Search - 1 Result - § 1.04 General Private and Commercial Law

1-1 Doing Business in Canada § 1.04

Doing Business in Canada

PART I Government, Legal System, and Business Environment
CHAPTER 1 Introduction to the Canadian Legal Business Environment

1-1 Doing Business in Canada § 1.04

§ 1.04 General Private and Commercial Law

[1] Real Estate [127]

[a] Non-Resident Ownership

The sale and development of real estate is under the jurisdiction of the provincial governments. In most provinces and territories legislation specifically confers on non-residents the rights to take, acquire, hold and dispose of real property in the same manner as a Canadian citizen or resident. [128] Prince Edward Island, however, has enacted the *Lands Protection Act*, [129] which significantly restricts the amount of land that may be held by persons (whether corporations or individuals) not resident in the province.

In all jurisdictions, corporations holding land in the province or territory must comply with licensing or registration requirements imposed on extra-provincial corporations carrying on business in the province or territory.

[b] Land Use Planning and Construction

The purpose of land use planning and development legislation is to provide of the orderly growth and development of municipalities and regions across the various

provinces. Policies concerning the development and division of land are established at the provincial level and delegated to local levels. Each province establishes the legal framework within which local governments may develop official plans to establish the broad parameters of appropriate land use. Within those parameters, local governments are empowered to enact zoning by-laws, amend and vary them, consent to land division and regulate building. It is at the local level that most contact occurs for real property ownership and development.

An important tool of development control used in Canada is the statutory restriction on the subdivision of land. By restricting the circumstances in which landowners may subdivide their land into smaller parcels, planning legislation seeks to control the density of development to ensure adequate municipal services. Subdivision control is normally effect through the requirement of a provincially approved registered plan of subdivision.

Zoning and building by-laws are the most familiar and generally the most effect means of development control in Canada. Municipal councils use them to regulate the use and character of different areas of the municipality. Zoning by-laws generally restrict the uses of particular properties. For example, if an area is zoned Residential, commercial buildings will not be allowed there.

Building by-laws govern the standards for construction and design of buildings. While building codes are generally of provincial application, there may be different or additional codes applicable to particular areas. Ontario, for example, has the *Building Code Act, 1992*, [130] which makes the Ontario Building code applicable throughout the province. The local government is an enforcer of provincial building codes through its investigation of compliance with the building permits, which it has issued. It is generally at the local or regional level that levies may be established and collected for infrastructure costs of new construction. There are also fees for the issuance of building permits, which generally vary according to the size of the structure to be built. There is also a National Building Code of Canada, which has been adopted in many jurisdictions.

In the case of new housing construction, there are provincial warranty programs to protect residential purchasers. In some provinces there are voluntary programs on the part of the builder or purchaser. In other provinces, the programs are compulsory. Under the compulsory regimes, a builder must be registered with the warranty agency and may have to post security. While the cost of the warranty premium may be passed on to new home buyers, those buyers enjoy warranty

protection extending for several years, the applicable period of warranty depending on the nature and extent of the deficiency.

For new construction or investment that creates new employment, certain incentives may be offered, primarily at the local level. Local chambers of commerce and business development agencies can often provide detailed information about any such incentives.

Land use planning will also be affected by environmental requirements. Particular environmental conditions applicable to certain lands may well affect or limit the permissible development of those lands. In the case of new construction, environmental considerations are normally a part of the process that the municipality undertakes before granting its approvals or issuing its building permit. Reference to applicable environmental legislation must be made for many purposes, including the conduct of various types of business, the transportation or storage of particular chemicals or, in some cases, the construction or maintenance of structures intended for particular environ-mentally-sensitive uses.

[c] Title Registration

Land registry offices located throughout each province are provincially funded and maintained. Land registration systems have historically enjoyed a high priority in Canada. Most provinces maintain or are implementing the "Torrens" or "Land Titles" system by which an up-to-date record is maintained of property descriptions, ownership and encumbrances. Technology plays a leading role. In Ontario, for example, all registered instruments are imaged and most searches can be done on line from designated licensed terminals. Registrations may be performed in the same manner, with no paper record or attendance necessary at the land registration office. This technology is being licensed to various foreign jurisdictions. are compulsory.

Title investigation and certification, as well as conveyancing, are predominantly done by lawyers (or notaries in Quebec). While there is growing use of title insurance in some jurisdictions, almost all conveyancing is performed by lawyers, rather than by escrow agents or title insurance companies. For commercial transactions the cost is usually lower than title insurance and escrow costs in most jurisdictions in the United States.

[d] Taxes Relating to Real Property

Taxes on real property constitute a major source of revenue in the Canadian tax system, rating fourth in revenue generated after personal and corporate income taxes and sales taxes. Most of these taxes are levied at the municipal level and are used to fund municipal services. Most municipalities impose a "real property tax" on the value of property within the municipality.

Typically a provincial assessment authority values all of the property in the province. Then the municipalities (or in some cases the provincial government itself) levies a tax based on each property based on its assessed value.

Another source of revenue is the taxation of transfers of land. In several jurisdictions, the purchaser of lands is required to pay a provincial or municipal land transfer tax or a property purchase tax. The specifics of the legislation differ significantly from province to province but they do not generally differentiate between transactions involving only Canadians and those involving non-residents. Quebec, however, levies additional transfer duties on a purchase of land by a non-resident.

In addition to these taxes, the goods and services tax (the "GST") will be imposed on the sale or lease of real property (with the exception of previously occupied residential property.

Income taxes are normally payable on profits or gains from the disposition of land. If a vendor of Canadian real property is not resident in Canada, the purchaser will generally require the vendor to provide a clearance certificate from the Receiver General of Canada prior to closing. If the vendor fails to provide the certificate, the purchaser must withhold one quarter of the purchase price and remit it to the Receiver General on the vendor's behalf.

[2] Intellectual Property [131]

Intellectual property protection is partly a federal responsibility and is the subject of six principal federal statutes:

- the *Patent Act*; [132]
- the *Trade-marks Act*; [133]
- the *Copyright Act*; [134]

- the *Industrial Design Act*; [135]
- the *Integrated Circuit Topography Act*; [136] and
- the *Plant Breeders' Rights Act*. [137]

The Canadian Intellectual Property Office ("CIPO") administers the first five statutes. [138] Agriculture and Agri-Food Canada administers the *Plant Breeders' Rights Act*. [139] The laws of passing off and trade secrecy fall within provincial jurisdiction although the *Trade-marks Act* also covers passing off.

[a] Patent Law

[i] General

Historically, patent law in Canada derives from the common law of England and specifically the royal prerogative to grant monopolies for new inventions. Accordingly, the patent law of the United Kingdom has been most relevant in interpreting Canadian patent law. Increasingly, however, United States patent decisions may be considered if the statutory language being interpreted is similar.

A Canadian patent grants its owner the exclusive right to make, use and sell an invention defined in the claims of the patent for a period of 20 years from the date of filing the first application. A patent will only be granted for inventions that are useful, new and inventive, and may be obtained for devices, materials and processes. Patent protection is generally not available for scientific principles, abstract theorems or ideas.

The *Patent Act* establishes a "first-to-file" system under which novel inventions are patentable in Canada provided the invention has not been publicly disclosed by the inventor any where in the world for more than one year before the first patent application has been filed in Canada or another Paris Convention country or at any time before the first application is filed by a third party. The one-year exception contrasts with the patent systems in most countries, which require absolute novelty

for inventions, insisting on no public disclosure prior to filing the first patent application.

The Patent Office receives, processes, examines applications and is responsible for granting patents in Canada. It is directed by the Commissioner of Patents. [140]

Canada is a member of the Paris Convention for the Protection of Industrial Property, by which all member countries agree to recognize the earliest patent filing date in any member country, provided the patent applicant files in the other countries within one year after the original filing.

[ii] Patents on Drugs

There are additional requirements for patents on drugs. The Food and Drugs Regulations [141] govern the process by which new drugs are approved for sale and advertising in Canada. Before selling or advertising a new drug for sale, a pharmaceutical manufacturer must obtain a notice of compliance form the Minister. However, the regulations prohibit the issuance of notice of compliance for patent-linked drugs. The drug manufacture can file a patent list for each drug for which the have a notice of compliance. Other manufacturers who wanted to apply for a notice off compliance for the same drug would have to wait until all outstanding patents had expired.

In addition the pricing of patented medicines are controlled by the Patented Medicine Prices Review Board (the PMPRB"). [142] The PMPRB is responsible for regulating the prices that patentees charge, the "factory-gate" price, for prescription and non-prescription patented drugs sold in Canada, to wholesalers, hospitals or pharmacies, for human and veterinary use to ensure that they are not excessive. The PMPRB regulates the price of each patented drug product, including the strength of each dosage form of each patented medicine sold in Canada.

Patentees are required to comply with the *Patent Act* to ensure that prices of patented medicines sold in Canada are not excessive. If the Board finds, after a public hearing, that a price is excessive in any market it may order the patentee to reduce the price and take measures to offset any excess revenues it may have received.

Under the Patented Medicines Regulations, 1994, [143] patentees are required to file

price and sales information twice a year for each patented medicine sold in Canada for price regulation purposes. Patentees are also required to file research and development expenditures once a year for reporting purposes.

Manufacturers are also required to inform the PMPRB of their intention to sell a patented medicine but are not required to obtain approval of the price before they do so.

[b] Copyright

The federal *Copyright Act* grants the owner of copyright the right to prevent the copying or commercial exploitation of original literary, dramatic, musical and artistic works and performances. Copyright protects the expression of ideas, but not the ideas themselves. It can be used to protect many types of works, including computer programs and choreographic works. Copyright in literary works by identified authors subsists for the life of the author plus 50 years. If the identity of the author is unknown, other durations may apply.

Canada is a signatory to the Berne Convention. As a result, copyright protection in Canada is extended, for example, to works by American citizens or works first published in the United States.

The Act provides for registration in the Copyright Office if desired by the owner of the copyright. [144] Registration is optional (as copyright arises at the moment of creation alone), but it does confer benefits, including the (rebuttable) statutory presumptions that copyright subsists in the work and belongs to the registered owner. In the absence of registration, some of the remedies in the Act may only be available if the author can prove actual knowledge of the existence of the copyright on the part of the infringing party. Actual knowledge is deemed to exist by statute the copyright has been registered. Infringement includes the production or reproduction of a copyrighted work and the knowing distribution or offering of the work to the public. The author of a copyright work also has the non assignable right to prevent any distortion, mutilation, misattribution or other modification of the work that is prejudicial to the author's reputation. Remedies for infringement are cumulative and include damages, an accounting of profits, delivery up of any infringing material and injunctive relief. Criminal sanctions are also available in limited circumstances.

[c] Trade-marks

A trade-mark is a word, label, name, symbol or trade-dress, or any combination, adopted and used by a manufacturer or merchant to distinguish its goods and services from those manufactured and sold by others. Trade-marks are primarily symbols of goodwill, allowing consumers to recognize attributes of goods and services based on recognition of the trade-mark.

The *Trade-marks Act* provides a registry system for trade-mark owners, based on a "first-to-use" principle. Although the statute does permit applications to be filed based on proposed use, use must take place prior to registration. In addition to rights that accrue at common law through use of a trade-mark in Canada, the registry system gives a trade-mark owner evidence of subject matter and ownership. While registration of a trade-mark under the Act is not mandatory, the extent of protection available to the owner of an unregistered trade-mark may be limited geographically to the area in which the trade-mark enjoys some notoriety. For a registered trade-mark, there is exclusive protection across Canada. In addition, broader remedies are available when there has been an improper use of a registered trade-mark as opposed to an unregistered one.

There is no inherent requirement of distinctiveness for a trade-mark to be registered. To be a trade-mark, the mark need only fulfill two requirements: it must be a mark and it must be used to distinguish the wares or services of one person from those of another. The mark must also not be one of the prohibited marks such as the Royal Arms. Also, the names of persons (presently living or having died within thirty years) cannot be registered. Marks that are descriptive of what a product will do are also unregistrable.

A trade-mark is registered for 15 years, and may be renewed indefinitely. Infringement of a trade-mark, which may lead to both civil and criminal liability, occurs when there is a sale, distribution or advertisement of wares or services in association with a confusing trade-mark or trade name. Infringement also occurs when a person uses a registered mark in a way that will depreciate the goodwill attached to it.

A trademark registration will be invalid if, when the validity of the trade mark is challenged, the mark has lost its distinctiveness and therefore cannot be said to identify in the minds of the public the particular source of the goods or service.

Use of a trademark in a competing business may also give rise to an action either at

common law or under statute for passing off or unfair competition.

[d] Industrial Designs

Design rights are distinct from patent, trademark and copyright, and are directed to protecting applied art creations, in particular the ornamental aspects of useful articles. The *Industrial Designs Act* grants exclusive rights to a registered industrial design within Canada for the duration of its registration. Industrial design is defined as "features of shape, configuration, pattern or ornament and any combination of those features that, in a finished article, appeal to and are judged solely by the eye."

Industrial design protection affords the registered owner the exclusive right to make, import, offer for sale, sell or rent any article in respect of which the design has been applied. To obtain an industrial design registration, there must be an original shape, pattern or ornamentation applied to a manufactured article that is not a utilitarian function of the article. Registration requires the filing of a photograph or a description and drawing or photograph of the design and a declaration that the design was not being used and had not been used, to the applicant's knowledge, by any other person at the time that the applicant adopted it. A valid registration requires absolute novelty, namely the design should neither be found to be identical with some other design already registered nor to so closely resemble some other design as to be confused with it. Initial application must be made within 1 year of the publication of the design in Canada and may be made by the author, the author's successor in title or the person for whom the author created the work.

The exclusive rights conveyed by the registration of an industrial design are valid for ten years. The infringement of a registered industrial design may give rise to both civil and penal remedies. Infringement includes the unauthorized use of an exact copy, an obvious imitation or a fraudulent imitation, the application of the design or an imitation to another article for purposes of sale, exposure for sale or use of the article and the publishing, selling or exposing for sale or use of the article. It is not, however, an infringement to apply a design similar or identical to a registered design to a substantially different article or in a new or novel manner.

[e] Integrated Circuit Topographies

The *Integrated Circuit Topography Act* gives registrants a ten year exclusive term of protection for the design or topography of integrated circuits, that is, semiconductor

chips. The purpose of registration is to provide rights in the three-dimensional representation of the layers of material that comprise an integrated circuit.

The application for registration must be filed in Canada within two years of the first commercial exploitation of the topography anywhere in the world.

Registration gives the exclusive right to reproduce, manufacture, import or commercially exploit the topography and any integrated circuit which incorporates the topography or a substantial part. Others can use the design for analysis, evaluation, research or teaching, as long as the use is not for commercial purposes.

[f] Plant Breeders' Rights

A person who originates or discovers a new plant variety may apply for registration under the *Plant Breeders' Rights Act* to obtain the exclusive right to sell, or produce propagating material for the purpose of selling, a new plant variety, for a period of 18 years from the date of registration. In order to qualify, the plant variety must be new, distinct, uniform and stable. The regulations under the *Plant Breeders' Rights Act* protect 23 plant categories including grain, fruit, vegetables and flowers. This form of protection is available to citizens of Canada and of countries that are members of the International Union for the Protection of New Varieties of Plants.

[3] Bankruptcy Law [145]

[a] General

Bankruptcy and insolvency is a matter of federal jurisdiction. The two principal federal insolvency statutes are the *Bankruptcy and Insolvency Act* (the "BIA"), [146] the *Companies' Creditors Arrangement Act* (the "CCAA") [147] and the Winding-up and Restructuring Act. [148] The property of an insolvent can also be dealt with by receivership under provincial law or by the appointment of an interim receiver under the BIA.

The insolvency regimes under these statutes can be divided into two general categories: liquidation regimes and reorganization regimes. Liquidation regimes have one primary purpose: the realization of all of the assets of the insolvent entity by the insolvency representative for the benefit of its creditors.

In contrast, reorganization schemes such as proposals, arrangements, and reorganizations are intended to allow an insolvent entity time to develop a plan for the continued existence of its business. Reorganization might involve the compromise of the existing claims of creditors or the provision for a particular body to take control of a troubled organization. The usual kinds of insolvency or quasi-insolvency proceedings are: (i) liquidation under the BIA; (ii) reorganization under the BIA; (iii) reorganization under the CCAA; (iv) private or court-supervised receivership or interim receivership by or at the request of a secured creditor; or (v) a combination of these.

[b] Liquidation Regimes

[i] The Bankruptcy and Insolvency Act

An "insolvent person" or a "debtor" may become "bankrupt". An "insolvent person" is a person [149] who resides, carries on business or owns property in Canada, is indebted to creditors for at least $1,000 and is insolvent on a balance sheet basis or has ceased to meet his or her liabilities as they fall due. A "debtor" is a person who resides or carries on business in Canada, is indebted to creditors for at least $1,000 and has committed an act of bankruptcy.

Almost any type of entity may become bankrupt under the BIA, including individuals, partnerships, associations and corporations. The BIA defines "corporations" to include not only any company incorporated and authorized to do business by or under a federal or provincial Act, but any incorporated company that has an office, carries on business or has assets in Canada. The definition does not include certain entities in the financial services sector such as banks, savings banks, insurance companies, trust companies, loan companies or railway companies, although holding companies of these entities are subject to the BIA. The liquidation of these entities is dealt with under the *Winding-up and Restructuring Act*.

A person may become bankrupt in one of three ways. An insolvent person may make a voluntary assignment in bankruptcy. An insolvent person may attempt a reorganization under the BIA (described below), and if that fails he or she will be deemed to have made an assignment in bankruptcy. Finally, a debtor may be the subject of an involuntary petition that, if successful, results in bankruptcy. [150] In the last case the petitioning creditor must prove that the debtor committed an "act of bankruptcy" within the six months prior to the issuance of the petition and that the debtor is indebted to the creditor in the amount of at least $1,000. There are ten acts

of bankruptcy set out in the BIA. A creditor will most usually rely on the debtor having ceased to meet its liabilities generally as they fall due.

On bankruptcy, a bankrupt's property [151] vests in the trustee in bankruptcy and a stay arises preventing unsecured creditors from taking or continuing proceedings to recover claims provable in the bankruptcy. Note that Property held by the bankrupt in trust for others and property that is exempt from execution or seizure under relevant law does not vest in the trustee. Secured creditors are free to realize on their collateral in accordance with their ordinary rights. [152] Subject to the rights of secured creditors, the property is dealt with by the trustee and distributed to unsecured creditors in accordance with the priorities set out in the BIA. A trustee has broad powers of investigation.

Among other things, the BIA allows the trustee in bankruptcy to realize on the assets of the bankrupt, determine the propriety of claims against the estate and distribute the proceeds. Generally, a trustee takes the property of the bankrupt, subject to the existing rights of third parties. For example, contractual rights of termination are binding on a trustee. Set-off is permitted. A trustee can, however, disclaim any lease under which a bankrupt is a tenant.

The trustee is able to challenge payments or transfers of property that have taken place within defined periods prior to the liquidation if they have had the effect of defeating or prejudicing the claims of creditors. A trustee or creditor may seek to overturn unjust payments or dispositions of property made prior to bankruptcy. Normally, a natural person who becomes bankrupt will be entitled to a discharge nine months after commencement of the bankruptcy. Other persons can only be discharged if all creditors are paid in full.

[ii] Winding-up and Restructuring Act

Liquidation provisions under the *Winding-up and Restructuring Act* apply to federal or foreign banks, federal or provincial loan or trust companies, and federal, provincial or foreign insurance corporations carrying on operations in Canada. Although the Act can apply to "trading companies" (except for corporations incorporated under the Canada Business Corporations Act), non-financial institution corporations are generally liquidated under the BIA. Although it is framed in different terms, the *Winding-up and Restructuring Act* operates in much the same way as the BIA.

[iii] Receivership

In most provinces of Canada receivership or interim receivership is the most common method of realization of commercial real estate, equipment, inventory and similar types of collateral by secured creditors. In essence, a receivership involves the appointment of a third party (usually a licensed trustee in bankruptcy) to take possession of the assets of a debtor for the purpose of sale, with payment first of its fees, second to the secured creditors and third any surplus to the unsecured creditors. While the traditional role of an interim receiver was to preserve and protect the collateral, the role has been expanded to allow an interim receiver to sell the collateral. In practice, most receiverships result in a shortfall to the secured creditors and no recovery to the unsecured creditors.

There are three basic forms of receivership: (i) a receiver appointed under a security instrument without court intervention; (ii) a receiver appointed by court order, usually on the application of a secured creditor; or (iii) an interim receiver appointed by the court under the BIA, usually when a debtor has filed a proposal in bankruptcy or action by a secured creditor is threatened.

The appointment of a receiver, either privately or via the court, requires the secured creditor first to deliver a notice to the debtor of its intention to enforce its security. The secured creditor must then wait 10 days, unless the debtor waived the notice period, before takeing any enforcement steps. There is no similar notice requirement for the appointment of an interim receiver.

For both private and court-appointed receiverships, the receiver may be either a simple receiver (limited to liquidation of the assets) or a receiver-manager (with power to operate the business over the longer term).

In a private appointment, the receiver lacks the authority of the court. In some instances privately appointed receivers have their appointment "upgraded" and in other instances the secured creditor will apply to the court in the first instance knowing that the receiver will need court authority. However court appointments are much more expensive, since every material step (including disposition of significant assets) is subject to the court's approval. Secured creditors will generally prefer to proceed privately unless there are complicated priority issues, the potential for trespass or very large amounts at stake.

[c] Reorganization Regimes

[i] BIA

The reorganization of creditor claims under the proposal provisions of the BIA applies to the same types of corporations to which the BIA liquidation provisions apply. Under the BIA, a company may give notice of intention to file a proposal or may simply file a proposal. In either case, aa thirty-day stay period arises against secured and unsecured creditors. The stay prevents these creditors from commencing or continuing proceedings against the debtor or its property. In general, the stay will survive until the proposal process succeeds or fails. However, the debtor must apply to the court at intervals for the continuation of the stay and the maximum aggregate duration is approximately six months. The stay does not apply to secured creditors who have already taken possession of collateral or who have sent a notice of intention to enforce security at least ten days before the filing. During the stay period a trustee monitors the business while the debtor attempts to negotiate an acceptable proposal with its creditors. If a proposal is not filed within the allowed time, the debtor will be deemed to have made an assignment in bankruptcy.

The proposal may be made to unsecured creditors only or to both secured and unsecured creditors. Creditors with proven claims are entitled to vote on the proposal and are divided into classes based on commonality of interest, with all of the unsecured creditors normally comprising one class. ... To succeed a proposal must receive the affirmative vote of a majority in number and a two-thirds majority in value of creditors voting in each class. If a secured creditor class turns down a proposal it is not binding on that class. If an unsecured creditor class turns down a proposal the debtor will be deemed to have made an assignment in bankruptcy. If all relevant classes vote in favour then the proposal must also be approved by the court at a fairness hearing. If the court declines to approve a proposal the debtor will be deemed to have made an assignment in bankruptcy.

Subject to certain exceptions for eligible financial contracts, the BIA provides that a provision in a contract that terminates the contract because a party is insolvent or has filed a notice of intention or a proposal is unenforceable. Similar clauses in leases of real property or licensing agreements that are triggered by the non-payment or rent or royalties are unenforceable. However, creditors may stipulate that any further supply of goods and services must be on a cash basis and unsecured unpaid suppliers are given the right, in certain circumstances, to reclaim

goods within thirty days of delivering them to a bankrupt or insolvent company.

[ii] Companies' Creditors Arrangements Act

The CCAA currently is the primary restructuring statute used in Canada for larger corporate enterprises. It has been called the Canadian equivalent to Chapter 11 of the U.S. Bankruptcy Code. However, unlike Chapter 11, the CCAA does not contain a detailed statutory framework, but instead depends upon judicial interpretation and application of very general provisions. As a result, every CCAA case is to some extent a "judge made" artifact. Nonetheless, enough cases have been considered to create a body of jurisprudence that has eliminated much of the uncertainty that originally surrounded practice under the CCAA.

To qualify for relief under the CCAA, a debtor must be an insolvent corporation with aggregate debts of not less than $5 million. [153]

The proceedings are commenced by an application by the debtor to the court. The court's initial relief is in the form of an "initial order" that must be confirmed within 30 days after notice of the initial order is provided to creditors. The materials in support of an initial order are unique to each filing, as is the order, although in practice the form of order has become increasingly standardized.

The initial order will contain a broad stay of proceedings. The length of the stay (once the initial order is confirmed) is discretionary. Although courts usually are reluctant to approve a period in excess of 6 months, much longer extensions have been granted in complicated cases.

Unlike the BIA provisions where the process is automatic, the decision to grant relief in CCAA proceedings is discretionary and may be denied by a court hearing the matter. In particular, a court may deny the initial application where support by the creditors is slim and there appears to be no chance that a plan will be successful. The court is also given complete discretion as to whether to grant a stay, the scope of the stay, and the time period in which the stay is in effect. In particular, the court must be satisfied that a stay is in the best interests of the debtor and creditors. Once a stay is granted it applies to both secured and unsecured creditors, and usually prevents the termination of contracts between the debtor and other parties, although eligible financial contracts are exempted. The debtor typically continues in possession of its assets throughout the restructuring period established by the court, subject to whatever controls the court may establish in relation to use of funds and

specific assets. The CCAA requires that a "monitor" be appointed at the time of the initial order. The monitor's role usually is limited to a monitoring of the behaviour of the debtor during the restructuring period, although sometimes the monitor can become actively involved in the development of a restructuring plan or is given other more specific duties by the court.

In Canada, many debtors will have granted security to a lender over all of the debtor's assets. In those circumstances, the debtor may arrange for continued financing through that lender. There is authority for a debtor to obtain debtor in possession ("DIP") financing from a third party or often from the existing lender at competitive rates. However, the right to security is not automatic and depends entirely upon the facts of the case. There remains much controversy in Canada as to the basis upon which a DIP lender should be allowed to take a security in priority to security given prior to the CCAA filing.

The CCAA does not provide an outline of the appropriate classes of creditors nor does it establish a claims administration process. These are both proposed by the debtor as part of the CCAA process. The classification of creditors is based on commonality of interest.

Voting is done by class, and each class must support the Plan by a simple majority in number and a two-thirds majority in dollars in order for the Plan to be successful. Plans are also subject to approval by the court at a fairness hearing. Claims can be accepted initially for voting but not payment purposes, and the claim adjudication process can extend long after CCAA plan approval is concluded. When a CCAA proceeding is combined with the appointment of an interim receiver, the assets will most often be liquidated with the result that the proceeds thereof are simply distributed to the secured creditors and no CCAA plan is presented to the creditors for approval.

If a debtor also requires a change in its equity structure this must be accomplished using the provisions of the relevant corporate statute, either federal or provincial, in conjunction with the creditor arrangements under the CCAA. Generally, shareholder votes are not required.

[4] Conflicts [154]

Conflict of law, or private international law, is the body of rules and principles that is applied to cases involving legal elements from two or more legal systems in

which a different result will occur depending on which law is applied. Each of the provinces and territories of Canada is a separate entity with its own conflict of laws system. In addition, there is a federal system for matters within federal legislative competence that encompasses the country as a whole. While the rules of the common law provinces are similar though not identical, there are significant differences between the civil law rules of Quebec and the common law regimes of each of the other jurisdictions.

Matters of substance are typically governed by the law that applies to the issue being adjudicated (often called the "*lex causae*"). Matters of procedure generally are governed by the law of the court or forum hearing the issue (called the "*lex fori*"). Therefore, it is crucial to determine whether a given law is procedural or substantive.

The laws of evidence and admissibility are, for the most part, governed by the law of the forum. This rule is subject to the general qualification that it is not everything that the domestic law would consider as part of the law of evidence that is classified as procedural for conflict of laws purposes, but only provisions of a technical or procedural character. The matter of the proper parties to an action is generally held to be one of procedure. However, the right to sue itself is substantive and a matter for the governing law. It is now generally accepted that questions as to the remoteness of damages or the availability of a particular type of damage (e.g. compensation) are substantive and therefore, for the governing law, whereas issues of the measure and quantification are procedural.

The general rule is that unless foreign law is pleaded and proved as a matter of fact, the court applies the law of the forum. In most Canadian courts foreign law is proven:

> (1) through provincial evidence statutes that provide for the proof of foreign law or the contents of foreign statutes;
>
> (2) through the testimony of duly qualified expert; and
>
> (3) in that the Supreme Court of Canada hearing an appeal from a provincial appellate court will take judicial notice of the laws of another province or territory.

Generally speaking, a Canadian court will not apply a foreign tax law or criminal law. In this regard, there is some concern as to the enforceability of indemnities with respect to foreign taxes. In addition, a Canadian court will not enforce or recognize a foreign law or judgment that is repugnant to the Canadian idea of public policy.

Canadian courts will generally respect choice of law clauses and jurisdiction section clauses in contracts. In addition, so long as there are no public policy concerns, foreign judgments for money sums will generally be enforced if the defendant appeared and defended on the merits, resided in the foreign jurisdiction, had previously agreed to submit to the jurisdiction or there was a real and substantial connection between the defendant and the foreign jurisdiction in relation to the litigation.

In other areas, one must look to the specific conflict of laws rule in order to determine which laws a Canadian court will apply. The Canadian rules are a mixture of statute law (e.g. specific rules in the personal property security legislation) and common law rules, in specific situations regarding contracts, torts, and property in which multiple jurisdictions are involved.

FOOTNOTES:

Footnote 127. For more information, *please see* Chapter 9, "Property and Real Estate Law".

Footnote 128. See for example the Aliens' Real Property Act, R.S. O. 1990, c. A.18, s. 1 or The Law of Property Act, R.S.M. 1987, c. L.90, s.1.

Footnote 129. R.S.P.E.I. 1988, c. L-5.

Footnote 130. S.O. 1992, c. 23.

Footnote 131. For more information, please see Chapter 11, "Intellectual Property".

Footnote 132. R.S.C., 1985, c. P-4.

Footnote 133. R.S.C. 1985, c. T-13.

Footnote 134. R.S.C. 1985, c. C-42.

Footnote 135. R.S.C. 1985, c. I-9.

Footnote 136. S.C. 1990, c. 37.

Footnote 137. S.C. 1990, c. 20.

Footnote 138. Its web site is at <cipo.gc.ca> accessed March 1, 2007.

Footnote 139. See <www.agr.gc.ca> accessed March 1, 2007.

Footnote 140. See <http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr00001.html>, accessed August 21, 2009.

Footnote 141. C.R.C., c. 870.

Footnote 142. Its web site is at <www.pmprb-cepmb.gc.ca> accessed March 1, 2007.

Footnote 143. SOR/94-688.

Footnote 144. See <strategis.ic.gc.ca/sc_mrksv/cipo/cp/cp_main-e.html> accessed March 1, 2007.

Footnote 145. For more information, *please see* Chapter 12, "Bankruptcy and Creditors' Rights".

Footnote 146. R.S.C. 1985, c. B-3.

Footnote 147. R.S.C. 1985, c. C-36.

Footnote 148. R.S.C. 1985, c. W-11.

Footnote 149. Banks, trust companies, loan companies, insurance companies and railway companies are expressly excluded from the definition of "person" in the BIA and so cannot resort to or be subjected to proceedings under the BIA though they may participate as a creditor in proceedings relating to others. The liquidation of insolvent banks, trust companies, loan companies and insurance companies is dealt with under the Winding-up and Restructuring Act.

Footnote 150. The petitioning creditor must prove that the debtor committed an "act of bankruptcy" within the six months prior to the issuance of the petition and that the debtor is indebted to the creditor in the amount of at least Cdn$1,000. There are ten acts of bankruptcy set out in the BIA. A creditor will most usually rely on the debtor having ceased to meet its liabilities generally as they fall due.

Footnote 151. Property held by the bankrupt in trust for others and property that is exempt from execution or seizure under relevant law does not vest in the trustee.

Footnote 152. In fact the BIA provides that the court may temporarily stay the rights of secured creditors, but this power is rarely exercised. It is designed to give the trustee an opportunity to consider whether to exercise the trustee's rights to redeem the secured creditor's security.

Footnote 153. The CCAA applies to Canadian corporations and to non-Canadian corporations that have assets or carry on business in Canada. Like the BIA, the CCAA does not apply to regulated financial institutions or railway companies.

Footnote 154. For more information, please see Chapter 13, "Conflict of Laws."