a case study

US$5.9 billion
Closed July 2014

TRANSACTION OVERVIEW

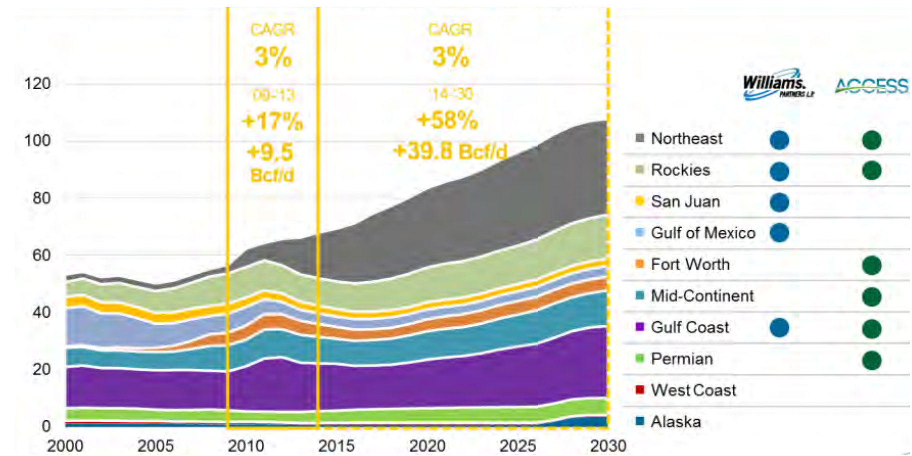
ACQUIRER	The Williams Companies, Inc. ("WMB")
TARGET	Access Midstream Partners, L.P. ("ACMP")
CONSIDERATION	WMB acquired 50% GP interest and 55.1 million LP units in ACMP, held by Global Infrastructure Partners II, for US$5.995 billion cash
TRANSACTION VALUE	US$5.9 billion
DATE CLOSED	July 1, 2014

STRATEGIC HIGHLIGHTS

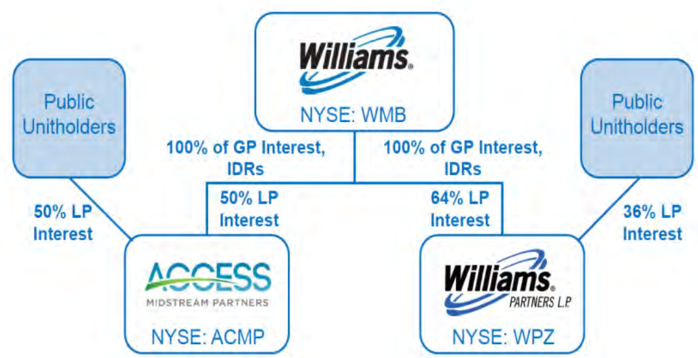
- Accelerates transformation of WMB to a pure-play GP holding company structure
- Expected to increase fee-based revenues to more than 80% of gross margin
- ACMP's high-growth business expected to drive attractive growth in its GP / IDR and LP cash distributions to WMB shareholders
- Following the acquisition, Williams has proposed a merger of Williams Partners L.P. ("WPZ") with and into ACMP, which would combine the stability of ACMP's current contract portfolio with WPZ's enhanced long-term growth opportunities and development expertise
- Strengthens position as the premier natural gas infrastructure player in the U.S., with gas gathering volumes directly operated doubling

ADDITIONAL INSIGHT

NATURAL GAS – US SUPPLY GROWTH (Bcf/d)



Source: *Wood Mackenzie, North America Gas Service*
Note: Excludes Canadian import volumes of approximately 4.5 Bcf/d (at 2014 levels)



Source: *Company Investor Presentation*

ENERGY TRANSFER PARTNERS, L.P. / SUSSER HOLDINGS CORPORATION
m&a case study

ENERGY TRANSFER

SUSSER Holdings Corporation

US$1.8 billion
Closed August 2014

TRANSACTION OVERVIEW

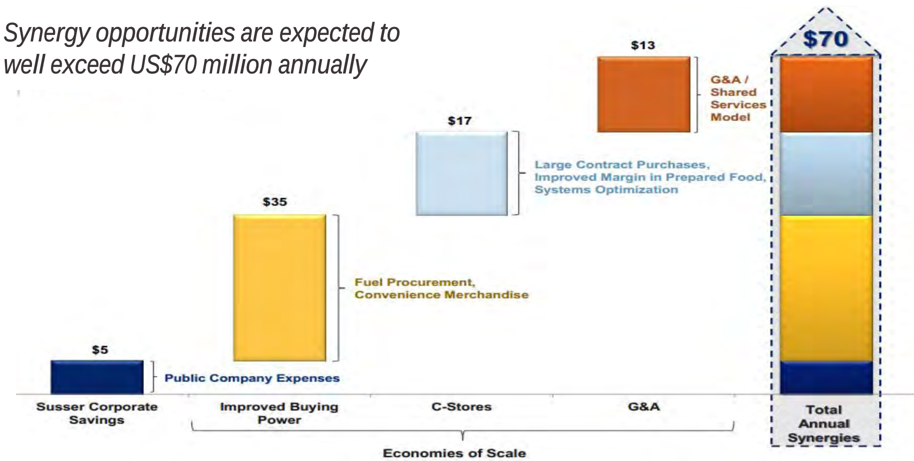
ACQUIRER	Energy Transfer Partners, L.P. ("ETP")
TARGET	Susser Holdings Corporation ("SUSS")
ACQUISITION SUMMARY	ETP acquired 100% of SUSS for US$80.25 per share, with consideration equally split between approximately US$895 million of cash and 16.2 million ETP common units
DROPDOWN SUMMARY	Over time, ETP's retail assets to be contributed to Susser Petroleum Partners LP ("SUSP") in exchange for new SUSP common units and cash
GP TRANSACTION SUMMARY	ETP to distribute GP and IDR interests in SUSP to ETE in exchange for ETP common units held by ETE
TRANSACTION VALUE	US$1.8 billion
DATE CLOSED	August 29, 2014

STRATEGIC HIGHLIGHTS

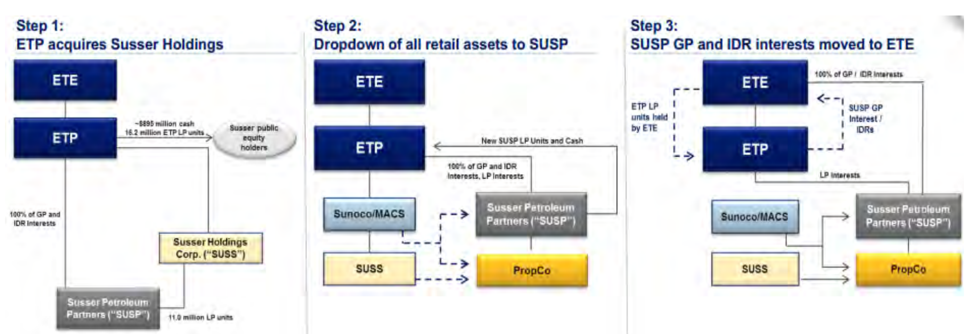
- Significantly diversifies ETP's retail business geographically and by source of revenue
- Expected to be immediately accretive to ETP
- Dropdowns to accelerate IDR cashflow into high splits, which will increase cash flow to ETP and enhance total GP and IDR valuation
- Significant operating, procurement, capital and systems synergies

ADDITIONAL INSIGHT

Synergy opportunities are expected to well exceed US$70 million annually



Illustrative Transaction Summary



Source: Company Investor Presentation

KINDER MORGAN, INC.
m&a case study

KINDER MORGAN

US$76 billion
Closed November 2014

TRANSACTION OVERVIEW

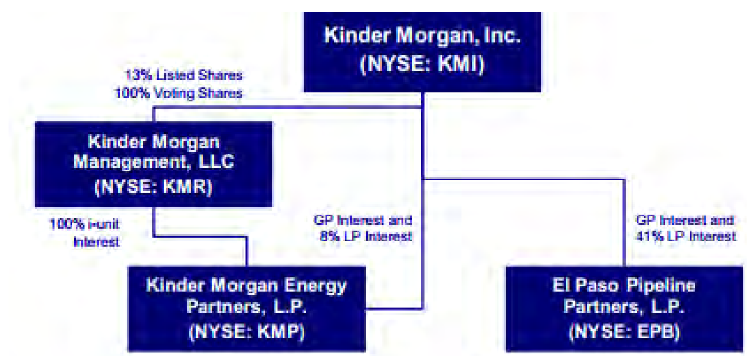
ACQUIRER	Kinder Morgan, Inc. ("KMI")
TARGET	1. El Paso Pipeline Partners, LP ("EPB") 2. Kinder Morgan Energy Partners, L.P. ("KMP") 3. Kinder Morgan Management, LLC ("KMR")
EPB ACQUISITION	EPB unitholders will receive 0.9451 KMI shares and US$4.65 in cash for each EPB unit, resulting in a price of US$38.79 per unit
PREMIUM	15.4% (based on the Aug. 8, 2014 closing prices)
KMP ACQUISITION	KMP unitholders will receive 2.1931 KMI shares and $10.77 in cash for each KMP unit, resulting in a price of US$89.98 per unit
PREMIUM	12% (based on the Aug. 8, 2014 closing prices)
KMR ACQUISITION	KMR shareholders will receive 2.4849 KMI shares for each share of KMR, resulting in a price of US$89.75 per share
PREMIUM	16.5% (based on the Aug. 8, 2014 closing prices)
CONSIDERATION	(1) US$40 billion KMI equity (2) US$4 billion cash (commitment letter for full amount) (3) US$27 billion of assumed debt
TRANSACTION VALUE	~US$76 billion
DATE CLOSED	November 26, 2014

STRATEGIC HIGHLIGHTS

- Makes KMI the third largest energy company in North America, with estimated combined pro forma enterprise value of ~US$140 billion*
- KMI will have the largest natural gas network in North America, with KMI owning or having an interest in ~68,000 miles of natural gas pipeline
- KMI will be the largest independent transporter of petroleum products and the largest transporter of CO2 in North America, based on 2014 budgeted volumes
- Simplifies KMI's structure, creating a single public equity class
- Lowers cost of capital and creates a more competitive acquisition currency distributable cash flow

ADDITIONAL INSIGHT

How the Math Works



Simplified Public Structure

Source: Company Investor Presentation

Third Parties Purchasing MLP General Partners

Third Party Purchases of MLP General Partners

Structural Approaches

- Announce the acquisition of the MLP's general partner with the intention to acquire the underlying MLP, without proposing a purchase price for the MLP (Tesoro Logistics/QEP Resources).
- Announce the acquisition of the MLP's general partner with the intention to acquire the underlying MLP, while publicly proposing a purchase price for the MLP (Enterprise Partners/Oiltanking Partners; Williams Companies/Access Midstream; and, in July of this year, NGL Energy Partners/Transmontaigne Partners).
- Announce the acquisition of the MLP's general partner simultaneously with the announcement of the acquisition of the underlying MLP (Targa Resources/Atlas Energy).

Strategic Highlights

- Growing GP / IDR cash distributions as MLPs experience growth
- Significant tax benefits
- Ability to acquire multiple MLPs in diversified sectors (e.g., Energy Transfer Equity)
- No or limited capital contribution requirements
- Ability to control MLP growth strategy

Sponsors Continue to Support MLP Growth Through Drop Down Transactions

Select Transactions

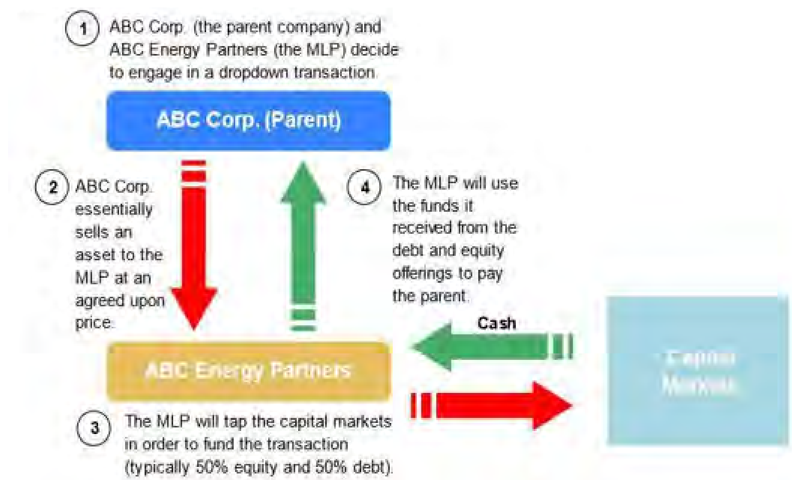
- Tallgrass Energy Partners acquired 33.3% interest in Tallgrass Pony Express Pipeline, LLC from a wholly owned subsidiary for US$600 million on September 8, 2014
- Tesoro Logistics LP acquired three marketing terminals and a storage facility owned by Tesoro Corporation and its subsidiaries for US$241 million on July 1, 2014
- Valero Energy Partners acquired the McKee Crude System, the Three Rivers Crude System and the Wynnewood Products System from Valero Energy Corporation for US$154 million on July 1, 2014
- Phillips 66 Partners acquired the Gold Product Pipeline System and the Medford Spheres from Phillips 66 for $700 million on March 1, 2014

Strategic Highlights

- Provides cash flow growth, fueling higher distributions
- Allows for separation of non-core assets from Sponsor's core business
- Interests remain aligned between Sponsor and MLP post-drop down

How Dropdowns Work

A hypothetical and typical example (situations may vary)



Source: Morgan Stanley

M&A Activity – Oilfield Services

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C&J Energy Services to Merge with Nabors' Completion & Production Businesses

C&J Energy Services

NABORS

Completion / Production Businesses

US$2.7 billion

Closed March 2015

Transaction Overview

- On June 24, 2014, C&J Energy Services, Inc. ("C&J") announced that it had entered into a definitive agreement to merge with Nabors Industries' ("Nabors") completion and production businesses
- The pro forma Company ("New C&J"), will retain the C&J Energy Services name, will be headquartered in Bermuda with corporate offices in Houston, and is expected to be listed on the NYSE under the ticker CJES
- Total consideration to Nabors of $2.86 billion
  - ~62.5 million New C&J common shares
  - ~$940 million cash consideration, to be paid from proceeds of a public debt placement by the combined company
- C&J stockholders to receive one share of New C&J common stock for each share of C&J common stock
- The transaction is expected to be tax free to C&J stockholders
- As a result of the combination, C&J stockholders will own ~47% of New C&J, and Nabors will own ~53%
- The existing C&J management team will run New C&J
- The new C&J board will consist of seven members, with CEO Josh Comstock serving as Chairman
- **Tudor, Pickering, Holt & Co. advised the Board of Directors of C&J and provided a fairness opinion**
- On February 9, 2015 C&J announced revised terms to the merger
  - The cash portion of the transaction would be reduced by $250 million to $688 million
  - This brings the purchase price, assuming the C&J June 24, 2014 share price, to ~$2.7 billion
- The transaction closed in March 2015.

Source: Company filings, press releases.

(1) LTM as of 3/31/2014.

Selected Transaction Rationale

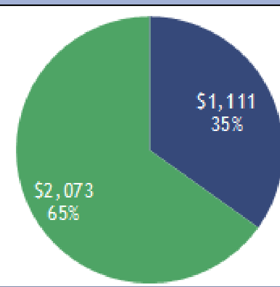
- Creates a leading diversified completion and production services provider
- Ability to capitalize on attractive market dynamics and improved activity levels in completions
- Diversifies product and service offerings to serve customers better
- Strengthens presence in all major basins
- Improved scale further harnesses vertical integration and technological advancement
- Enhanced ability to capitalize on international growth opportunities
- Transaction expected to be accretive to C&J's cash earnings for the first full year of operations

Pro Forma Financial Profile

($ in millions)

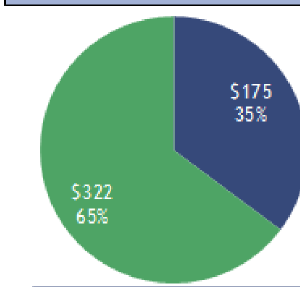
C&J Energy Services | Nabors Completion & Production Businesses

LTM Revenue[(1)]



Total Revenue: $3,184 million

LTM EBITDA[(1)]



Total EBITDA: $497 million

Energy-Focused Activism

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Energy-Focused Activism

- Over 360 reported shareholder activism campaigns in 2013
- Over 340 reported shareholder activism campaigns in 2014
- 138 reported activism campaigns YTD in 2015
- Shareholder activists have broadened their appeal among the general public and, more importantly, among institutional investors
  - focusing on governance reforms
  - enhancing shareholder value
- The energy industry has not been immune to this trend and the number of activists targeting the energy industry appears to be increasing
- Many energy-focused shareholder activists are focused on asset rationalization, as opposed to sales of the entire company or wholesale changes in management (although activists will certainly resort to that tactic if ignored or progress — in their eyes — appears to come too slowly)
- Increasing shareholder value through different types of monetization strategies
  - spin offs
  - sales of non-core assets
  - increasing use of MLPs
- Shareholder activism in the energy space is likely to continue for the foreseeable future, and M&A and MLP activity could increase as a result

Energy-Focused Activism

COMPANY	ANNOUNCED	ACTIVIST	DEMANDS
Jones Energy, Inc.	February 2015	• JVL Advisors LLC	• Strategic alternatives
QEP Midstream Partners LP	December 2014	• Tesoro Corporation	• Offer to acquire remaining stake not already owned by QEPM (Dec 2014)
Lucas Energy, Inc.	September 2014	• Condagua, LLC	• Explore strategic alternatives to maximize shareholder value (Sept 2014) • Signed Letter of Intent for merger with Victory Energy (Feb 2015)
Apache Corporation	July 2014	• JANA Partners	• Divest non-core international assets
Endeavour International Corporation	May 2014	• Lone Star Value • Talisman Group	• Board representation
Penn Virginia Corporation	March 2014	• Soros	• Sale of company
Cliff's Natural Resources	January 2014	• Casablanca Capital	• Board representation • Management ouster • Break-up
WPX Energy, Inc.	October 2013	• Taconic	• Board representation
QEP Resources, Inc.	October 2013	• JANA Partners	• Separate midstream business (Oct 2013)
Whiting Petroleum Corporation	September 2013	• Galbraith Global	• Divest Whiting USA Trust I
Oil States International Inc.	April 2013	• JANA Partners • Greenlight	• Separate oilfield services segment from accommodations segment and convert accommodations to a REIT (April 2013)
Talisman Energy Inc.	February 2013	• West Face	• No publicly disclosed demands
Transocean Ltd.	January 2013	• Carl Icahn	• Special dividend of >US$4.00/share (Jan 2013) • Board representation (3 nominees; Mar 2013)
Nabors Industries Ltd.	January 2013	• Pamplona	• Discussions with management on performance and declining market share (Jan 2013)
SandRidge Energy Inc.	November 2012	• TPG-Axon • Mount Kellett	• Review strategic alternatives (Nov 2012) • Replace CEO (Nov 2013) • Board representation (Nov 2012) • Consent solicitation to remove board (Dec 2012)
Murphy Oil Corporation	October 2012	• Third Point	• Spin-off retail business, Sale of Canadian assets, and Exit UK refining business (Oct 2012)
Chesapeake Energy Corporation	May 2012	• Carl Icahn • Southeastern	• Change compensation practices (May 2012) • Board representation (4 nominees, May 2012)
CVR Energy, Inc.	January 2012	• Carl Icahn	• Evaluate business and strategic alternatives (Jan 2012) • Board representation (9 nominees, Feb 2012) • Offer to acquire company (Feb 2012)
Marathon Petroleum Corporation	January 2012	• JANA Partners	• Discussions with management regarding business strategy, structure, capitalization, repurchase policy, and governance (Jan 2012)
El Paso Pipeline Partners LP	May 2011	• JANA Partners	• Separate business (May 2011)

Overview of Roles and Responsibilities

	Primary Responsibility	Key Workstreams / Activities
Board	– Determine strategic orientation and ensure implementation – Validation of proxy defense / battle strategy – Review Activist nominees (Nominating Committee)	– Selection of Board candidates – Shareholder meetings – Proxy advisor (e.g. ISS) meeting – Activist nominee interviews (Nominating Committee)
Management	– Business plan development and execution – Internal and external Communication	– Shareholder meetings – Meetings / calls with buyside / sellside analysts – Media representation – Proxy advisor meeting
Financial advisor	– Coordination – Develop story – Strategic financial analysis – Financing strategy	– Key themes / scripts (with all other advisors) – Roadshow presentation – Daily market update
Legal advisor	– Corporate governance – Legal aspects	– Review of Activist filings – Proxy statement – Timeline (meeting / record dates, etc.) – Background checks
PR firm	– Communication	– Response letter – Press releases – Fight letters – Daily press update
Proxy advisor	– Shareholder feedback – Shareholder solicitation	– Analysis of shareholder profile – Calls to shareholders – Log of shareholder communication – Shareholder “grid” (ISS influence and vote probability)

Questions Every Company Should Ask

Topic	Questions
Company vulnerabilities	▪ Is the Company vulnerable to an activist approach? ▪ For example, does the Company have an undervalued stock price, internal dissention, business lines and assets that are particularly attractive or poor performance versus its peers? ▪ How is the Company addressing vulnerabilities?
Potential activist strategies	▪ What might an activist identify as a potential strategy? ▪ For example, are there structural or other changes that the Company should consider to drive shareholder value? ▪ What are the merits and risks of each type of approach?
Significant shareholders	▪ Who are the Company's significant shareholders? ▪ How supportive are they of current corporate leadership and strategy?
Strategic direction	▪ Does the Company clearly explain its strategic direction in its public documents?
Activist ownership	▪ Do any known activists own stock? ▪ Is management monitoring acquisitions of Company stock (for example, through a proxy solicitor or public filings)?
Takeover defenses	▪ What takeover defenses are in place at the Company? ▪ Does the Company have a shareholder rights plan in place or on the shelf? ▪ How are shareholders and their proxy advisors likely to react if a shareholder rights plan is implemented, and how could implementation be managed?
Alerting the board	▪ Is there a clear understanding between the board and management about the need to inform and involve the board at the earliest opportunity of an unsolicited approach or an activist's accumulation of stock or other threat?
Handling an approach	▪ Is there a plan in place for handling an unsolicited approach or an activist threat? ▪ Has the Company identified the team that would play a role should an activist approach the Company, including key officers and directors and other advisors, such as public relations firms, legal counsel or proxy solicitors?
Communications policies	▪ Does the Company have a well-articulated communications policy and an appointed Company spokesperson?

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Deal Litigation

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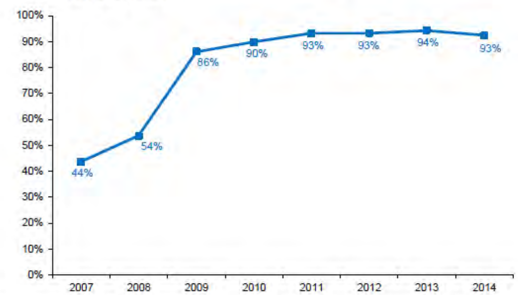
Deal Litigation

- Approximately 93% of M&A deals valued over $100 million were litigated in 2014, which is consistent with recent years but significantly higher than 10 years ago.

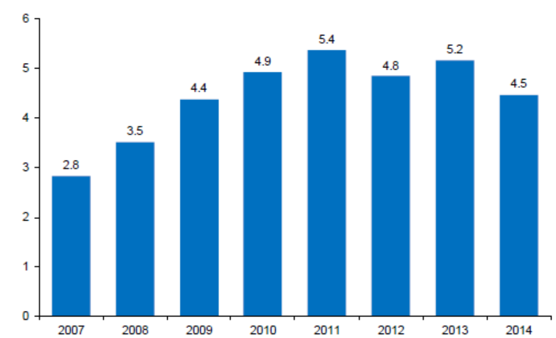
Figure 1: **Percentage of M&A Deals Challenged by Shareholders (by deal year)**



Source: Thomson Reuters SDC; SEC Filings
Note: Percentages have been rounded to the nearest whole number.

- The average number of lawsuits per deal declined in 2014.

Figure 2: **Average Number of Lawsuits per M&A Deal (by deal year)**

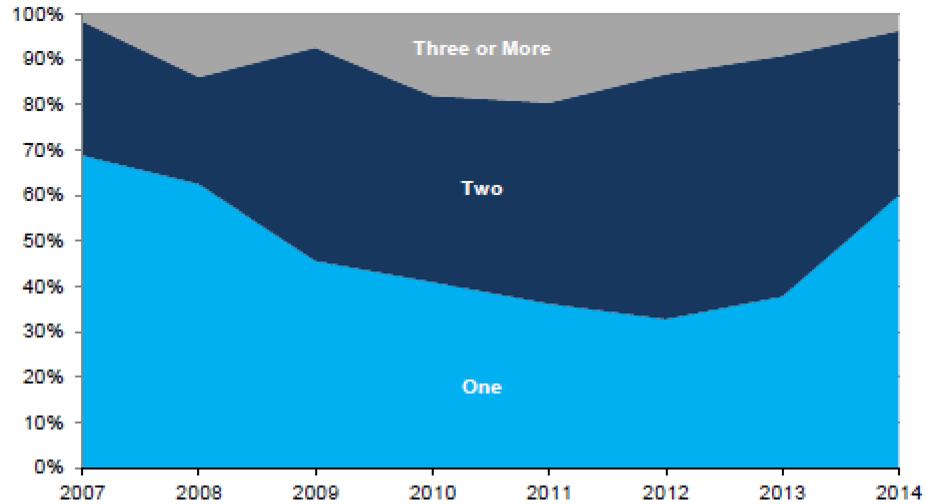


Source: Cornerstone Research: Shareholder Litigation Involving Public Companies, February 2015

Deal Litigation

- Approximately 40% of shareholder litigation was filed in two or more jurisdictions (typically Delaware). The decrease in multi-jurisdictional litigation is likely the result of the increasing adoption of exclusive forum bylaws.

Figure 3: **Number of Jurisdictions per M&A Deal (by deal year)**



Source: Cornerstone Research: Shareholder Litigation Involving Public Companies, February 2015

Deal Litigation

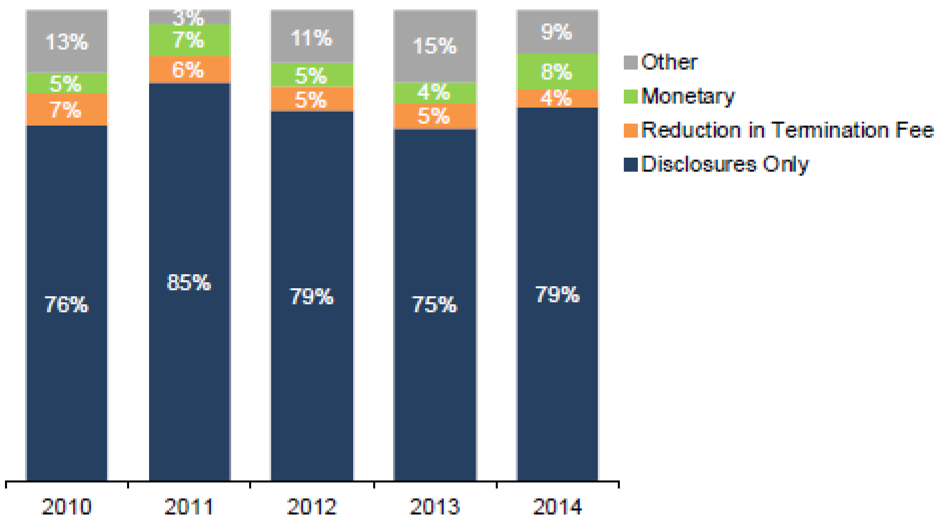
- Exclusive Forum Bylaws
  - Appeared after 2007; Approved by Delaware courts in the Chevron decision in 2013
    - The bylaw essentially provides that litigation relating to Chevron's internal affairs should be conducted in Delaware, the state where Chevron is incorporated and whose substantive law Chevron's stockholders know governs the corporation's internal affairs.
  - Further approved in the First Citizens decision in 2014
    - The bylaw required corporate disputes to be brought exclusively in North Carolina courts.
  - Subject to situational reasonableness
  - Sample Bylaw Provision
- Unless the Company consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall, to the fullest extent permitted by law, be the sole and exclusive forum for (1) any derivative action or proceeding brought on behalf of the Company, (2) any action asserting a claim of breach of a fiduciary duty owed by any director, officer, other employee or stockholder of the Company to the Company or the Company's stockholders, (3) any action asserting a claim arising pursuant to any provision of the General Corporation Law of the State of Delaware or as to which the General Corporation Law of the State of Delaware confers jurisdiction on the Court of Chancery of the State of Delaware, or (4) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring or holding any interest in shares of capital stock of the Company shall be deemed to have notice of and consented to the provisions of this Article X.

Source: *In re Plains Exploration & Prod. Co. Stockholder Litig.*, 2013 Del. Ch. LEXIS 118

Deal Litigation

- Disclosure-only settlements remain the predominant form of resolution for shareholder litigation in the M&A context.

Figure 6: **Settlement Terms (by settlement year)**



Source: Cornerstone Research: Shareholder Litigation Involving Public Companies, February 2015

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Joint Ventures

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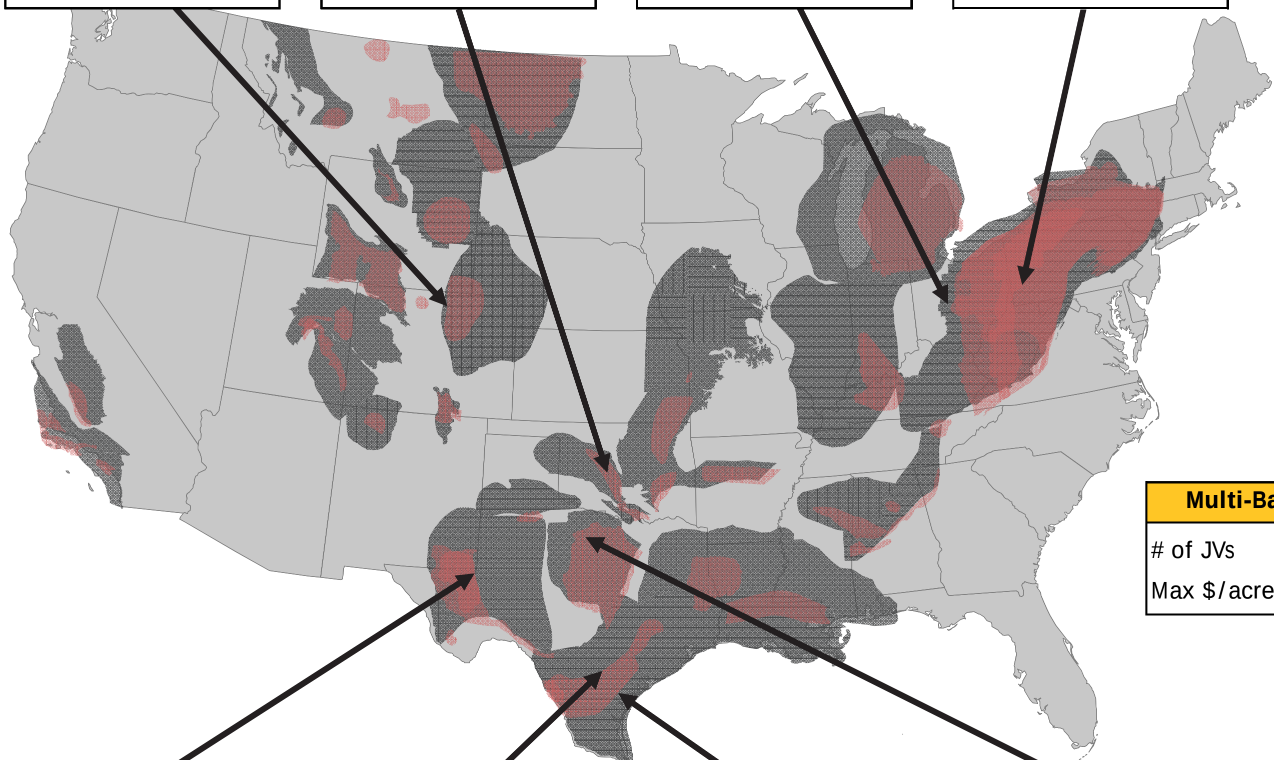
Joint Ventures Have Covered the US *Resource Play Activity Since 2008*

Rockies	
# of JVs	6
Max $/acre	$5,000

Mid-Con	
# of JVs	6
Max $/acre	$10,215

Utica	
# of JVs	2
Max $/acre	$15,015

Marcellus	
# of JVs	16
Max $/acre	$14,158



Multi-Basin Shale	
# of JVs	3
Max $/acre	$5,500

Permian	
# of JVs	4
Max $/acre	$20,531

Eagle Ford(1)	
# of JVs	11
Max $/acre	$25,000

Pearsall	
# of JVs	1
Max $/acre	$14,286

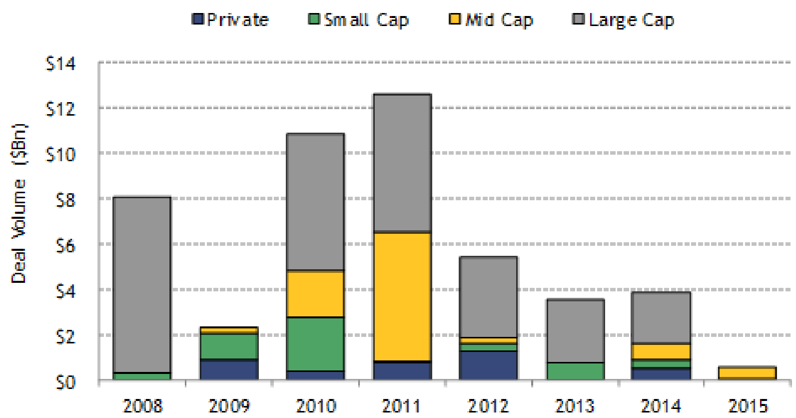
Barnett	
# of JVs	4
Max $/acre	$33,333

Source: IHS Herold, Company filings.

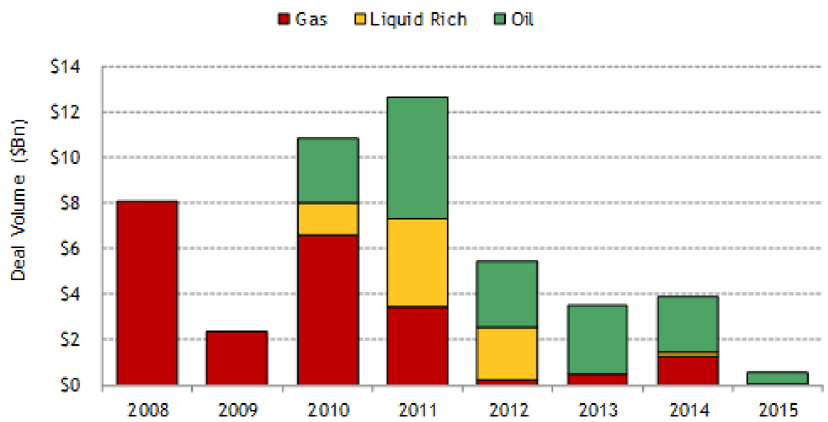
(1) Includes KKR and Anadarko Eaglebine joint venture.

U.S. Joint Venture Dynamics

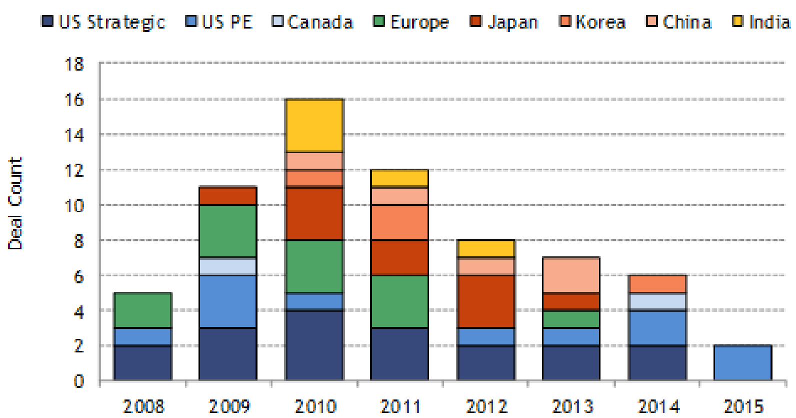
Who are the JV Participants?



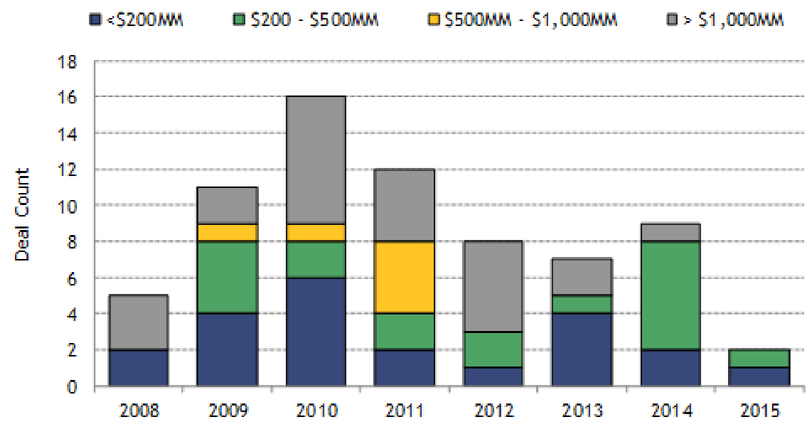
Which Commodity are JV Participants Seeking?



Where are JV Participants From?



How Much are JV Participants Spending?



Source: IHS Herold as of 5/8/2015.

Transfer Restrictions and Exit Mechanisms

1. Lock Up Period
   - Specified period, often tied to drilling carry

---

2. Tag-Along
   - Right to participate in sale by other party
   - Increases in likelihood with decreasing control
3. Right of First Offer
   - Right to offer to buy selling party's interest
   - Non-selling party sets price
4. Right of First Refusal
   - Right to buy selling party's interest
   - Selling party or its buyer sets price
   - Can have chilling effect on third party bids, which can be counteracted with premiums
5. Drag-Along
   - Right to force other party to sell to third party
   - Typically tied to specified types of exits
6. Put / Call and Buy-Sell
   - Right to force purchase of interest by other party or sale of other party's interest to partner
   - Buy-sell is right of one party to put its interest or call the other party's interest at price set by the other party
   - Sometimes used as remedy for default or deadlock breaking mechanism

Least Significant

Most Significant

Structure Parameters – Cash & Carry
Considerations for Both Sides

Upfront Payment

- Buyer entry into new play
- Weighting vs. drilling carry
- Immediate monetization/realization of value
- Acreage value vs. full development value

Drilling Carry

- Weighting vs. upfront payment
- Funding exposed to drilling decisions and incentives of operator
- Term
- Offramps
- Operator capex

AMI

- Aligns regional interests
- Footprint and "Halos"
- Term and offramps
- Affiliation issues for financial sponsors

Include PDP Reserves

- Immediate cash flow
- May help fund future capital commitments
- Carve out issues
- Economic benefits tied to selling above current trading / leverage metrics

Structure Considerations - Reversionary JV
Economics and Governance

Working Interest/Ownership

- Characterization
- Alignment with respect to initial WI levels
  - Operator capital outlays
  - Buyer downside risk
- Some buyers have expressed openness to synthetic WI
- Post reversion, both parties participate going forward as WI partners, with reduced structural provisions and limitations
- Tail economics depend on buyer objective

Hurdles

- Identifying “pools” (wellbore, time …) to isolate reversionary thresholds
- More granular pools isolate risk
- Broader pools dampen volatility impact
- Flexibility across structures for capital call, reinvestment and distribution
- Remedies and offramps in downside scenarios where hurdle not met
  - Reversion clock

Existing Wellbores

- Interference with existing producers
- PDP conveyance for proceeds
- Inclusion of PDP simplifies well selection but affects return potential

Governance, Drilling Pace & Budget

- Pre approved program vs. program parameters vs. consent rights
- Pre-reversion governance considerations differ from post-reversion
- Financial buyers will be more ROI & IRR focused in budget and wellbore selection
- Non-participation rights in light of funding commitments

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PRIMER: REGULATORY REFORM IN CANADA

Introduction

Development of natural resource projects and infrastructure has been a central component of Canada's economy throughout its history. Today, most natural resource developments in Canada are overseen by one or more quasi-judicial regulatory agencies, such as the National Energy Board ("NEB"), who is responsible for international and interprovincial pipelines and power lines, as well as offshore oil and gas development, and the Alberta Energy Regulator ("AER") and British Columbia Oil and Gas Commission ("OGC"), who regulate all aspects of upstream oil and gas development in their respective provinces. These regulatory agencies are tasked with making determinations of whether or not specific natural resource development projects are in the overall public interest, as well as overseeing their safe operation and eventual abandonment.

Specific aspects of natural resource developments in Canada are also managed or overseen by various federal and provincial government departments, such as the federal Department of Fisheries and Oceans Canada, who is responsible for managing fish habitat and fisheries in Canada; Environment Canada, who is responsible for species at risk and migratory birds; Transport Canada, who is responsible for managing navigable waters; and each province's respective departments responsible for managing the environment, natural resources, public land and water.

Need for Regulatory Reform in Canada

Prior to 2012, major natural resource projects in Canada typically required a variety of separate regulatory approvals from provincial and federal agencies, including separate environmental assessments under both federal and provincial law. These review processes were often carried out in isolation of one another, which resulted in inefficiencies and delays and no clear decisions making process. Depending on which agencies were engaged, there were significant differences in the scope and nature of information required from project proponents. The overall regulatory review process for major projects often took three and five years (and in some cases considerably longer), which jeopardized the economic viability of several projects (i.e., for major pipelines, the delays caused by the regulatory review process resulted in projects missing the window of opportunity in which to solidify connections and trade). In addition, many of the agencies involved in the environmental assessment process focussed on their specific areas of jurisdiction (e.g., fisheries) but had minimal understanding of the overall project need, the technical aspects of the project or the overall public interest. As a result, these agencies often made decisions that were inconsistent with the decisions of other agencies and that failed to properly consider the overall public interest. Finally, a lack of clarity from governments regarding consultation obligations with Aboriginal communities led to regulatory delays and uncertainties, as well as significant litigation risk for some projects post-approval.

Process for Regulatory Reform

Starting in 2011, the federal and provincial Ministers of Energy identified regulatory reform as one of the primary objectives for a national energy strategy. The federal legislature formed a Standing Committee to consider regulatory reform as part of its mandated 7-year review of the *Canadian Environmental Assessment Act* and invited submissions and presentations from all interested parties. Among others, the Energy Policy Institute of Canada (comprised of Canada's largest energy producers and energy consumers) and industry associations such as the Canadian

Energy Pipeline Association and Canadian Association of Petroleum Producers published policy papers and made submissions to the Standing Committee advocating for change.

Regulatory Reform to Date

Following consultation with interested parties, several regulatory reforms were adopted in 2012 at both the federal and provincial levels. These reforms focussed on: (i) making the regulatory review process for major projects more predictable and timely; (ii) reducing overlap and inconsistency at all levels of government; (iii) employing "smart regulation" to ensure that the level of regulatory oversight matches the level of risk involved; (iv) developing effective mechanisms for involving Aboriginal communities in regulatory processes; and (v) addressing new technological innovations (e.g., shale gas and fracking) in the regulatory framework. Specific changes at the federal level included:

- Introducing fixed timelines for all federal environmental assessments (12 to 24 months from application to decision, depending on the type of project)

- Focussing environmental assessments and public hearings on the types of projects most likely to result in significant adverse environmental effects

- Limiting interveners in public hearings to parties that will be directly affected by the proposed project or that they have relevant information or expertise

- Allowing the federal government to substitute the provincial environmental assessment process for the federal process

- Designating a single federal agency to oversee the federal environmental assessment process for each type of project

Several of the provinces in Canada also adopted significant regulatory reforms. For example, British Columbia and Alberta both consolidated regulatory oversight for upstream oil and gas activities so that all regulatory approvals are now obtained from a single regulator (the AER in Alberta and the OGC in British Columbia). Fixed timelines for environmental assessments were also introduced in British Columbia.

Status of Regulatory Reform

All of the above regulatory reforms have been passed into law and are now in force. In some respects, these laws have already resulted in measurable changes in the regulatory review process. For example, the fixed timelines under the *National Energy Board Act* have resulted in the review process for several major and controversial pipeline projects concluding in less than two years from the date of the application (as compared to almost ten years for the Mackenzie Gas Project under the previous regime). In areas where new regulators have been created or assumed new areas of responsibility, we have seen some inefficiencies as regulators create new policies and processes to manage their new roles and implement new statutory provisions. These inefficiencies are generally becoming reduced over time through experience, although it will likely take several more years before all areas of uncertainty and inefficiency are addressed. In addition, there remain some areas (particular in relation to Aboriginal consultation) where the regulatory reforms to date have not meaningfully addressed the underlying concerns and further reform is needed.

The New Canadian Energy Landscape:

Regulatory Perspective and Impact

Shawn Denstedt, Q.C.
Partner, Osler, Hoskin & Harcourt LLP

June 2015

OSLER

Canadian Energy Policy

Introduction

- New technologies (i.e., shale gas/oil) have resulted in energy supply "boom" in Canada and U.S., which has increased Canadian supply and eroded U.S. market for Canadian energy exports
- Oil sands alone are estimated to contain 170 billion barrels of oil
- The U.S. Energy Information Administration estimates that Canada has 388 tcf of technically recoverable shale gas reserves (in addition to conventional natural gas)

Canadian Energy Policy

Introduction, cont'd

- As a result of significant oil and gas supply, Governments in Canada are increasingly focused on market diversification and increasing export capabilities to Asia-Pacific
- New infrastructure projects are required to transport oil and gas to ports and increase export capabilities – several already initiated
- Recent regulatory reforms have been adopted by the federal and provincial governments to allow new infrastructure projects to proceed faster, more efficiently and with greater certainty

Canadian Energy Policy

- Proposed National Energy Strategy
  - Energy Policy Institute of Canada (EPIC), comprised of Canada's largest energy corporations: purpose is to build a Canadian energy framework and strategy
  - EPIC presented Progress Report at Conference of Canada's Energy Ministers in July 2011, including the following key recommendations:
    - Long-term transition to a lower-carbon economy
    - Streamlining Canada's regulatory system
    - Fostering energy innovation through collaboration of industry, research organizations and governments
    - Diversifying and expanding the market for Canada's energy exports
    - Improving energy literacy and conservation

Canadian Energy Policy

- Proposed National Energy Strategy, cont'd
  - Ministers identified areas of possible collaboration:
    - Reducing GHG emissions through clean energy production
    - Regulatory reform
    - Energy efficiency
    - Developing new markets and international trade
  - Working group of Manitoba, Alberta, Newfoundland, premiers developed strategy to put before Council of Federation meeting of Premiers, British Columbia and Quebec signed on in 2013.
  - Three broad areas of focus:
    - Energy sustainability and conservation
    - Technology and innovation
    - Effective ways to deliver energy to people.

Canadian Energy Policy

- Current Status
  - Premiers discussed the Canadian Energy Strategy at the 55th Annual Premiers' Conference was in August 2014.
  - Focus was on the following principles:
    - Increasing collaboration and transparency between governments
    - Addressing climate change and social environmental responsibility
    - Ensuring energy security and stability
  - Developed a list of objectives for the Strategy including identifying opportunities to develop and transport energy and promoting a competitive economy.
  - The Premiers agreed to finalize the Strategy in advance of their 2015 Summer Meeting.

Canadian Energy Policy

- Benefits
  - Harmonizes federal and provincial regulatory objectives
  - Increases regulatory certainty
  - Improves approvals process for major projects
- Challenges
  - Differing energy policies across Canada
    - Ontario hesitant to endorse oil sands development as "sustainable and responsible"
    - B.C. position on heavy oil pipelines to West Coast - conditions
    - Danger in focusing on particular outcomes as part of a national strategy – goal is better framework for energy policy decisions that involves key stakeholders and structures choices in a way that facilitates innovation. Risk becomes a “shopping expedition of special interests” and timing – by the time the policy makers agree on what has to be done the market has changed.
  - Canada reluctant to diverge from U.S. (i.e. GHG’s)

Canadian Energy Policy

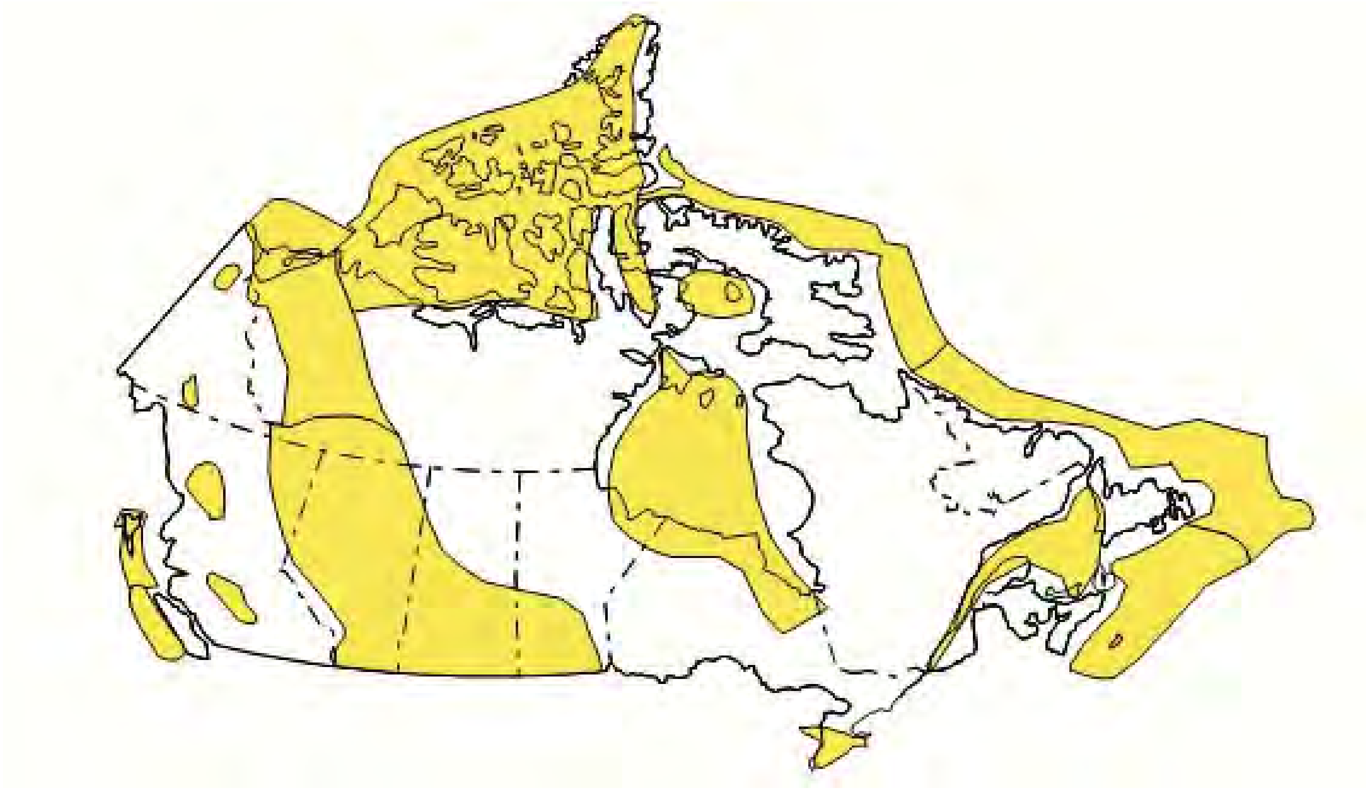
- Alberta's NDP Government
  - The NDP won a majority government in Alberta on May 5, 2015
  - The Party has yes to announce firm plans for royalties, pipeline or environmental policies. It's Platform, as it affects the energy sector, includes:
    - Implementing new royalty rates, including investing 100% of incremental royalty revenues into Alberta's Heritage Fund
    - Bringing in more stringent environmental regulations
    - Increasing corporate taxes from 10% to 12%
    - Establishing a Resource Owners' Rights Commission
    - Diversifying the economy to reduce dependence on bitumen exports
    - Increasing minimum wage to $15/hour

Canadian Energy Policy

- Impacts on Energy Sector
  - Impacts of the new NDP government on the energy sector are still speculative
  - Energy Minister announced in May 2015 that royalty review would be underway in six months, report within one year
  - Concerns create uncertainty
    - New royalty, taxation, and environmental and GHG policies have the potential to be taxing on industry in the face of weak oil prices
    - Many are questioning future of west coast pipelines projects based on Premier's comments that she will not advocate for Northern Gateway

Canada's Oil and Gas Resources

- Canadian Sedimentary Basins



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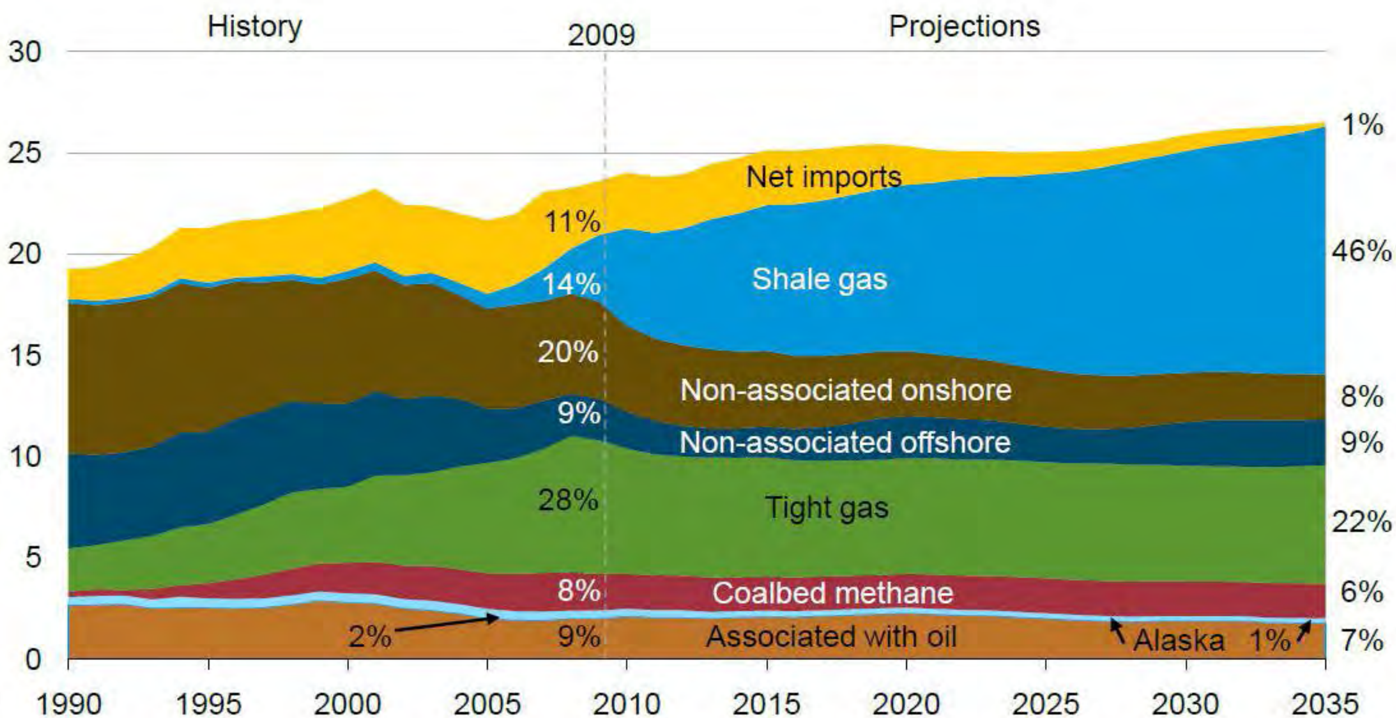
Canada's Oil and Gas Resources

- Conventional Natural Gas
  - Discovered Resources: 215 Trillion Cubic Feet (tcf)
  - Estimated Undiscovered Resources: 286 tcf
  - Estimated Ultimate Potential: 501 tcf
  - The entire country of Canada used only 2.8 tcf in 2010
- Shale Gas
  - Shale gas "boom" has opened up vast new gas supplies in North America, including Northeast British Columbia
  - The U.S. Energy Information Administration estimates that Canada has 388 tcf of technically recoverable shale gas reserves
  - Recent National Energy Board report estimates 449 tcf of marketable shale gas in the Montney Formation alone

Canada's Oil and Gas Resources

- U.S. Gas Demand Forecast



Source: EIA, Annual Energy Outlook 2011

OSLER

Canada's Oil and Gas Resources

- Oil Sands
  - Contain 170 billion barrels of oil
  - A natural mixture of sand, water, clay and bitumen
  - The United States consumes 6.9 billion barrels of oil per year
  - Canada is now third in global oil reserves behind Saudi Arabia and Venezuela
  - Modern engineering, including drilling technology that uses steam to warm the bitumen, makes oil sands production economical

Canada’s Oil and Gas Resources

- Oil Sands - Recovery
  - Two primary ways to recover oil sands: (1) Surface Mining and (2) Drilling using Steam Assisted Gravity Drainage (SAGD)
  - 20% of oil sands reserves are close enough to the surface to be mined
    - There are currently six oil sands surface mines open and two more under construction, several others approved or proposed
  - The remaining 80% of the oil sands must be recovered through drilling
    - Roughly two-thirds of the expected increase in oil sands production is expected to come from in-situ SAGD developments
    - There are currently eighteen SAGD oil sands projects in operation, and thirteen more under construction
    - Some advantages of SAGD are that it creates less surface disturbance, and it does not require tailings ponds for water with environmental contaminants

Canada's Oil and Gas Resources

- Recent Oil Price Collapse
  - Crude oil prices fell sharply in the fourth quarter of 2014 after reaching peaks of US$111/bbl (Brent) and US$105/bbl (WTI) in June.
  - In January 2015, Brent and WTI fell below $50/bbl.
- Causes of Oil Price Collapse
  - Global oversupply from OPEC and US Bakken
    - Saudi Arabi refusing to sacrifice market share by cutting production
  - Reduced demand
    - Slowing European and Asian economies
  - Geopolitical developments
    - Middle East and Eastern Europe conflicts weighed less heavily on supply than expected

Source: http://www.firstenergy.com/research/daily-shots/market-and-commodity-prices

Canada's Oil and Gas Resources

- Impacts of Price Collapse
  - Canadian production growth is not expected to be impacted
  - More significant regional implications in the oil-producing provinces
    - Hits to government revenues, labour markets and incomes in Alberta, Saskatchewan and Newfoundland in particular.
  - Activity in the energy sector is being cut back to accommodate the downturn
    - Major industry players making decisions to reduce their operational and capital spending (slashing capital budgets, reducing workforces)
    - Projects and expansions are being delayed or shelved (i.e., Shell's Pierre River Mine)

Canada's Oil and Gas Resources

- Impact of Price Collapse
  - Companies are looking for alternative sources of funding in this low price environment (e.g., royalty agreements, private equity)
  - We will likely start to see an increase in asset sales, takeovers and transactions
  - Price collapse in combination with new Alberta government has companies pausing on investment decisions for the time being

Infrastructure Developments in Canada

- Policy is driving the need for new infrastructure projects to increase export opportunities
- Several major projects were initiated in response to this identified need
- LNG Projects:

Project	Status
Kitimat LNG (Chevron, Apache)	• Front End Engineering and Design phase • Final investment decision has not been made
LNG Canada (Shell, Mitsubishi, KOGAS, Petrochina)	• BC environmental assessment in progress • Final investment decision has not been made
Pacific Northwest (Progress/Petronas)	• CEAA environmental assessment in progress • BC EA Certificate issued on November 25, 2014 • Final investment decision delayed
Prince Rupert LNG (BG Group)	• CEAA environmental assessment in progress • BC EA pre-application progress • Final investment decision has not been made

Infrastructure Developments in Canada

- Gas Transmission Pipeline Projects:

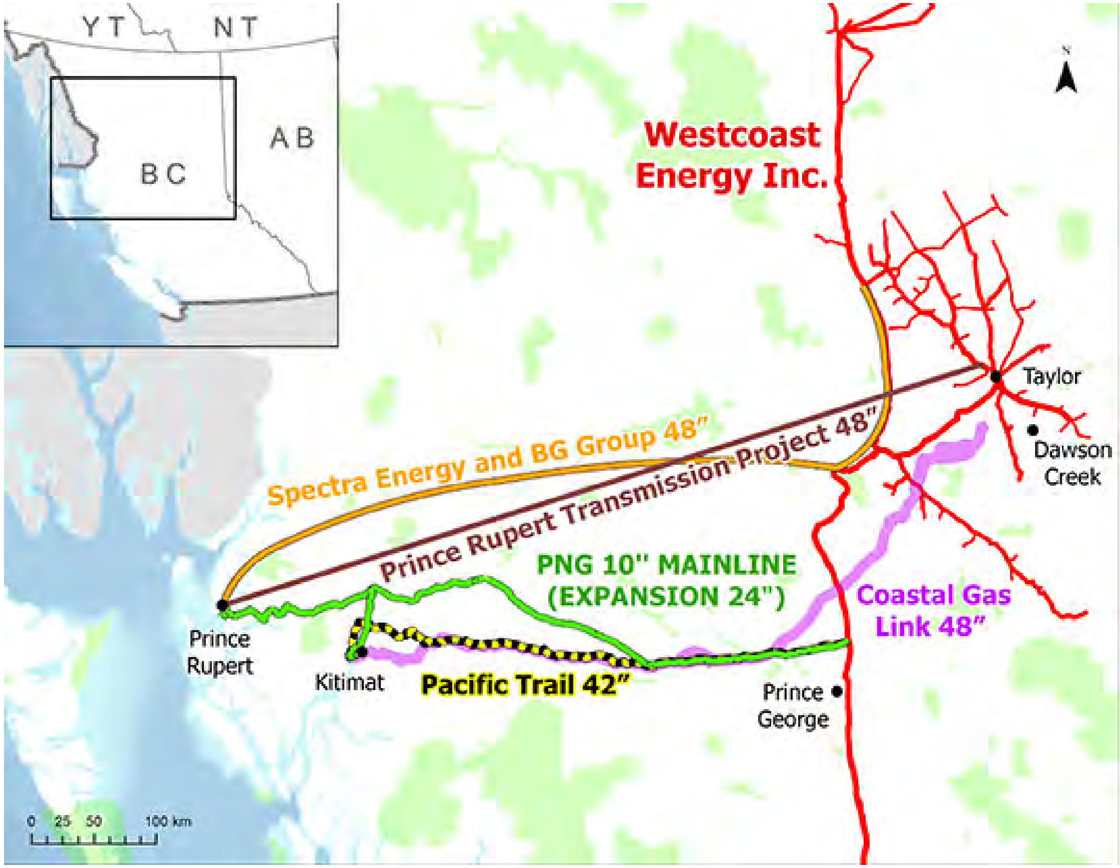
Gas Pipeline Projects	Status
Pacific Trails Pipeline (Chevron, Apache)	• BC EA Certificate issued June 2008 (subject to 9 conditions) • BC Oil and Gas Commission (BC OGC) permitting in progress
Coastal GasLink Pipeline (TransCanada)	• BC EA Certificate issued on October 24, 2014 (subject to 32 conditions). • BC OGC permitting in progress
Prince Rupert Gas Transmission (TransCanada)	• BC EA Certificate issued on November 25, 2014 (subject to 45 conditions). • BC OGC permitting in progress
Westcoast Connector (Spectra Energy)	• BC EA Certificate issued on November 25, 2014 (subject to 43 conditions) • BC OGC pre-application stage

Infrastructure Developments in Canada

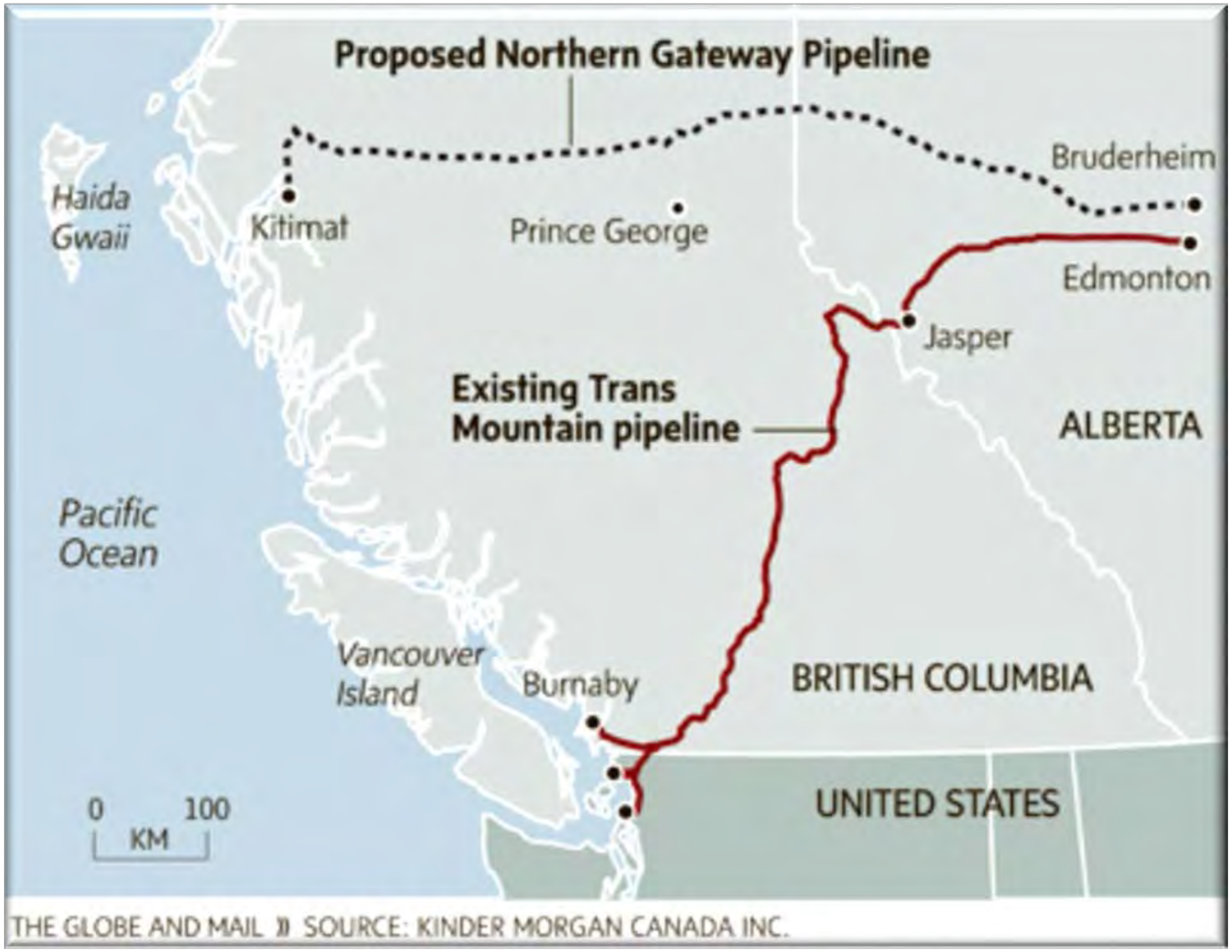
- Oil Pipeline Projects:

Project	Status
Northern Gateway (Enbridge)	• Approved by Governor-in-Council on June 17, 2014 (subject to 209 conditions) • Currently subject to litigation in the Federal Court of Appeal (Court File No. A-437-14)
Keystone XL (TransCanada)	• Approved by NEB on March 11, 2010 (OH-1-2009) • President Obama vetoed bill to force approval in February 2015 • Senate failed to override veto on March 4, 2015; Project is subject to Executive approval
Trans Mountain Expansion (Kinder Morgan)	• NEB hearing in progress (OH-1-2014)
Energy East Pipeline (TransCanada)	• NEB is currently reviewing application

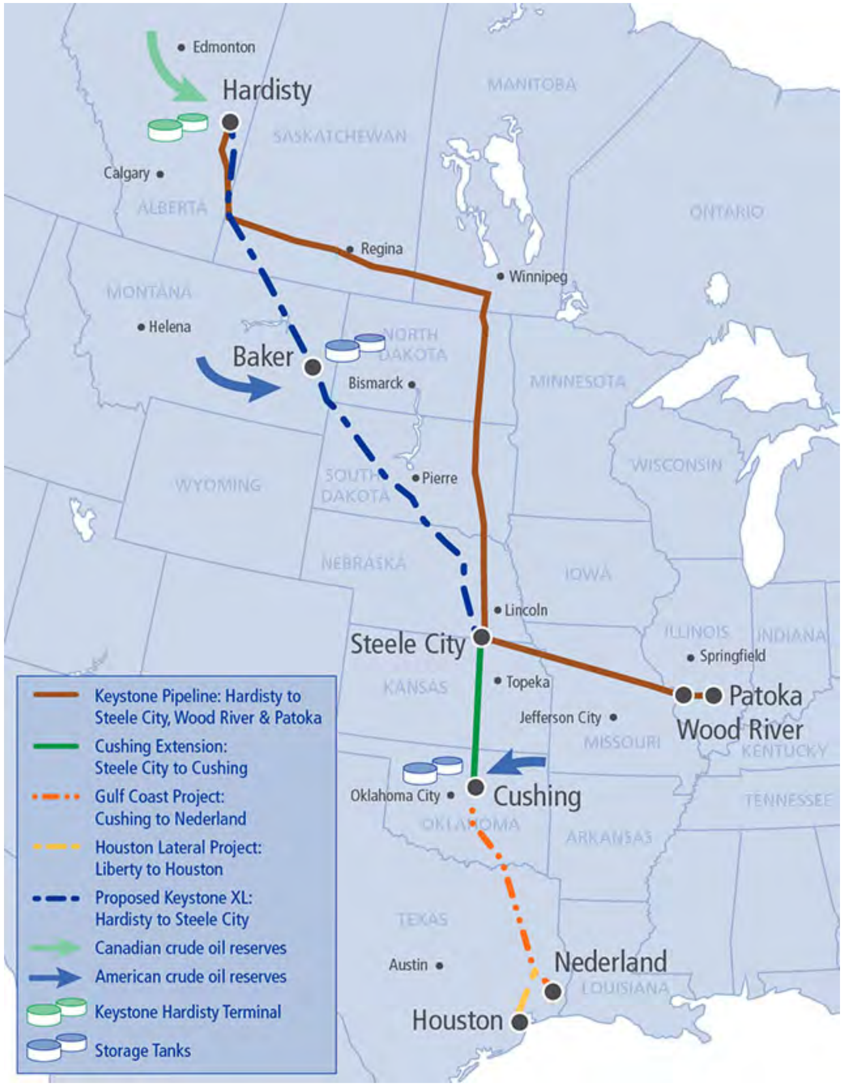
West Coast LNG Export Proposals



West Coast Oil Export Proposals



Keystone XL


Edmonton
Hardisty
SASKATCHEWAN
Calgary
ALBERTA
MANITOBA
ONTARIO
Regina
Winnipeg
MONTANA
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Baker
NORTH DAKOTA
Bismarck
MINNESOTA
WISCONSIN
WYOMING
SOUTH DAKOTA
Pierre
NEBRASKA
IOWA
Lincoln
Steele City
ILLINOIS
INDIANA
Springfield
KANSAS
Topeka
Patoka
Jefferson City
Wood River
MISSOURI
KENTUCKY
Oklahoma City
Cushing
OKLAHOMA
TENNESSEE
ARKANSAS
TEXAS
Austin
Nederland
LOUISIANA
Houston
Keystone Pipeline: Hardisty to Steele City, Wood River & Patoka
Cushing Extension: Steele City to Cushing
Gulf Coast Project: Cushing to Nederland
Houston Lateral Project: Liberty to Houston
Proposed Keystone XL: Hardisty to Steele City
Canadian crude oil reserves
American crude oil reserves
Keystone Hardisty Terminal
Storage Tanks

Energy East Pipeline

THE CANADIAN PRESS

Risks for New Infrastructure Projects

- There are a variety of risks for new infrastructure projects:
  - Regulatory (timing, cost, outcome risks inherent in regulatory approvals processes)
  - Litigation (the risk of regulatory decisions being challenged in the courts, e.g. Trans Mountain Expansion)
  - Aboriginal (the risk of aboriginal groups challenging a project through the courts or otherwise, e.g. Northern Gateway judicial review)
  - Political (the risk of politics interfering with the regulatory approvals process, e.g. NDP, Keystone)
- Generally, crude projects are more controversial than gas/LNG, with greater overall risks

Risks for New Infrastructure Projects

- Other risks:
  - Remote location of resources in Canada
  - Overseas markets requiring tanker shipments
  - Significant new infrastructure required in many areas
  - Size of capital investment required
  - Pricing
  - Media campaigns and celebrity opposition (i.e., Young, Cameron, Redford, Hannah)

Mitigating Risks: Regulatory Reform in Canada

- Over the past several years, the federal government and provinces have identified several issues with the regulatory system:
  - Overlap/inefficiencies between federal government/provinces and amongst provincial agencies
  - Uncertainty of regulatory outcomes
  - Process was taking too long for major approvals
  - Insufficient clarity around aboriginal consultation requirements

Regulatory Reform in Canada, cont'd

- Regulatory reforms have been introduced to:
  - Make the review process for major projects more predictable and timely
    - For example, fixed timelines under the CEAA, NEB Act, BCEAA
    - 12 months for standard CEAA reviews, 15 months for NEB
    - 225 days for BCEAA reviews from Application being deemed complete
  - Reduce overlap and inconsistency at all levels of government (consolidation of regulatory responsibilities)
    - Only 3 Responsible Authorities under the CEAA 2012 (CEA Agency, NEB, CNSC)
    - New Alberta Energy Regulator (AER) in Alberta will be responsible for all upstream oil and gas regulation from Alberta Energy, ERCB, ESRD
    - Same in BC under the *Oil and Gas Activities Act* where all upstream regulation is the responsibility of the BC OGC

Regulatory Reform in Canada, cont'd

- Regulatory reforms have been introduced to:
  - Implement "one-project/one-approval" for environmental assessments
    - Substitution/equivalency powers under the CEAA 2012 where provincial EA process is substituted for federal EA process (i.e., Shell's LNG Canada Project where the CEA Agency approved substitution of the BC EA process on May 21, 2013); same under *Fisheries Act*
    - AER in Alberta will be the "one window" regulator
  - Employ "smart regulation" principles to ensure that level of regulatory oversight matches level of risk involved
    - Environmental assessments only required now for major projects
    - Hearings no longer required for export licence applications

Regulatory Reform in Canada, cont'd

- Regulatory reforms have been introduced to:
  - Develop effective mechanisms for involving Aboriginal communities in regulatory process
    - New Aboriginal Consultation Office, Consultation Policy in Alberta
    - New regulations under the CEAA 2012
  - Address new technological realities
    - New Unconventional Framework in Alberta to regulate shale gas
    - Changes in export licence filing requirements to accommodate LNG exports to Asia

Aboriginal Consultation Requirements

- Aboriginal and Treaty Rights
  - Constitutionally entrenched collective rights
  - First Nation, Inuit, and Métis
- The Crown's Duty to Consult and Accommodate
  - Arises when government is asked to grant an approval that may adversely affect Aboriginal or treaty rights
  - The scope of duty is proportionate to the strength of the asserted right and the seriousness of the potential impact (spectrum)
  - Crown often delegates procedural aspects of consultation to project proponent
  - Project proponent may need to provide funding to enable Aboriginal communities to review the project and to participate in the regulatory process
  - Crown may rely on the process of an independent regulatory tribunal to satisfy the duty

Historical Treaties

OSLER

Modern Treaties

Aboriginal Consultation Requirements, cont'd

- Aboriginal consultation and accommodation primarily consists of:
  - Providing information to the Aboriginal community
  - Identifying the community's interests and concerns
  - Taking action to avoid or mitigate negative impacts from the project
- Consultation requirements are clear at law, do not give a veto to Aboriginal groups
- A challenge to the adequacy of consultation can mean project delay
- Early and effective consultation is critical to the success of resource projects in Canada
- Risks can be managed through agreements and consultation strategy

Conclusions on Energy Development in Canada

- Recent market and political shifts have affected the Canadian Resource Sector and Resource Service Sector in 2014 and 2015
  - While there are opportunities in the low-price environment for new sources of funding and deals, there is uncertainty as to the impact of Alberta's new NDP government
  - Companies are pausing on investment decisions
  - The Premier has repeatedly said that energy industry is critical to Alberta's economic prosperity
  - There is still support for market diversification and a growing public awareness in Canada of the importance of resource development

Conclusions on Energy Development in Canada

- Regulatory reform was intended to allow new projects to proceed faster
  - We are seeing an increased onus on applicants to submit accurate and complete applications to the Board, failure to do so causing material delays in the regulatory review
    - Trans Mountain Expansion assessment delayed six months after new preferred corridor through Burnaby Mountain
    - TransCanada Energy East application review subject to information request from NEB after amendments to facilities (i.e., Cacouna marine terminal suspended)
- Aboriginal issues may create legal risks and cause delay for projects, but these risks are well understood and can be successfully managed in an acceptable time frame through development and execution of an aboriginal consultation strategy

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Update:
Investment Canada Act:

- "enterprise value"
- new notification form
- national security update

Susan M. Hutton
Stikeman Elliott LLP
June 10, 2015 (New York)

New threshold for review: “enterprise value”

- Applies to all transactions closing on or after April 24, 2015
- Applies to:
  - direct acquisitions of control
  - by WTO-investors
  - who are not state-owned enterprises (SOEs)
  - of non-cultural Canadian businesses
- C$600 million for first 2 years (i.e., to April 23, 2017)
- C$800 million for next 2 years (i.e., to April 23, 2019)
- C$1 billion (indexed annually for inflation beginning Jan.1, 2021)

Calculation of enterprise value depends on structure of the acquisition:

- Acquisition of shares of Publicly-Traded Entity:
  - Market capitalization + liabilities – cash & cash equivalents
- Acquisition of shares of Privately-Held Entity:
  - Acquisition value + liabilities – cash & cash equivalents
- Acquisition of assets:
  - Acquisition value + assumed liabilities – cash & cash equivalents

Market capitalization (publicly traded shares):

- for listed securities: average daily # of shares (by class) outstanding during the “trading period” X average daily closing price on the “principal market”
  - Trading period = most recent 20 days of trading before the 1st day of the month before the month of notification or review (if filed prior to closing); or
  - Trading period = most recent 20 days of trading before the 1st day of the month prior to closing (if no filing pre-closing)
  - Principal market = the published market on which the greatest volume of trading in those securities occurred during the trading period.

Liabilities and Cash & Cash Equivalents

- Total liabilities - operating liabilities (e.g., trade receivables)
- Cash and cash equivalents
- Both as shown in most recent quarterly statement (released before filing, if a filing is made, otherwise before closing)

Acquisition Value (unlisted securities/assets)

- Acquisition value = total amount of consideration payable, as determined in accordance with the transaction documents (if 100% shares acquired).
- For portion of shares not being acquired, the acquisition value = fair market value.
- Fair Market Value = the monetary consideration that, in an open and unrestricted market, a reasonably prudent and informed buyer would pay to a reasonably prudent and informed seller, when acting at arm’s length
- ..as determined by the “authorized body” (Board or committee or person authorized thereby to make such determinations).

Exchange rates:

- All amounts to be expressed in Canadian dollars
- Conversion for share prices to be made at the average of the noon exchange rates quoted by the Bank of Canada during the trading period.
- Conversion for liabilities and cash and cash equivalents to be made at the average of the noon exchange rates quote by the Bank of Canada on the last day of the period covered by the latest quarterly statements.

The new notification form requires significant information, concerning:

- the investor and its ultimate controller
- ownership and involvement of State-Owned Enterprises (SOEs)
- the investment transaction
- the Canadian business
- establishment of a new Canadian business
- cultural activities

- Lawyers can no longer sign notifications for the investor – now requires sworn affidavit by investor's officer or director (or person exercising that authority, if not a corporation) " to the best of their knowledge and belief".

Questions about the Investor (* indicates new requirement):

- Legal name of the investor
- Business address of the investor (other than the address of its legal counsel)
- Legal names of the investor's directors, 5 highest-paid officers, and any person or entity that owns 10% or more of the investor's equity or voting interests, along with: *
  - their business and (in the case of individuals) mailing addresses (not PO boxes)
  - Telephone number, fax number and email addresses for the investor and any of the persons/entities listed in this item 2
  - For individuals, their dates of birth
- An indication of whether the investor is a WTO investor or a NAFTA investor
- Legal name and address of the investor's ultimate controller, if any, and the manner in which control is exercised
- Description of the business activities carried on by the investor and by its ultimate controller, if any *
- Country of origin of the investor's ultimate controller, if any

SOE Questions (all * for notifications, but Industry Canada had issued standard SOE questions as part of every review since 2009):

- An indication of whether a foreign state has a direct or indirect ownership interest in the investor and, if so, the name of the state and the nature and extent of its interest in the investor *
- An indication of whether the investor, a subsidiary of the investor, a member of the investor's board of directors, the investors 5 highest-paid officers or a person or entity that owns 10% or more of the investor's equity or voting interests owns any equity or voting interest in the Canadian business at the time of filing. *
- An indication of whether a foreign state owns a third or more of the investor's voting interests and no other party has a controlling interest. *
- An indication of whether a foreign state owns a minority of the investor's voting interests. *
- If a foreign state has an ownership interest or voting interests in the investor, an indication of whether a special veto or other decision-making right is attached to that interest. *
- An indication of whether a foreign state has the power to appoint members to the investor's board of directors and, if so, the number of members the state has appointed and the total number they may appoint. *
- An indication of whether a foreign state has the power to appoint the investor's Chief Executive Officer or other senior management officers. *
- An indication of whether a foreign state has authority under the law or instruments governing the investor to direct its strategic or operational decision-making. *

Questions about the investment transaction:

- Legal name of the vendor and legal name of the vendor's ultimate controller, if any.*
- An indication of whether the investment is an acquisition of control of a Canadian business or the establishment of a new Canadian business.
- Copy of the purchase and sale agreement, or if not available, a description of the principal terms and conditions, including the estimated total purchase price for the Canadian business and, if applicable, the estimated purchase price for all entities acquired.*
- Sources of funding for the investment.*
- Date of implementation of the investment (note you have to give an intended closing date if notifying in advance).

Questions about the Canadian business:

- Legal name of the Canadian business.
- Business address of the Canadian business.
- Brief description of the business activities that are or will be carried on by the Canadian business, including:
  - a description of the products that are or will be manufactured, sold or exported by the Canadian business,
  - the services that are or will be provided and
  - the codes that are assigned to the products and services by the North American Industry Classification System (NAICS) Canada, 2012, published authority of the Minister responsible for Statistics Canada, as amended from time to time. (previously, a few words were sufficient "e.g., manufacture of automotive parts") *
- In the case of an acquisition of control of a Canadian business, the number of person employed in connection with the Canadian business.

Questions about the Canadian business (cont'd):

- If the Investor is not a WTO or a NAFTA investor, an indication of whether immediately before the implementation of the investment the Canadian business was controlled by a WTO or NAFTA investor
- If the investor is a WTO or NAFTA investor, or if immediately before the implementation of the investment the Canadian business was controlled by a WTO or NAFTA investor, an indication of whether the Canadian business is a cultural business as defined in subsection 14.1(6) of the Act
- If the Canadian business is, immediately before the implementation of the investment, controlled outside of Canada, the country of origin of the ultimate controller *
- In cases where the threshold for review is still based on the book value of assets (ie., non-WTO investors buying from non-Canadian/non-WTO vendors, SOE investors, or anyone buying a cultural business):
  - The book value of the relevant assets, calculated in accordance with the Regulations.
- In the case of investments by WTO investors, or those buying from a non-Canadian, WTO investor (so long as the Investor is not an SOE and the business is not cultural):
  - The market capitalization (for publicly traded companies) or total acquisition value (privately-held entities or assets) of the Canadian business acquired *
  - The liabilities of the Canadian business (excluding operating liabilities) *
  - The cash and cash equivalents of the Canadian business *

Establishment of a New Canadian Business

- The projected number of person to be employed in connection with the new Canadian business at the end of the second full year of operation
- The projected total amount to be invested in the new Canadian business during the first two full years of operation; and
- The projected level of sales or revenues of the new Canadian business during the second full year of operation.

Cultural Business Activities

- In addition to specifying any cultural activities (however small) of the Canadian business, the investor must now identify any business activities of the investor that are similar to any cultural activity of the Canadian business. *

National security reviews institutionalized:

- National security reviews made possible in 2009
- Essentially no institutional structure for routine enforcement for a few years: Industry Canada officials relied on Public Safety to tell them if an investment caused them some concerns
- Vimpelcom/Wind and MTS Allstream/Accelero changed that in 2013: government caught off guard by proposed foreign acquisition of Canadian telecom carriers (even though it had changed the legislation to allow exactly that)
- Government put in place a multi-departmental committee to oversee national security reviews (chaired by Public Safety)
- Now all ICA filings – whether notifications or reviews – are screened by Public Safety
- Much of increased information in notifications is aimed at facilitating initial national security screens

National security review timelines extended: 155 days (and can be extended with investor consent). Net benefit reviews end 30 days after conclusion of NS review (long with consent of investor).

Step	Day (since March 13, 2015)	Day (up to March 12, 2015)
File notification or application for review with investment with Industry Canada.	0	0
Date by which notice of potential national security review must be received from Industry Canada.	45	45
If notice of potential review is received, date by which notice of national security review must be received from federal cabinet.	90	70
If notice of review is received, date on which initial Ministerial review period ends. * NOTE: This period may be extended with consent of the Investor.	135	115
If mitigation is required, date on which Cabinet review period ends.	155	130
If the transaction is subject to economic review under the ICA, and a "net benefit" assessment has not been issued when the national security process ends, date on which the Minister is deemed to be satisfied that the transaction is of net benefit.	30 days after national security process ends (subject to extension with consent of the Investor).	5 days after national security process ends.

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For further information

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transaction may not be completed until approval is obtained. Closed transactions may be subject to remedies including divestiture orders.

Changes to the ICA's national security regulations – which came into effect as of March 13, 2015 – extended various national security timelines, allowing the government more time to decide whether to initiate a national security review, and more time to complete national security reviews. If the maximum periods under the regulations are fully utilized (without extensions), a national security review could take 155 days after an ICA notification or application or review is filed, or if no such filing is required, then after the transaction first comes to the Minister's attention. If a net benefit review is also conducted, it will not conclude until 30 days following conclusion of the national security review (or longer with the consent of the investor).

Q: Is there a voluntary filing process to deal with national security issues?

A: No. However, in some cases it is possible to provide the government with notice of the transaction before closing and obtain the benefit of a statutory prohibition on a review, once applicable time periods have expired. The government encourages advance consultations where national security concerns are likely (e.g., telecoms or defence or proximity to sensitive government installations).

Q: Have any national security review processes been commenced?

A: Yes, we have been involved in several such cases. However, the government has disclosed virtually no information regarding the conduct of its national security reviews. It is believed that several transactions have been abandoned prior to receiving a formal rejection. Transactions involving telecommunications, defense industries, information technology, cyber-security and related matters have proven to be sensitive from a national security perspective.

Q: Is there a process to enforce undertakings?

A: Yes. The ICA has enforcement provisions applicable to breaches of undertakings. Remedies include fines and divestment of the acquired business. The Attorney General of Canada ("AGC") commenced proceedings in July, 2009 against US Steel in relation to undertakings it gave when it had acquired Stelco in 2007. The AGC alleged that US Steel had breached undertakings related to production and employment levels. US Steel vigorously defended the proceeding, arguing, among other things, that the global downturn was a critical factor that must be considered when assessing compliance. US Steel also brought a constitutional challenge regarding the ICA enforcement provision. Although its challenge was dismissed at the trial level, US Steel was pursuing an appeal when a settlement, on the basis of new undertakings, was announced in December, 2011. Amendments to the ICA enacted in 2012 also permitted the Minister to accept a performance bond as security against breaches of undertakings.

Q: Are further changes expected to the ICA and related policy?

A: Now that the "enterprise value" threshold announced in 2009 has been implemented (in 2015), no further legislative amendments are expected in the near future. As noted above, when the CETA between Canada and the European Union is ratified, European SOEs are expected to be exempted from the lower "book value" threshold for economic review, as well as from the SOE Guidelines.

Q: Is the current climate favourable for foreign investment in Canada?

A: While there has been more public scrutiny and political debate of a few high-profile transactions in recent years, the Canadian government has repeatedly and clearly stated that in general it is strongly supportive of foreign investment in Canada. Early assessment of ICA issues is essential for the development of a successful strategy to obtain approval.

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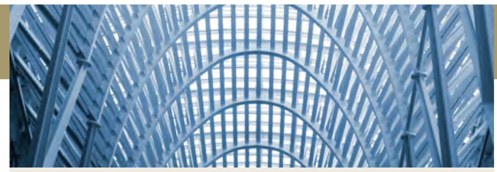

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Susan Hutton is a senior partner in Stikeman Elliott's Competition and Foreign Investment and International Trade practice groups. She has provided *Competition Act* and *Investment Canada Act* advice in respect of numerous complex mergers and acquisitions, for example, Reynolds Consumer Products/Novelis Foil Products, MTS Allstream/Accelero, CNOOC/Nexen, Astral/BCE, Motorola Mobility/Google, Johnson & Johnson/Synthes and PotashCorp/BHP Billiton. She has guided clients through civil and criminal investigations as well as complaints under the *Competition Act*, and provides ongoing compliance advice to many clients.

The Global Competition Review's Canada survey recognizes Susan as acting for clients in several top-tier deals and describes her as being "among the most talented and well-regarded in the country". She has successfully represented complainants and exporter/importers in dumping and countervailing duty actions and also advises with respect to anti-corruption compliance.

0615

STIKEMAN ELLIOTT

INVESTMENT CANADA ACT FAQ

Q: Is Canada open to foreign investment?

A: Absolutely. Although a few high-profile transactions have received a high level of public and political attention, there is no doubt that the Canadian government is generally supportive of foreign investment. Since the *Investment Canada Act* (the "ICA") came into force over a quarter of a century ago, over 99% of reviewable transactions have been approved. As discussed in more detail below, only two transactions have failed as a result of a rejection (other than in connection with national security matters) and they each had unique circumstances.

Q: How does the ICA work?

A: The ICA has three distinct processes applicable to foreign investment in Canada: notifications, economic reviews under the "net benefit" to Canada test, and national security reviews. A notification is a form-based filing that is often made after closing, when a non-Canadian investor acquires control of a Canadian business or commences a new business. No governmental approval is required for notifications.

An economic review under the "net benefit" to Canada test is required in certain cases when a non-Canadian investor acquires control of a Canadian business, and certain thresholds are exceeded. Reviewable direct investments in Canadian businesses require ministerial approval before closing (and indirect investments, where control is acquired via the acquisition of an offshore parent, within 30 days after closing).

A national security review may be required where the government believes that there are reasonable grounds to believe that an investment may be injurious to national security. If the process is initiated by the government, governmental approval must be obtained, and if initiated post-closing, may result in an order to divest. National security reviews are still relatively rare, although on the increase since 2012.

Q: What is the trigger for an ICA notification?

A: A notification is required where there is an acquisition of control of a Canadian business by a non-Canadian, and where the thresholds for an economic "net benefit" review are not met. A Canadian business exists where the target business has: (i) a place of business in Canada, (ii) individual(s) in Canada who are employed or self-employed in connection with the business, and (iii) assets in Canada used in carrying on the business. Generally, the Canadian business test is easily met. Notifications are also required when new Canadian businesses are established by a non-Canadian.

Q: What is the trigger for an ICA economic review?

A: There must be an acquisition of control of a Canadian business by a non-Canadian in one of the ways specified in the statute and a financial threshold must be exceeded. Pursuant to rules effective April 24, 2015, in the case of buyers who qualify as "WTO Investors" under the ICA (i.e., buyers ultimately controlled by citizens of WTO-member states), and who are not controlled or influenced by a foreign state (and, as such, are not considered to be "state-owned enterprises" or SOEs), the threshold for 2015 is exceeded where the Canadian business has an enterprise value greater than C$600M (unless the Canadian business carries on any "cultural" activities). The enterprise value threshold will rise in 2017 to C$800M and in 2019 to C$1B. The calculation of "enterprise value" depends on the structure of the acquisition (all terms within brackets are defined in the applicable regulations):

- Acquisitions of shares of Publicly-Traded Entities: Enterprise value = (market capitalization) + (total liabilities (excluding operating liabilities)) – (cash and cash equivalents).
- Acquisitions of shares of Non-Publicly Traded Businesses: Enterprise value = (acquisition value) + (total liabilities (excluding operating liabilities)) – (cash and cash equivalents).
- Acquisition of Assets: Enterprise value = (acquisition value) + (assumed liabilities) – (cash and cash equivalents).

For SOEs who are WTO investors, the enterprise value threshold does not apply, and the threshold for 2015 for economic review (unless the Canadian business carries on any "cultural" activities) is C$369M (indexed each January for inflation) and is based on the book value of assets. The threshold for the direct acquisition of control of a cultural business or for transactions where neither the buyer nor the seller is a WTO investor is C$5M. The threshold for review of an indirect acquisition of control of a cultural business, or of any Canadian business where neither the buyer nor the seller is a WTO investor, is C$50M.

Q: Are there exemptions from review requirements?

A: There are a number of exemptions. The most important exemption is for an indirect acquisition of a non-cultural Canadian business by a WTO investor (i.e., acquisition of control of the offshore parent of a Canadian business). Although the test is complex, a WTO investor is most commonly found to exist where an entity is controlled by persons who are citizens of one or more states that are members of the World Trade Organization. See below for the definition of a "cultural business".

Q: What if there is only a head office and perhaps a stock exchange listing in Canada and the operating assets are located outside of the country?

A: Generally speaking, this fact is insufficient to exempt a transaction from a review, if otherwise required. Even if all operations are offshore, the existence of the Canadian head office will usually be sufficient to constitute a "Canadian business" under the ICA.

Q: Are there sensitive sectors?

A: Formally, there is now just one sensitive sector: cultural businesses. Substantially lower thresholds for review apply to acquisitions of control of a Canadian cultural business: C$5M based on the book value of the assets involved for direct acquisitions of control, and C$50M for indirect.

Q: What is a cultural business?

A: The ICA treats a Canadian business as a cultural business if it engages in any of the following activities (however small a part of the business these activities may form):

a) 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 of books, magazines, periodicals or newspapers,

b) the production, distribution, sale or exhibition of film or video recordings,

c) the production, distribution, sale or exhibition of audio or video music recordings,

d) the publication, distribution or sale of music in print or machine readable form, or

e) radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services.

Q: What if the business is only involved in cultural products to a *de minimis* extent?

A: There is no *de minimis* exemption, in the view of Heritage Canada, the department responsible for administering the ICA provisions in respect of cultural businesses.

Q: Are there special issues for cultural products?

A: Yes, there are a number of unique cultural considerations. The review threshold drops in most cases to C$5M (book value of assets). In some cases reviews can be ordered where the asset value is below C$5M or when the test for an "acquisition of control" has not been met. Also, Heritage Canada conducts the review of acquisitions of cultural businesses. Policy considerations of Heritage Canada may play a role in the review. Transactions involving certain cultural sectors are subject to policies that acquisitions will not be approved except in exceptional cases. The policies are not always applied.

Q: What must be done to get approval if an economic or cultural review is required?

A: An application for review must be filed with the applicable governmental agency. The application must explain the purchaser's plans for the business for the next few years, in detail. In most cases it will be necessary to give the Canadian government legally binding undertakings regarding the future operation of the business.

Q: What kinds of undertakings must be given?

A: This varies with the circumstances of each transaction. Generally speaking, undertakings cover Canadian employment levels (number of persons), capital expenditure and research and development expenditure levels, the preservation of a Canadian head office, the role of Canadians in senior management and the board of directors, and a wide range of other factors. Undertakings usually run for three to five years after closing, but can be longer for very important businesses. Undertakings specific to governance issues are common for investors who are SOEs.

Q: What is the test for approval?

A: The Minister must determine that the transaction will likely be of net benefit to Canada.

Q: Is the approval process onerous?

A: The process may initially be concerning to foreign investors who are unfamiliar with it. However, the government agency conducting the review has extensive experience and will endeavour to reach an outcome that is acceptable to the investor while still providing a sufficient basis for the Minister to properly approve the transaction. As discussed in this FAQ, high profile transactions are likely to experience a much higher degree of scrutiny.

Q: Is the review process public?

A: No. At present the investment review process is conducted in strict confidence as required by the ICA. It is important to note that it is common on more significant transactions for the investor (at the request of the government), or the government in some cases, to issue a press release at the end of the process that discloses information regarding the main elements of the undertakings given by the investor. Following the 2010 decision to reject BHP Billiton's proposed acquisition of PotashCorp (discussed below) and again during the debate over CNOOC Ltd.'s bid for Nexen, however, there were repeated Opposition calls for greater transparency, including demands for public hearings. Amendments in 2012 permit the government to publish reasons even for preliminary decisions.

Q: How long does a review take?

A: There is an initial deadline of 45 days; however, a typical review usually takes 60 – 75 days, and longer reviews are not uncommon.

Q: Are there special rules applicable to state-owned enterprises ("SOEs")?

A: SOE investments are reviewed according to the same law that applies to private investors. That said, in 2007 the government issued guidance as to particular issues it will consider when reviewing SOE transactions, and government and media scrutiny of SOE transactions has intensified in recent years. The SOE guidelines were amended in late 2012 at the same time that the approvals of SOE investments by Malaysia's Petronas (Progress Energy) and China's CNOOC (Nexen) were announced. In short, the Minister will need to be satisfied as to the commercial orientation of the investor and that its governance structure meets commonly accepted Canadian business norms. Undertakings will likely be required to address these issues. The SOE guidelines indicate that an acquisition of control of a Canadian oil sands business by an SOE will be approved only under exceptional circumstances, but that minority (joint venture) investments will continue to be welcome, as will SOE acquisitions of control in other sectors (if the SOE guidelines can be satisfied). As of March 2015, one such exception had been approved, permitting the re-structuring of an existing oilsands investment by an SOE.

Amendments in 2013 enabled the government to determine that minority acquisitions that do not meet the statutory tests for the acquisition of control will nonetheless give an SOE "control in fact" of a Canadian business (and thereby potentially be subject to net benefit review under the ICA). The amendments also defined SOEs as including not only those controlled by a foreign state (control is defined in terms of ownership of voting interests) but also those "influenced" directly or indirectly by a foreign state – an inherently subjective test.

As noted below, investments by SOEs from WTO-member states are subject to a different threshold for economic review than are their private-sector counterparts. Specifically, an acquisition of control of a Canadian business by a foreign SOE from a WTO-member state is subject to review if the book value of assets of the Canadian business exceed C$369M; the C$600M "enterprise value" threshold does not apply to SOE investments.

Q: Has the government approved SOE investments in the past?

A: Yes. A number of such investments have been approved including by Chinese, Korean, European and Middle Eastern SOEs. As noted, Canada approved CNOOC's C$20B bid for Nexen in late 2012, along with Petronas' C$6B bid for Progress Energy. The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, when ratified, will exempt European SOEs from the special rules.

Q: Which transactions have been rejected under the ICA?

A: Under the economic provisions of the ICA, there have been one final and two preliminary rejections to date (one of which was ultimately approved). The first, in 2008, was in respect of the proposed acquisition by a United States defence company, Alliant Techsystems Inc., of the space business of MacDonald, Dettwiler & Associates Ltd. That business developed and operated the Radarsat satellite program charged with defending Canada's north, as well as the robotic arm attached to NASA's space shuttle, and was finally rejected as not being of "net benefit" to Canada under the test.

The second rejection, in November 2010, was in respect of the proposed acquisition of Potash Corporation of Saskatchewan Inc. ("PotashCorp") by BHP Billiton Plc. There was strenuous objection to the acquisition by the province of Saskatchewan, where most of PotashCorp's mines are located, echoed by other provincial governments, as well as from other stakeholders. The Minister of Industry issued a press release on November 3, 2010 that referred to a notice that he had sent to BHP to the effect that he was not, at that time, satisfied that the proposed transaction was likely to be of net benefit to Canada and informed BHP that it had 30 days to make any additional representations and undertakings it deemed appropriate. Ten days later, the Minister issued a press release stating that he had been informed that BHP Billiton had withdrawn its application for review and that this terminated the ICA review process. The Minister stated that Canada welcomed foreign investment as being in the best interests of Canada for all the benefits it brings, including new ideas, sources of capital, and job creation. However, in the case of this particular acquisition the Minister determined, despite the offer of significant undertakings by BHP, that three of the criteria specified in the ICA were not satisfied; in particular, the criteria relating to Canada's ability to compete in world markets, productivity, efficiency and innovation in Canada, and the country's overall level of economic activity.

The third rejection, the preliminary rejection of Petronas' bid for Progress Energy in October, 2012, proved not to be the undoing of the transaction. The preliminary finding of no "net benefit" was reportedly issued as a result of a refusal by Petronas to extend the deadline for review as requested by the Minister in order to allow the government more time to issue revised SOE guidelines and to announce its decision concurrently with its decision on CNOOC/Nexen. Ultimately, Petronas agreed to further extensions and was approved on the basis of undertakings.

Under the national security provisions of the ICA, there has been one formal, public rejection to date (a telecom transaction involving the sale of Allstream to Accelero Capital, an Egypt-based investor). However, there have also been several situations where a proposed investment has been abandoned due to national security concerns. National security questions are also routinely asked as part of net benefit reviews in certain sectors and for certain investors. A revised notification form issued in 2015 also includes questions that facilitate the initial screening of all notifications for potential national security concerns.

Q: Do politics play a role under the ICA?

A: For routine transactions, politics do not play a role; however, in some high-profile cases politics may be very important. Although the factors to be considered by the Minister are specified in the ICA, they are often very broad. For example, one of the specified factors is the compatibility of the investment with national industrial, economic and cultural policies. The Minister therefore has considerable discretion when making decisions about particular investments. Also of note is that there is consultation with other federal governmental departments and affected provincial governments. Individuals and organizations may also make submissions to the government. In recent years, the ICA process has received a higher degree of political prominence, which places the Minister under a higher degree of scrutiny. Some transactions have been the subject of political debate in Parliament. Although politics can play a role in such cases, nonetheless, the Minister and his staff can be expected to take care to exercise their responsibilities within the requirements of the ICA.

Q: What is the role of governmental relations and public relations advisors?

A: In most cases, significant governmental relations and public relations efforts will not be required. However, for transactions that may raise politically sensitive issues, GR and PR strategies and careful implementation are essential. An early assessment (well before public announcement) of political risk should be made. For transactions that warrant political attention, it is often appropriate to make courtesy calls and meet with key municipal, provincial and federal officials, in order to introduce the investor and explain the rationale. Engaging with such officials at the earliest possible date often allows any concerns to be raised and addressed on a constructive basis. In these cases ongoing monitoring of the political and public reaction to a transaction is very important.

Q: How does the national security review process work?

A: There are a number of steps, but in essence the ICA allows the government to initiate a review where there are reasonable grounds to believe that an investment may be injurious to national security. Unlike the economic review provisions, there does not have to be an acquisition of control of a Canadian business – minority investments too can be scrutinized on national security grounds, and the investment need not qualify as a Canadian business. Once a national security review is commenced, a

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