Cross-Border Seminar Series

Seminar One: Cross-Border Mergers & Acquisitions

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Metropolitan Hotel
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Cross-Border Series

Seminar One: Mergers & Acquisitions
Welcome

Why a cross-border seminar series?

- Acceleration in cross-border business activity
  - Driven by strong domestic economic growth
  - Continuing trend of globalization and opening up of new markets
  - Canadian companies seeking growth opportunities abroad
    - Expansion into new markets
    - Capital-raising transactions
    - Acquisitions

- "Going global" requires companies to address new business and legal issues

- Today’s seminar - mergers & acquisitions

- Summary of topics
  - Recent cross-border M&A trends
  - Structuring cross-border M&A transactions
  - Protecting your transaction
  - Legal and regulatory issues

M&A Activity in Canada

- M&A activity is starting to turn from post-2000 lows
- Cross-border M&A is large part of total M&A activity
M&A Activity in British Columbia

- Cross-border M&A accounts for two-thirds of total M&A activity by transaction value
- BC consistent with overall Canadian trend

Key Drivers of M&A Activity

- Perceived growth opportunities abroad
- High energy and metals prices
- Low interest rates and continued liquidity
- Investor demand for higher yields
- Active financial groups
  - Private equity and pension funds key players
- Strong Canadian dollar
- Repatriation of U.S. earnings abroad
  - Tax rates temporarily reduced from 35% to 5.25%
  - Up to US$350 billion expected to be repatriated
- Emerging market countries starting to expand globally
Cross-Border Transactions

- Currency appreciation is driving shift from foreigners buying Canadians to Canadians buying foreigners

Summary of Current Trends

- Cross-border M&A driving overall M&A activity
  - 62% of total transaction value in first-half of 2005
  - 35% of announced transactions

- Canadian companies are predominantly buyers
  - Number of acquisitions of foreign companies exceeds acquisitions by foreigners of domestic companies by 3 to 1
  - Value of outbound/inbound deals has recently equalized
  - U.S. remains largest target market

- Strength in mid-market ($1M-$100M)
  - 63% of announced transactions
  - 50% of total transaction value

- Overall M&A activity expected to remain strong in 2006
Common Themes in Cross-Border M&A Deals

- Build-up cultural awareness and use it as a tool
- Focus on the art of communication
- Tailor the terms to allocate and mitigate risk

Alternative Transaction Structures

- Key to structuring a cross-border transaction is to achieve business goals in a tax efficient manner
- Business drivers
  - Whether there is a liquidity event with transaction (e.g. cash for shares/assets) or not (e.g. shares for shares, where shares not freely tradable)
  - Migration of Canadian assets (offshore/US)
  - Migration of Canadian operations
- Discuss alternative structures that are examples of these business drivers
1. Simple Change in Ownership for Cash

- **US Corp (Acquiror)**
  - Shares
  - Cash
  - Shares

- **Canadian Shareholder**
- **Canadian Shareholder**

- **Canadian Corp (Target)**

1. Simple Change in Ownership for Cash – Intermediate Canadian Acquisition Corporation

- **US Corp (Acquiror)**

- **Canadian Acquisition Corp**
  - Shares
  - Cash
  - Shares

- **Canadian Shareholder**
- **Canadian Shareholder**

- **Canadian Corp (Target)**
2. Migrate IP Assets Over Time

- Same tax implications as Simple Change in Ownership for Cash example
- Research & Development Cost Sharing Agreement and/or License and Consulting Agreements to migrate value of total IP offshore/US as new IP owned by the offshore/US entity
- Transfer pricing between Canadian Corp and Offshore/US Corp
- Potential build up of income, cash or receivables in Canadian Corp needs to be considered
3. Migrating Assets & Operations

US Corp (Acquiror)

Continue Canadian Corp into the US (e.g. Delaware)

Canadian Corp (Target)

- Continuation results in a tax event at the corporate level
  - Deemed disposition of assets at FMV
  - Not tax efficient unless minimal appreciation in corporate assets
3. Migrating Assets & Operations

- Merger results in tax event at the shareholder level of Target
- No roll-over for Canadian Target shareholders, unlike share exchange between two Canadian companies

4. No Liquidity Event - Exchangeable Share Structure

- Main purpose of exchangeable share structure is to defer tax until Canadian shareholder has a liquidity event (e.g. can sell the shares received in lieu of cash)
- Main characteristics of exchangeable share structure
  - Canadian Target shareholder exchanges shares in Target for shares in Canadian Acquisition Corp
  - Canadian Acquisition Corp shares are exchangeable into shares of the US entity
  - Canadian Target/Canadian Target shareholders have contractual rights with the US entity mirroring rights they would have if a shareholder in US entity
4. Exchangeable Share Structure

**US Corp** holds Class A Common Voting Shares in **Canadian Acquisition Corp**

**Canadian Acquisition Corp** issues Class B Non-Voting Shares (with exchange rights into US Corp) as consideration for shares in the **Target**.

**Canadian Shareholders**

- **Canadian Target shareholders** benefit from “roll-over” provisions as they continue to hold shares in a Canadian company.
- **Canadian Acquisition Corp** shares entitle (and may obligate) **Target shareholders** to exchange shares in **Canadian Acquisition Corp** for US Corp.
- **Canadian Target Shareholders** generally have certain rights and protections with US Corp to mirror rights they would have if US Corp shareholders.
- When exchange the Canadian Acquisition Corp shares for US Corp shares then tax event at **Target shareholder level**.
5. Exchangeable Share Structure & ULC

- US purchasers often use Nova Scotia unlimited liability companies ("NSULCs") as the Acquisition vehicle
  - it's a corporation for Canadian tax purposes
  - it may be a flow-through entity for US tax purposes, which among other things may allow any losses in Canada to be applied against US profits

Common Themes

- Cross border M&A deals are often more complex than deals between Canadian parties (e.g., tax, regulatory, customary/cultural differences)

- Important to manage the “tax tail wagging the dog”

- If the purchase price is not cash or freely tradable shares then the Canadian Target shareholders will generally require an exchangeable share structure

- Often cross border M&A deals, particularly in the technology sector, involve the sale of shares of Canadian Target to a US public company
Protecting Your Deal

• What is “deal protection”?
• When are deal protection devices used?
  • Before Letter of Intent
  • Between LOI and signing
  • Between signing and closing
• Five main categories of deal protection
  • Confidentiality obligations
  • “No-shop” provisions
  • Stock or asset options
  • Shareholder “lock-ups”
  • Breakup fees
• Canada and U.S. generally similar

Confidentiality Provisions

• Restrict bidder and target from revealing proposed transaction and any information gathered during due diligence process
• Protect initial buyer from third-party bidders during incubation stage of transaction
• Contained in letter of intent or separate non-disclosure agreement
• Obligations may survive signing and closing in private transactions; disclosure generally required for material transactions involving public companies
No-shop Provisions

- Prevent target company from soliciting or encouraging third party offers
  - Strictness can vary: "no-talk" vs. "window shop"
- Often included in both LOI and definitive agreement
- Must be reasonable to survive judicial scrutiny
  - Typical to combine "fiduciary out" for superior, fully-financed third-party offers with advance notice and "matching right" for initial bidder

Stock or Asset Options

- Stock Options
  - Provides bidder with option to acquire target stock
    - Enables bidder to influence shareholder vote
    - Enables bidder to profit if a higher bid prevails
- Asset Options
  - Provides bidder with ability to acquire selected assets of the target (usually at a discount) if the deal fails
    - "Crown Jewel" defence – strong disincentive to competing bidders
- Less common than other deal protection devices
**Lock-up Agreements**

- Agreement by designated shareholders to vote in favour of transaction
  - Voting or support agreement(s) typically entered into at same time as merger agreement
- Typically only bind shareholders as shareholders
  - “fiduciary out” for shareholder-directors
- Can include “tail”
  - Requirement not to vote in favour of competing transaction even after initial transaction is terminated
- In U.S., a hard lock-up combined with a “no-outs” merger agreement is illegal (*Omnicare*)

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**Breakup Fees**

- Requires target to make payment to prospective buyer if deal does not close
  - Compensates failed bidder for transaction expenses and loss of opportunity
- Fees typically range from 1%-5%, with larger transactions limited at 2%-3%
- Typically triggered by:
  - Exercise of “fiduciary out” by target board
  - Breach by target of warranties or covenants
  - Rejection of transaction by shareholders
  - Acceptance of third-party bid
- Tend to be heavily negotiated
Fiduciary Outs

- Judicial scrutiny of deal protection devices has led to adoption of “fiduciary outs”
  - Enables target board to ignore deal protection restrictions where failure to do so would breach duties to shareholders
  - Permits negotiation with serious third-party bidder
  - Permits withdrawal of recommendation to shareholders in favour of original transaction
- Invocation by target typically requires legal opinion
- Fiduciary outs generally included in no-shop provisions and lock-up agreements
- Matching right usually included
- Breakup-fees remain payable

Legal Challenges to Deal Protection

- Courts in Canada and U.S. have sought to strike balance between twin effects of deal protection:
  - Inducement of initial bidders
  - Inhibiting effect on auction process
- In U.S., Omnicare decision subjects deal protection devices to “enhanced scrutiny”
- In Canada, WIC and Schneider decisions consistent with dissent in Omnicare: deal protection devices subject to normal business judgment rule
Delaware is Different

Delaware vs. CBCA
- Residency of directors
- Shareholders Approval Thresholds
- Shareholder Action by Written Consent
- Power to Call Shareholders Meetings
- Appraisal Rights
- Oppression Remedy

Antitrust Pre-Merger Review

**HSR (US) vs Competition Act (Canada)**
- Size of Parties
- Size of Transaction
- Timing
- Canada/U.S. Cooperation
Foreign Investment - Canada

Investment Canada Act

- **Notification**
  - Non-Canadians must file

- **Application for “Net Benefit” Review**
  - WTO Investor
    - Direct acquisition of assets worth Cdn$250 million
  - Non-WTO Investor
    - Direct acquisition of Cdn$5 million
    - Indirect acquisition of Cdn$50 million
  - Uranium, Financial Services, Transportation, Culture

- **Who Reviews?**
  - Industry Canada or Heritage Canada

- **Timing**
  - 45 days plus 30 day extension

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Foreign Investment - Canada

National Security Review?

- Bill C-59 amends *Investment Canada Act*
- investments by non-Canadians “that could be injurious to national security”
- no definition of “national security”
- no time line for government actions
Foreign Investment - USA

**Exon-Florio**

- President blocks acquisitions that threaten national security
- Committee on Foreign Investment in the U.S. ("CFIUS")
- "national security" not defined, but it does list key factors
- Voluntary notice, but unreported transactions forever subject to review
- Timing:
  - CFIUS - 30 days to decide whether to investigate
  - CFIUS - 45 days to investigate
  - President – 15 days to decide to block or suspend
- post Sept 11 CFIUS reviews telecom and tech deals, not just defence

Foreign Investment - USA

**USA Patriot Act**

- ownership of foreigners investing in USA
- non-affiliation of foreign investors with certain organizations

**BE13 Filing**

- survey report within 45 days of closing

**Sensitive & Regulated Sectors**

- aviation, communications, broadcasting, defence, banking, insurance, maritime shipping, utilities, minerals, real estate
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• Tax
• Financing
• Licensing

Who You Gonna Call?

“For sheer breadth and depth, McCarthys can scarcely be bettered.”
– Chambers Global

McCarthys has more "Leading 100 Canada-US Cross-Border Corporate Lawyers" than any other firm
- Lexpert/Thomson
Richard J. Balfour is a partner in the Vancouver office practising in the Business Law Group.

He acts for private and public corporations, investment dealers, merchant banks and private equity funds in corporate finance and mergers and acquisitions transactions both in Canada and abroad. He also advises on corporate governance matters.

Mr. Balfour has been recognized as a leading lawyer in various guides, including Lexpert/American Lawyer, Euromoney, International Financial Law Review, Global Counsel and International Who’s Who of Business Lawyers. He was recognized in the 2005 edition of Lexpert’s Guide to the Leading 500 Lawyers in Canada, as a leading lawyer in the areas of corporate commercial law, corporate finance and mergers and acquisitions. He was also listed in the new Lexpert/Thomson Guide to the Leading 100 Canada – U.S. Cross-Border Corporate Lawyers in Canada.

Mr. Balfour was educated at the University of British Columbia and the Massachusetts Institute of Technology. He received his BCL and LLB from McGill University in 1980. Mr. Balfour was called to the Alberta bar in 1981 and the British Columbia bar in 1982.

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Ted Koffman is a partner in our Business Law Group and Technology Group in Vancouver. His practice focuses on providing general counsel to businesses with a particular emphasis on mergers and acquisitions, outsourcings, the formation and financing of business ventures and corporate reorganizations.

Mr. Koffman's recent experience includes acting for:

- Research In Motion in the acquisition of a number of companies, including three U.S. based companies;
- OctigaBay Systems Corporation in its $150 million sale to Cray Inc.;
- British Columbia Buildings Corporation in its up to $1.35 billion outsourcing arrangement with BLJC;
- Methanex Corporation in a terminalling services agreement with EnCana, the acquisition of interests in a Trinidad methanol facility and the acquisition of a Canadian ammonia facility;
- Radical Entertainment Inc. from its formation until its sale to Vivendi Universal Games;
- Accenture Inc. in its $1.45 billion outsourcing arrangement with BC Hydro;
- Abatis Systems Corporation from its formation until its sale for the largest amount ever paid for a private technology company in Canadian history;
- OctigaBay Systems Corporation in the largest financing of its kind in Canadian history;
- Microsoft Corporation in the acquisition of NCompass Labs Inc.; and
- numerous other technology companies, venture capitalists and investors in numerous equity and debt financings.

Mr. Koffman has lectured at various programs and conferences on the legal aspects of buying and selling businesses, outsourcing agreements and the formation of business ventures.
TED KOFFMAN  
Partner

Mr. Koffman received a BA from the University of British Columbia in 1983 and an LLB from the University of Toronto in 1986. He joined the firm in 1986 and was called to the British Columbia bar in 1987.

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Sven Milelli is an associate in our Business Law Group in Vancouver.

He advises public and private corporations in a wide range of industries regarding mergers and acquisitions, public and private securities offerings and corporate governance matters. Prior to joining McCarthy Tétrault, Mr. Milelli was a senior lawyer with Sullivan & Cromwell LLP, a leading international law firm, in New York.

He received his BA (Hons.) in Economics and Political Sciences from Trinity College in 1994 and received his MBA and LLB from the University of Toronto in 1999. Mr. Milelli was called to the New York bar in 2000 and the British Columbia bar in 2005.

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Cheryl Slusarchuk is a partner and leader of our Technology, Communications and Intellectual Property Group in Vancouver. She practices in the areas of financings, mergers and acquisitions, alliances, licensing, and technology distribution, with an emphasis on US/Canada cross-border and international transactions.

Ms. Slusarchuk is featured in the “40 Corporate Lawyers to Watch” in the Lexpert/ALM 500 Survey, appeared in Lexpert’s “Top 40 under 40” in September, 2004 and was also selected as one of the “40 under 40” business people for 2003 by Business in Vancouver. She was also featured on the cover and lead article entitled “Getting IT: First Mover Advantage in Information Technology in the October 2003 issue of Lexpert.

Highlights of Ms. Slusarchuk’s recent experience include:

- acting for Research In Motion in the acquisition of U.S. based and international companies;
- cross-border financings of technology companies including preference shares, secured convertible notes, warrants, bridge financing and reorganization/asset transfer;
- acting for Accenture on outsourcing transactions for IT functions, call centers and business processes (BPO);
- cross-border licenses and software development agreements; and
- software license and distribution agreements for numerous countries including Australia, Bahamas, Barbados, Bermuda, Caymen Islands, China (Hong Kong and PRC), France, Germany, India, Indonesia, Jamaica, Japan, Korea, Malaysia, Mexico, New Zealand, Pakistan, Philippines, Singapore, Taiwan, Thailand, Venezuela, Vietnam, and the United Kingdom.

Prior to joining McCarthy Tétrault, Ms. Slusarchuk was a partner in the Technology/E-commerce Group of a large, international firm in the U.S. where she worked in these same practice areas.

Ms. Slusarchuk was General Counsel of a NASDAQ-listed international high technology company with a market capitalization of $1 billion and over 6,000 employees. Her responsibilities included preparing the company to go public and taking it through an initial and secondary public offering.

Ms. Slusarchuk also worked for six years in Australia, focusing on corporate and commercial transactions in the Asia-Pacific region.
Cheryl Slusarchuk received her LLB from McGill University and her J.D. from Chicago Kent-College of Law (Order of the Coif). Ms. Slusarchuk was initially admitted in New South Wales, Australia and then admitted in Colorado, Illinois and British Columbia. She remains licensed to practice law in Colorado, Illinois and British Columbia.

Ms. Slusarchuk co-authored the following publications:

- “The Legal and Regulatory Framework for E-Commerce and Internet Information Services”, the lead article in the World Bank’s 2002 Law and Justice for Development: World Bank Review;
- How To Protect Your Intellectual Property Information, Business in Vancouver, May 6 – 12, 2003; and

Ms. Slusarchuk is on the Advisory Board of Leading Edge BC and the Global Linkages Committee of the BCTIA and is a member of the International Bar Association.

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Daniel Steiner is a partner in our Vancouver office practicing in the Business Law Group.

Mr. Steiner has advised public and private corporations in a wide range of industries regarding the purchase and sale of businesses, mergers, acquisitions, joint ventures and the formation and financing of business ventures.

Prior to joining the firm in 2002, Mr. Steiner articled and practised with another major law firm in Toronto from 1996 to 1999, and was an associate of Simpson Thacher & Bartlett in New York from 2000 until 2002.

He has advised both Canadian and U.S. clients in all aspects of Canadian, U.S. and international mergers and acquisitions, business combinations and financings in the fuel cell, financial services, energy, resources, hospitality, telecommunications, software, airline, manufacturing and health care industries.

Mr. Steiner’s experience includes:

- advising various private equity funds and companies on acquisitions, divestitures and equity investments in Canada, the U.S. and Europe;
- advising buyers, sellers and lenders on the transfer of assets under both the Companies’ Creditors Arrangement Act and Chapter 11;
- advising on joint ventures in Canada, the U.S. and Europe;
- advising on shareholder rights plans and other protective measures;
- organizing U.S. private equity funds; and
- advising on going-private transactions.

He received his BA in Political Studies from Queen’s University, his M.Sc. in European Studies from the London School of Economics and his LLB from McGill University.

Mr. Steiner has been called to the bars of New York (USA), Ontario (Canada) and British Columbia (Canada).

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Our Cross-Border Group

**Breadth and Depth of Expertise**

With offices in all major Canadian financial centres as well as New York and London, McCarthy Tétrault advises on many of the largest transactions and cases around the world. Authoritative legal directories such as the *International Financial Law Review* and the *Guide to the Leading 500 Lawyers in Canada* consistently rank McCarthy Tétrault among the world’s top law firms.

McCarthy Tétrault has an impressive depth and range of international and U.S. cross border experience including substantial experience in complex cross-border M&A transactions, corporate finance and corporate reorganizations, cross border private placements and public offerings and transactions involving U.S. assets, either directly or through our many relationships with counsel in the United States.

To learn more about our Cross-Border Practice visit our website at www.mccarthy.ca

**More Leading Cross-Border Corporate Lawyers Than Any Other Firm in Canada**

Thirteen McCarthy Tétrault lawyers have been ranked among the best cross-border lawyers in Canada – more than any other Canadian law firm. The partners named in the 2005 *Lexpert/Thomson Guide to the Leading 100 Canada-US Cross-Border Corporate Lawyers* in Canada represent the breadth and depth of legal services offered by the firm. They include partners from each of our offices practicing tax, corporate commercial, corporate finance and mergers and acquisitions, business law, energy, banking and financial services, technology, securities and competition.
Any company that is thinking about licensing its technology into a foreign jurisdiction must be aware of the many tricks and traps involved in international licensing.

Exporting technology through licensing means that a company is granting to others the right to use the proprietary rights that it has in its technology without transferring ownership of such technology. These intangible proprietary rights are referred to as “intellectual property” and are protected by a body of laws relating to patents, trade marks, industrial designs and copyright. These laws give the owner of the intellectual property the right to stop others from using it without permission.

Companies should balance the risk of licensing into a foreign jurisdiction, where they are unaware of how local laws will apply, against the cost of obtaining legal advice to mitigate this risk.

Ten Tricks and Traps of International Licensing:

1. “Don't forget your morals” – Consider the implications of local intellectual property laws

Since not all countries recognize and protect intellectual property rights, the first step in international licensing is to make sure that your company’s technology will be recognized as “property” to be protected by law in the target country.

It is important to recognize that different countries have different laws relating to intellectual property. For instance, in many countries, especially civil law countries (i.e., many of the European and Latin American countries) distinguish between “economic rights” and “moral rights”. Moral rights, which include the right to be identified as the author and prevent any distortion of the work, are an important component of intellectual property rights.

It is also useful to know whether there are any registrations which must be made to protect your company’s intellectual property, if there are any local laws that can be used to your company’s advantage and whether the local jurisdiction is likely to enforce such laws in practise.

2. “Not in my backyard” – Consider implied warranties and other mandatory consumer laws in the local jurisdiction

Almost all jurisdictions have mandatory laws to protect the local jurisdictions’ nationals. Consumer protection laws ensure that national consumers get what they paid for. If your company does not comply with
these mandatory laws, there is a risk of unlimited direct product liability to the customers in the local jurisdiction.

Certain jurisdictions also prohibit limitation of liability clauses and local law may impose penalties for excluding liability in violation of mandatory law. For instance, local law may dictate that you cannot enforce a clause that excludes or limits warranties or provides for a limitation of liability and may go as far as to set out the licensees’ remedies for warranty claims.

3. “Taxes: they are everywhere you want to be” – Watch out for tax traps

Certain jurisdictions have requirements under local tax laws or regulations that limit, restrict or otherwise affect your company’s ability to transact commerce in the jurisdiction. Be aware of how withholding taxes and VAT taxes will apply to your transaction and specify in your agreement that the foreign payee must gross up the license fees (unless such a clause is prohibited by local law).

4. “Around the world with one agreement?” – Be wary of language and cultural differences.

Just because your license agreement is enforceable in Canada does not necessarily mean it is enforceable in a foreign jurisdiction.

For instance, it is crucial to determine whether the binding agreement can be in English or whether it has to be in the local language, such as French, German or Japanese. Also check whether there is a risk that cultural nuances may be read into your agreement and whether there are any requirements or benefits, for example, investment or export incentives, of incorporating local content into your technology.

5. “Don’t leave home without it” – Knowledge of Export Regulations is important

The implications of Canadian and U.S. trade regulations and export controls must be considered. These rules prohibit the export of all software to specific destinations named by the Canadian and U.S. government and may subject certain software exports to a prior license requirement.

6. “No License, No Permit, No Entry” – Consider the implications of Import Regulations

It is important to be aware of any licenses or permits required in order to import the technology into the foreign jurisdiction. For instance, certain developing countries still have “transfer of technology” legislation that basically allows the local authorities the right to renegotiate the transaction as a condition to the enforceability of the underlying agreement or the local party’s access to foreign exchange for remittance to the licensor.

A new wave of import restrictions is now emerging: controls on the importation and use of encryption software and technology. Certain countries prohibit the importation of encryption products without a license or import permit.

7. “Show me the money!” – Foreign Exchange Issues

An important practical issue to be aware of is making sure that the foreign entity is legally entitled to remit payment for the licensed technology in Canadian or U.S. dollars. Find out whether local law regulates the foreign exchange or transfer of money and whether there are any permits or forms required prior to shipping your product into the jurisdiction.

It is also useful to know in advance if there are any currency exchange risks in the local jurisdiction, because a
violation of foreign exchange controls is often a civil crime.


Arbitration is a key component of international licensing. Almost all countries are members of the New York Convention on Arbitration Awards, which means that the courts will enforce an arbitration award from another member country.

The parties must decide in advance what will happen if a dispute arises over the license agreement and should set out the jurisdiction of choice in case a court application becomes necessary. Another factor to consider is whether or not the local court system is reasonably efficient and reliable.

9. “Dealers are Forever?” – Consider applicable Dealer Legislation

Are there any mandatory laws in the local jurisdiction that define the relationship with the distributor? Such legislation may give the local agent or distributor the right to claim extra-contractual indemnification in the event that the principal terminates or refuses to renew the agreement without “just cause” and it will be important to know of any common practices used to lessen the impact of the dealer legislation.

It is also useful to know whether or not the distributor has to be qualified and registered as an agent and whether there are any restrictions on termination or renewal of distributor agreements. Some jurisdictions may require payment of compensation upon termination.

10. “It’s (not) a small world” - Other Mandatory Laws

A variety of other laws and regulations may be applicable to the international license agreements, depending on the specific jurisdictions involved and the technology being licensed. Some other issues to look out for in the international licensing realm relate to: privacy requirements, insolvency/bankruptcy laws, competition laws, security technology regulations and the impact of treaties and supranational laws.

Obtain Advice to Reduce Risk

In conclusion, while there will always be risks involved in licensing your intellectual property to foreign jurisdictions, these risks can be reduced if your licensing arrangements take into account the tricks and traps set out above.

The team of international licensing lawyers at McCarthy Tétrault LLP advises clients on a daily basis by coordinating local counsel and negotiating licensing arrangements outside of Canada. We have advised clients in each of the following jurisdictions:

Australia, Argentina, Australia, Bahrain, Belgium, Bermuda, Brazil, British Virgin Islands, Chile, China (Hong Kong – Special Administrative Region and People’s Republic of China), Colombia, Costa Rica, Czech Republic, Ecuador, El Salvador, Egypt, England, Finland, Germany, Greece, Guatemala, Guernsey, Hungary, India, Indonesia, Israel, Isle of Man, Italy, Japan, Jamaica, Korea, Kuwait, Malaysia, Mexico, Morocco, New Zealand, Pakistan, Paraguay, Peru, Philippines, Portugal, Puerto Rico, Russia (including certain post-UCCS countries), Saudi Arabia, Singapore, South Africa, Spain, Sweden, Taiwan (Republic of China), Thailand, Turkey, UAE, Venezuela and United States.

“Just because your license agreement is enforceable in Canada does not necessarily mean it is enforceable in a foreign jurisdiction.”
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Email is the “killer application” of the Internet. It is estimated that 31 billion emails were sent daily in 2002. In a few short years it has become an indispensable means of communication. It is inexpensive and easy-to-use. It travels well and cheaply across time zones.

The phenomenon of email, however, presents challenges for companies. Storage requirements and storage costs are ballooning. Data “bottlenecks” are forming on networks. Spam email is affecting productivity in the workplace. Email indiscretions are commonly making headline news. Individuals and organizations are facing criminal sanctions for destroying data.

The management of email and data retention policies in general are a matter of balancing the costs and advantages of retaining documents against destroying documents in the context of a specific business, industry, and management style. The following sets out some primary concerns that should be considered in adopting document retention policies and practices, as well as some practical considerations for implementing such policies and practices.

Statutory and regulatory retention requirements

Various federal and provincial legislation prescribe retention requirements in respect of types of information and documents, such as financial information and information regarding employees. Companies with operations outside Canada may be subject to retention requirements under foreign legislation or regulatory regimes (e.g., the SEC). Further, certain sectors such as financial services or telecommunications require special considerations.

Litigation (preserve the evidence you need)

If a legal action is brought by or against a company, it will often rely on documentary evidence to prove its case. For example, where the company alleges that a party has breached an obligation that was owed to the company, the company should be in a position to produce documentary evidence that supports its claims – whether a signed contract, an email evidencing promises that were made, or a print-out of the terms of a click-wrap license that was presented to a customer that downloaded a software update from the company’s web site. Accordingly, the ability to locate and authenticate a document could be integral to the success or failure of the litigation.

Various statutes set out limitation periods that limit the time during which a legal action may be commenced in respect of an alleged
The Andersen/Enron document shredding disaster has focussed people’s attention on document retention issues.

wrong. Accordingly, it is common practice to retain documents that might be required as evidence in respect of a matter at least for the duration of the statutory limitation period during which claims may arise. Companies should contemplate the possibility that a limitation period may not begin until the aggrieved party is aware of the damage suffered.

Documents that evidence “title” to assets – such as contracts with software developers providing that the company will own the rights to the software or share certificates evidencing title to shares in a company – should be retained as long as the company wishes to retain its ownership of the assets, usually indefinitely.

Litigation (relevant documents must be preserved)

Intentional destruction or concealment of evidence with the intent of defeating the course of justice may constitute obstruction of justice - a criminal offence. The Andersen/Enron document shredding disaster is a prime example of this. The failure to produce documents, the hiding of documents, or the destruction of documents may also lead to civil sanctions, including:

- the drawing of an adverse inference (if the company destroyed the evidence, the court may assume that the evidence was against the interests of the company);
- the striking out of a claim or a defence for the failure to comply with the rules of practice or because the claim or defence constitutes an abuse of process; and
- a claim for the tort of spoliation.

Generally, an adverse inference will not be drawn from the destruction of documents provided the documents were destroyed in the ordinary course of business and not in an attempt to affect evidence relevant to a pending or potential dispute. In order for a company to prove that the information was destroyed as part of a regular and consistent destruction policy, the company should ensure that it has in fact adopted, implemented, and adhered to a document retention policy. It is also important for the document retention policy to contemplate the suspension of any relevant document destruction when there is a reasonable possibility of a regulatory, civil, or criminal action or investigation.

Privacy laws and privacy policies

Privacy laws may set both minimum and maximum requirements for the retention of personal information (i.e., information about an identifiable individual).

For example, the Personal Information and Electronic Documents Act (PIPEDA) requires that personal information may be retained only as long as necessary for the fulfilment of those purposes for which it was collected. PIPEDA also requires certain information to be retained, such as when an individual makes an information request from the organization (i.e., the company cannot quickly destroy data to avoid responding to the request for information).

Accordingly, a document retention policy must contemplate privacy legislation as well as the company’s privacy policy. Further, the information should be retained in a manner that permits the company to quickly and easily respond to any request that is made by an individual to access or update personal information.
Practical Considerations

The following are some points to consider in adopting, implementing, and administering a document retention policy:

**Application** – The document retention policy should be developed and implemented on a systematic basis, across all of the company’s divisions, and should apply to all of the company’s documents, including those in paper-based as well as electronic forms, such as email, faxes, documents created with word processing software, web, intranet, and extranet pages, and stored voicemail messages. Consideration must also be given to the different retention periods and requirements that may apply to each type of document and each business unit.

**Classification** – Company personnel should, as soon as practicable, classify each document in accordance with the company’s paper-based and electronic filing systems, and retain, in electronic or hard copy, or destroy originals or copies of the document in accordance with the company’s document retention policy. For example, for each email, personnel should decide whether a copy of the email should be retained and, if so, in what format (e.g., should the email be printed out?) and in what location should the email be retained.

**Practical** – It must be practical for each person in the company to actually implement the document retention policy. Where it is not practical to implement the policy then it is very unlikely that the policy will be consistently adhered to. In many circumstances it can be worse for a company to have a document retention policy that is not consistently implemented or followed than to not have a policy at all.

**Management Support** – Like any corporate program, a document retention policy should have the support of management and should be developed, deployed, and audited – merely drafting a policy and posting it on the company Intranet will not be effective.

**Allocation of Responsibility** – In order to ensure successful implementation of a document retention policy, responsibility for administering the policy should be expressly assigned to a specific individual whose duties should include:

- ensuring that all existing and all new employees have read and have ready access to a copy of the policy;
- ensuring that the company’s document management practices are, in fact, consistent with the policy;
- working with the company’s IT department to ensure compliance with the policy and to ensure that employees are equipped with the tools required to create, manage, and retain electronic documents in accordance with the policy; and
- ensuring that the document retention policy is updated at regular intervals to reflect changes in applicable laws and in the company’s procedures.

**Litigation** – Once litigation is commenced or is even contemplated, the company should suspend document destruction as appropriate and ensure, in consultation with litigation counsel, that proper steps are taken to preserve relevant documents.

**Features Unique to Electronic Documents** – Although the retention of documents in electronic format may offer certain advantages, such as

“The document retention policy should be developed and implemented on a systematic basis, across all of the company’s divisions, and should apply to all of the company’s documents, whether paper or electronic.”
enhanced searching and indexing capabilities and the reduction of storage costs, additional care should be taken in managing electronic documents. In retaining electronic documents, for example, steps should be taken to ensure the continued security and integrity of the documents. In destroying electronic documents, the company should consider whether unintended copies may exist on network back-up media and whether redundant copies were created on mobile or local media (as is increasingly the case with email). Also, the company should always consider whether it is advisable to retain “originals” of documents for evidentiary purposes.

Every effort has been made to ensure the accuracy and timeliness of this publication, but the comments in it are necessarily of a general nature. Clients are urged to seek specific advice on matters of concern and not to solely rely on the text of this publication.

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When the Money is American

In today's financing environment, companies generally want to pursue the broadest range of financing options, whether those opportunities are in Canada or the United States. If your company is venturing south of the border for financing, it is important to understand the different rules of the financing game for American investors.

This paper addresses some of the key issues raised when the money is American.

Moving to the U.S.

American investors often prefer to invest in U.S. companies. In fact, the terms of many constating agreements governing venture capital funds restrict any investments outside of the U.S. Consequently, a U.S. investor may condition its investment on the continuance by the Canadian company into a U.S. jurisdiction, typically Delaware.

Tax Issues when Moving to the U.S.

Under Canadian income tax rules, an emigration to the U.S. by way of continuance may trigger significant adverse tax consequences. The Canadian company (“CanCo”) would be subject to a ‘departure tax’ that would treat CanCo for Canadian tax purposes as if it had sold all of its assets (including goodwill and other intangibles) at their fair market value. This could give rise to substantial tax on unsheltered income and capital gains if there has been an increase in the value of CanCo’s assets above their cost. CanCo would also be required to pay a second Canadian tax, known as a ‘net surplus tax’, at a 5% rate under the Canadian tax rules and the Canada-U.S. tax treaty. This tax would apply to the excess of the fair market value of CanCo’s assets over the total of its paid up share capital and liabilities.

Corporate Reorganization

A corporate reorganization of CanCo could be structured to meet the U.S. investors’ requirement to invest in a U.S. company while avoiding the Canadian departure tax. A new Delaware corporation (“DelCo”) would be created which would acquire from CanCo’s shareholders all of Canco’s outstanding shares in exchange for equivalent shares of DelCo. DelCo would thereby become the parent holding company and CanCo would become DelCo’s wholly-owned Canadian operating subsidiary.

The drawback with this reorganization structure is that no tax deferral, or rollover, is currently available for Canadian resident shareholders in cross-border share for share exchange transactions. The Canadian federal budget tabled on February 18, 2003 indicated that proposals, originally announced on October 18, 2000, will soon be released for public comment that would allow Canadian resident
shareholders to exchange their shares of a Canadian corporation for shares of a foreign corporation on a tax-deferred rollover basis. However, until these proposals are implemented, the use of a complicated and costly exchangeable share transaction typically will be necessary.

**Exchangeable Shares**

Exchangeable share structures allow shareholders to defer any gain or loss for Canadian tax purposes. A new exchangeable share structure could be layered on top of the DelCo/CanCo reorganization described above.

Under the exchangeable share structure, DelCo would create a new Canadian subsidiary ("Exco"). Instead of exchanging their shares for DelCo shares, shareholders subject to Canadian tax would exchange their shares for Exco exchangeable shares. These exchangeable shares would be exchangeable for and economically equivalent to the DelCo shares shareholders otherwise would have received. Exco shareholders would have the right to vote, on a per share equivalent basis, on all matters on which the applicable DelCo shareholders are entitled to vote, through the medium of special voting shares of DelCo held by a trustee.

Since Exco is a Canadian company, the shareholders would be able to achieve Canadian tax deferred rollover treatment. The taxable transaction would occur when the shareholder decides to exchange its Exco exchangeable shares for DelCo shares (i.e., for liquidity after a Delco IPO).

When designing these types of reorganization structures, it is important to ensure that any grants, investment tax credits or other R & D funding arrangements remain available to CanCo, and that CanCo’s intellectual property, employee arrangements and key licensing and contractual relationships remain intact.

There are a number of other business, legal, tax and accounting considerations that should be carefully weighed before emigrating a company to the U.S.

**Private Placement Exemptions**

The most commonly used exemption from the registration requirements of the U.S. Securities Act of 1933 is Regulation D. Offerings complying with Regulation D will not be "public offerings". Another frequently relied on series of rules is Regulation S which makes it clear that the protections of the U.S. registration requirements are for the benefit of U.S. residents only. Regulation S sets out a series of rules that clarify the circumstances in which securities will be deemed to be offered outside of the U.S. and, as a result, will not be required to be registered.

Within Regulation D, there are essentially three alternative private offering exemptions available. They vary in terms of the aggregate value of securities that can be offered in a particular period of time, the level of solicitation activities permitted, the need to provide an offering document to potential investors, and the number of "accredited investors" and "non-accredited investors" to whom such securities can be sold.

The key concepts to understand with respect to Regulation D are as follows:

**Accredited Investors**

A non accredited investor includes any person who comes within, or who the company reasonably believes comes within, certain specific categories. The most commonly relied on categories are:

- corporations and partnerships not formed for the specific purpose of acquiring the securities offered with total assets of more than US$5 million;
a natural person with an individual net worth, or joint net worth with that person's spouse of more than US$1 million; and

a natural person with an annual income of more than US$200,000 in each of the two most recent years (or, together with his or her spouse, more than US$300,000) who has a reasonable expectation of maintaining these levels in the current year;

It is prudent for the company to obtain representations in the subscription agreement and a completed “purchaser questionnaire” signed by each prospective investor to establish the factual basis for concluding that any particular investor is or is not an accredited investor.

Purchaser Counting Rules

To the extent that any Regulation D exemption provides for limitations on the number of purchasers, the rules permit certain purchaser groups (i.e., accredited investors) to be excluded from the calculation of the maximum number of purchasers under the exemption.

Integration

In order to determine whether an offering qualifies for a particular registration exemption, it is important to ensure that it is in fact a separate offering and will not be treated under integration rules as part of a larger offering.

Regulation D provides a safe harbour from the application of the integration rules where for a period of at least 6 months both before and after the Regulation D offering, no other offers or sales of the same or similar class of securities are made. Regulation S sets out conditions for alternative safe harbour exemptions that may be relied on to avoid inadvertent integration of offers or sales of securities in Canada with a Regulation D offering.

Advertising Limitations

Generally, in the context of Regulation D offerings, neither the company nor any person acting on its behalf may offer or sell securities through any form of “general solicitation” or “general advertising”.

Resale Restrictions

Investors who acquire shares in reliance on a registration exemption, such as Regulation D, will generally be subject to hold periods restricting their ability to resell their shares. Such shares are known as “restricted securities”. Investors will have some ability under the SEC’s Rule 144 to sell their shares without registration, provided the company is in compliance with certain statutory public reporting requirements. If an investor has held its shares for at least one year, it can publicly sell the shares subject to certain volume restrictions. After two years, an investor can sell its shares freely, provided it is not an affiliate of the company.

Regulation S enables U.S. investors to sell otherwise restricted securities in Canada so long as certain conditions are satisfied. These securities may be subject to Canadian hold periods (which in some circumstances are shorter than those under Rule 144).

Registration Rights

In the U.S., even after an IPO, an investor’s shares will not be publicly tradeable in unlimited quantities due to their original issuance in a private transaction. To enjoy full liquidity, the shares must be “registered” with the SEC. A registration rights agreement imposes a contractual obligation on the company to register the investor’s shares.
Registration rights are almost always required by U.S. investors. They will also be important to Canadian investors if these investors are provided with exchangeable shares under a corporate emigration to the U.S., because the Rule 144 hold period does not begin to run until the exchangeable shares are exchanged for the underlying DelCo shares. A sent registration, Canadian investors could find themselves in a position of having crystallized the tax liability by making the exchange, but having to wait a year to sell the underlying shares in the market (possibly at a lower price) to get cash to pay the tax.*

There are three types of registration rights: (1) long-form demand registration rights; (2) short-form demand registration rights; and (3) piggyback registration rights.

**Demand Rights**

As their name suggests, demand rights enable investors to demand that the company register their shares for sale in a public offering. It should be kept in mind that, although these rights are typical, the process of registration and filing is a very expensive and time-consuming procedure.

Investors typically receive more short-form demand registration rights than long-form demand registration rights because short-form registrations are less onerous in terms of time and expense than long-form registrations. Short-form registrations permit a large amount of the information required in the registration statement to be incorporated by reference to the company's previous SEC filings. Generally, a company can use a short-form registration if it has been filing SEC reports for at least twelve months and if the market value of its publicly-held voting stock is at least US$75 million.

**Piggyback Rights**

Piggyback rights are less onerous than demand rights. They enable investors to participate in a public offering that the company itself initiates. If the company has already decided to proceed with a registration or filing, there is typically little incremental expense or effort required to include the investor.

Every effort has been made to ensure the accuracy and timeliness of this publication, but the comments in it are necessarily of a general nature. Clients are urged to seek specific advice on matters of concern and not to solely rely on the text of this publication.

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Firm Profile

Welcome to Canada's premier law firm. With a client base that spans the globe, we advise on many of the largest transactions and cases in Canada and around the world. We are recognized as a top firm by the leading international directories in a broad range of practice areas. With the resources of a full-service firm at our fingertips, we deliver competitive and comprehensive strategies to help our clients succeed.
McCarthy Tétrault is Canada’s premier law firm, with a significant presence in all major financial centres in Canada and offices in New York and London. With close to 800 lawyers, we regularly advise on many of the largest transactions and cases in Canada and around the world.

We are recognized as a top law firm by the leading international legal directories, including the International Financial Law Review, Chambers Global: the World’s Leading Lawyers, The Guide to the Leading 500 Lawyers in Canada and the Canadian Legal Lexpert Directory.

According to Thomson Financial’s international league tables, McCarthy Tétrault is the top-ranked legal advisor on Canadian completed mergers and acquisitions for 2003. In addition, the firm is listed as the “Top M&A Shop in Canada” by the Financial Post.

With an international client base across a broad range of practice groups, we provide a wealth of Canadian, cross-border and international legal services. Our lawyers and agents are renowned for delivering timely, competitive and comprehensive strategies that enable our clients to achieve the best results.

Practice Groups
McCarthy Tétrault is organized into practice, industry and specialty groups with related business lines. As part of a full-service firm, our lawyers exchange knowledge and resources across practices in the interest of clients. Our integrated organizational structure enables us to serve our clients on the full spectrum of legal matters as no other firm can.

Bankruptcy and Restructuring
Our Bankruptcy and Restructuring Group is multijurisdictional in scope - we regularly act on major international matters in the U.S., Europe, and Central and South America. Members of our group have an extensive and leading bondholder representation practice and frequently represent major financial institutions, large corporate creditors, debtors and insolvency professionals, such as court-appointed monitors, receivers and trustees. We have acted on many of the major Canadian and cross-border insolvencies, restructurings and workouts over the past 20 years.

Biotech/Life Sciences
Our Biotech/Life Sciences Group advises on financing and securities, licensing, intellectual property (patents, trade mark and copyright), strategic alliances, mergers and acquisitions, commercial agreements, corporate governance, litigation, regulatory, environmental, international trade and tax matters. We serve a diverse range of clients varying in size from start-up companies to biotech incubators and major multinational corporations. In addition, we advise biotechnology and pharmaceutical clients involved in the research and development of new technologies as well as manufacturers, and distributors of pharmaceuticals and medical devices.

Class Actions
Our Class Actions Group offers outstanding expertise and a demonstrated ability to assist national and international clients in class action litigation. We have represented clients in some of the most high-profile cases in Canada and in a broad cross-section of claims, including securities,
consumer, product liability, environmental, competition, labour and tax proceedings. Members of the group are the authors of *Defending Class Actions in Canada* (2002, CCH), a concise and valuable resource for business executives and corporate counsel. In addition to being skilled courtroom litigators, we recognize that alternative procedures for the resolution of claims can be more fair, efficient and manageable. We have significant experience in the design and use of alternative dispute resolution programs for adjudication and resolution of multiple claims.

**Communications**
McCarthy Tétrault’s Communications Group advises on a wide range of matters, including telecommunications, broadcasting, internet and electronic commerce, and copyright law. We provide counsel and assistance on all matters concerning the business and regulation of the telecommunications and broadcasting industry in Canada. In addition to its Canadian communications practice, McCarthy Tétrault has been involved in communications projects in North, South and Central America, Europe, the Middle East, Asia and Africa. Members of our team have worked on many of the major transactions and regulatory proceedings in the communications field in Canada over the last 25 years.

**Competition**
Our Competition Group creates effective, business-oriented solutions to sophisticated competition law issues. We advise national and international clients on all aspects of competition law, including mergers and acquisitions, joint ventures and strategic alliances, pricing practices, distribution and marketing, restrictive trade practices and trade association activities. We also help create effective compliance programs. Members of our Competition Group include experienced litigators who have been involved in many landmark cases and seasoned experts in other areas of competition law including mergers and acquisitions.

**Corporate Finance and Mergers and Acquisitions (CFMA)**
McCarthy Tétrault’s CFMA Group acts for national and international companies, as well as those interested in the activities of entities such as investment dealers, special committees and shareholders. We collaborate with our Financial Services and Technology, Communications and Intellectual Property Groups (TCIP) to provide all the business law needs of our clients. Our group is one of the leading Canadian firms in providing corporate finance advice ranging from private equity and venture capital financing, through private and public offerings to the public, including initial public offerings. Our other main activity is mergers, acquisitions and divestitures of private and public companies where we are consistently ranked at or near the top of Canadian deals, announced and completed.

**Energy**
Our Energy Group has considerable experience in the development, structuring and financing of energy-related projects, including cogeneration, hydroelectric and wind power projects, mergers and acquisitions, utility restructuring, privatization and energy procurement. We also advise on issues arising out
of the deregulation or re-regulation of electricity generation and distribution. Members of our group act for all levels of government, lenders, developers, equity investors, steam hosts, electricity and pipeline utilities, fuel suppliers, equipment suppliers and other project participants in Canada and abroad.

Environmental
McCarthy Tétrault’s Environmental Group advises on a broad spectrum of international, federal, provincial, local and municipal environmental regulation. We act on behalf of a wide range of corporate and government clients, including public and private corporations, municipalities, financial institutions, directors, officers, employees and shareholders. We are also at the forefront of emerging environmental issues, such as emissions trading. We work closely with environmental professionals to provide our clients with the most informed decisions regarding environmental matters, from litigation, corporate transactions, assessments, project development to day-to-day business operations.

Family Law
Our Family Law Group specializes in high-profile, complex family law cases and issues. We represent clients at every level of the courts, from the local to the Supreme Court of Canada. Our team understands the intricacies of the various provincial statutes that make it crucial to receive local counsel. We have a broad range of experience related to complex property disputes, estate planning, divorce, separation agreements, resolution of spousal support, child support, and custody and access. In addition, we assist in the planning of marriage and cohabitation agreements. Our lawyers create comprehensive legal strategies by working closely with other firm practitioners with related experience in tax and estates. We establish the structure and solutions, from strategic planning through legal guidance and direction.

Financial Services
Our Financial Services Group is a leading practice that advises on all aspects of Canadian financial services law. We regularly act on the largest and most complex project financing, securitization, transitions, syndicated credit facilities and secured lending offering. We collaborate with our CFMA and TCIP Groups to ensure seamless service for our clients. We are Canada’s leading law firm with respect to capital findings by banks and insurance companies. We also advise on a broad range of issues, including financial institutions regulation, payments systems, personal property security, electronic securities, foreign exchange clearing and settlement systems. In addition, we assist domestic and foreign financial services companies in their major acquisition and disposition transactions.

Health
McCarthy Tétrault’s Health Group advises on matters integral to health care institutions and pharmaceutical companies, including outsourcing agreements, research and development agreements, joint ventures, and public/private partnerships. We advise on issues pertaining to corporate governance, bylaws, reorganizations, liability, fundraising arrangements, corporate governance, supplier agreements, security
enforcement and regulatory compliance. We also have extensive experience in acting for health-related institutions, such as goods and services providers, nursing homes, professional organizations, public and private foundations and charitable organizations. As a result of this experience, we are able to provide effective and efficient legal counsel to clients facing complicated issues that require a diverse range of legal and technical knowledge.

**Hospitality**
Our Hospitality Group is involved in all aspects of the development, financing, ownership and management of hotels, resorts, food service and other hospitality properties. Our group is multidisciplinary, with respected counsel in corporate and commercial law, real property and planning, labour and employment, taxation, intellectual property, electronic commerce, litigation and insolvency. We represent clients in a wide range of transactions, bringing together innovative ideas and strategies for a variety of owners, managers, lenders, commercial developers, financial institutions, government agencies, individual investors, REITS and their advisors. Our lawyers regularly act for clients in cross-border and international transactions in order to capitalize on global markets.

**Immigration**
McCarthy Tétrault’s Immigration Group advises clients on a broad range of matters, such as acquiring temporary status, permanent residence, Canadian citizenship certificates and passports. We also advise on the employment, customs and tax issues that may arise in transfer situations, and assist clients in applying for government approval to overcome inadmissibility problems. We work with immigration authorities to ensure the most efficient processing possible for workers arriving from overseas. Our client base includes major entertainment and sports companies, leading Canadian companies in the fields of engineering, mining, high-tech and financial services.

**Intellectual Property**
Our Intellectual Property Group comprises lawyers and patent and trade-mark agents who advise on patent, trade-mark, copyright, design and trade secret matters. We provide counsel on intellectual property management and commercialization, registration and licensing, validity and infringement, and litigious disputes involving intellectual property protection before the courts. In the patent field, our experience covers all major scientific and engineering disciplines, including biotechnology, chemistry, mechanical and electrical engineering, electronics and software. Our clients include national and international companies, public and private research and teaching institutions, hospitals, biotechnology and computer companies, and inventors and start-up technology enterprises.

**International**
McCarthy Tétrault’s International Group advises on a full range of international commerce matters and has extensive practices in specific industry areas, such as telecommunications and mining. We can communicate effectively in many of the world’s languages and we have a unique familiarity with the common and civil law legal systems that are integral to a national
Canadian legal practice. We advise clients on matters, such as project finance, privatization, joint ventures, strategic alliances, licensing, trade regulation, dispute resolution, mergers and acquisitions and commercial arbitration. Our international clients include governments, governmental agencies, financial institutions, private lenders and investors.

Internet and Electronic Commerce
Our Internet and Electronic Commerce Group assists companies in developing innovative legal solutions to e-commerce and internet legal issues, such as copyright, patent and trade-mark protection, domain names, privacy, electronic banking, electronic contracts, financing, intellectual property, taxation and compliance. Our team includes lawyers accomplished in all areas of e-commerce and internet law, including tax, intellectual property, banking, mergers and acquisitions, corporate finance, securities, strategic alliances, real estate, insurance, litigation and communications. In dealing with internet and e-commerce issues, our lawyers work with clients who provide products and services across the internet, and those establishing e-commerce services over the internet.

Labour and Employment
McCarthy Tétrault's Labour and Employment Group is a dynamic, experienced group that works with both federal and provincial employers in the public and private sectors. The scope of our experience is as broad as the issues facing today's employers, including traditional union/management relationships; human rights, wrongful dismissal, employment standards, corporate restructuring and executive compensation, and cutting edge issues such as privacy, novel work arrangements and managing technology in the workplace. We regularly appear before the courts and administrative tribunals across the country, on matters such as defending on wrongful or unjust dismissal complaints, or representing employer interests before labour relations boards or human rights tribunals. We provide concise and practical legal advice, recognizing the ever changing labour and employment regulatory structure. Whether our clients need general advice on statutory rights, employee or management training, or full defence representation, our group has the experience and resources to assist.

Litigation
Our Litigation Group has acted as counsel at all levels of the federal and provincial court systems, before regulatory and administrative tribunals and in commercial arbitrations. We have a diverse litigation practice that includes all aspects of civil, commercial, criminal, family, insurance, professional liability and international law litigation. In addition, we provide alternative dispute resolution strategies and handle complex class action claims. We advise and represent a large client base in corporate, banking, securities, bankruptcy, municipal, environmental, insurance, intellectual property, real estate and telecommunications law.

Mining
McCarthy Tétrault’s Mining Group advises on mining projects globally, on behalf of national and international clients with worldwide interests and businesses without borders. We have offices
in the major national and international centres for mining finance and investment, including Vancouver, Calgary, Toronto, Montréal and Québec City and London, England. We advise a significant number of the world’s leading mining groups, as well as many junior and intermediate mining companies. We have experience in a number of key regions, including Africa, Asia, Eastern and Western Europe and Latin America and we have strong relationships with local counsel in those regions.

**Municipal**

Our Municipal Group has broad experience in dealing with municipal and environmental authorities to obtain initial approval for projects through to financing, construction, leasing and sale. We regularly act for real estate lenders, especially in areas involving construction finance. In addition, we advise on bond issues, loan syndications, workouts in the real estate area and mortgage receivables financing on behalf of real estate developers and lenders. We also advise on planning approvals for all types of development proposals, property and business tax assessments, expropriation matters and emerging environmental law issues.

**Privacy**

McCarthy Tétrault’s Privacy Group advises on privacy compliance obligations in national and international jurisdictions. We are on top of the latest judicial and policy changes regarding the use and control of data in the public, private and not-for-profit sectors. Using our comprehensive knowledge base, we work with clients from the initial assessment phases of their practices and policies through their adjustments to ensure compliance with industry standards and provincial, federal and international regulations. We also advise clients regarding requests, complaints, regulatory interventions and court actions related to privacy matters. We serve clients in all areas of business, including banking, insurance, manufacturing, the pharmaceutical industry, information technology providers, municipalities and educational and medical institutions.

**Real Property and Planning**

Our Real Property and Planning Group has significant experience in all types of industrial and commercial real estate transactions, including development, financing, securitization and public-private joint ventures. We handle a variety of properties, including retail, industrial, commercial, recreational, hospitality, utilities and healthcare.

**Securities Trading and Adviser Regulation (STAR)**

McCarthy Tétrault’s STAR Group provides domestic and foreign capital market participants with a comprehensive understanding of the regulatory requirements governing the conduct of their businesses, and the offering of their financial products and services, in Canada. We advise on the regulatory framework which governs the trading of securities, and the offering of investment counselling and portfolio management services in Canada, as well regulatory requirements that should be considered and addressed when developing new products and services for Canadian residents. We also assist clients on transactions involving the sale, transfer, restructuring or merger of their businesses,
products and services, and with the development of strategies in response to compliance audits and inquiries, investigations, enforcement proceedings and civil actions.

**Tax**
Our Tax Group advises on all aspects of Canadian taxation, including corporate, commodity, sales and use, international trade, customs, estate planning, and pensions and employee benefits matters. We have considerable experience negotiating and managing all stages of the tax dispute resolution process, from the initial audit by the Canada Customs and Revenue Agency (CCRA) to litigation before the courts. We also assist clients in the preparation of briefs seeking legislative amendments to Canada's tax laws.

**Tax Dispute Resolution**
McCarthy Tétrault's Tax Dispute Resolution Group advises on all levels of the tax dispute process, from the audit and pre-assessment stage through to the appeal and litigation process. The group is renowned for its exceptional experience in tax law and litigation, with a remarkable record of precedent-setting tax decisions to its credit.

**Technology**
Our Technology Group is distinguished by a combination of legal and technical experience in various legal areas, including e-commerce, corporate finance, mergers and acquisitions, licensing, joint ventures, outsourcing, strategic alliances, intellectual property, employment, telecommunications, litigation, finance and taxation. Working together with lawyers from our Financial Services and CFMA Groups, we provide counsel to a diverse client base, from start-up enterprises to leading technology corporations and investment companies. Our lawyers provide effective, innovative and flexible legal services to a broad spectrum of clients, such as software developers, Internet companies, new media publishers, outsourcing services suppliers and buyers, hardware manufacturers, financial intermediaries, universities and governments.

**Telecommunications**
McCarthy Tétrault's Telecommunications Group provides advice and representation on regulatory, commercial and financial aspects of the telecommunications business worldwide. We have worked on telecommunications projects in more than 25 countries in North, South and Central America; Europe; the Middle East; Asia; and Africa. We provide a broad range of legal and consulting services to telecommunications carriers and users, regulatory agencies, governments, international financial institutions, new service providers, investment banks, telecommunications equipment, and systems suppliers and contractors. In recent years, we have worked on a wide range of matters, such as regulatory and policy issues; mergers and acquisitions; financing; privatization; licensing; joint ventures; competition issues; internet and electronic commerce; interconnection; and outsourcing.

**Trade Law**
Our Trade Law Group advises on a wide range of measures concerning cross-border trade in goods, services, technology and intellectual property, including customs and tariff laws, import, export and transaction controls,
economic sanctions and trade remedies. We have been involved in most of the major anti-dumping and countervailing cases heard in Canada over the past three decades, acting for domestic producers, importers, exporters and end-users of subject goods. In addition, we have considerable experience advising on the full range of customs issues that arise on the importation of goods into Canada, including customs valuation, transfer pricing, tariff classification, rules of origin, the marking of imported goods, duty remissions and drawbacks, and seizures.

Trusts and Estates
McCarthy Tétrault’s Trusts and Estates Group provides comprehensive advice and advocacy on the full spectrum of trust and estate matters, including tax planning, wills, trusts, charitable organizations, powers of attorney, incapacity planning, contentious proceedings, and estate administration and accounting. Our comprehensive estate plans and trusts facilitate the accumulation, management and preservation of wealth and the orderly devolution of assets to subsequent generations. We are engaged in every stage of the planning process and work seamlessly with other members of the firm to deliver the best representation and advice from the top talent in all areas of the law. This enables us to best advise our clients on meeting their goals, such as tax minimization and wealth preservation.

Our Knowledge Management System
Law firms throughout the world are now being challenged as never before to better manage their collective knowledge and expertise to serve their clients. To address this we have developed an electronic Knowledge Management system that captures and retains existing firm-wide knowledge and gives our lawyers access to up to the minute legal developments. The system also enables our lawyers to leverage the wealth of knowledge in the firm to provide quality service to our clients in a timely and efficient manner. McCarthy Tétrault’s Knowledge Management system is supported by full-time knowledge management lawyers who ensure the accuracy and timeliness of the content. With this electronic matrix of skill, we can quickly put in place the right team of experts to meet the complex needs of our clients.

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