

CERTAIN LEGAL ASPECTS OF DOING BUSINESS IN ALBERTA

DISCLAIMER

This memorandum is for general informational purposes only. It is necessarily general in scope and essential details (including many important exceptions and qualifications) have been omitted. This memorandum is not intended as a substitute for legal advice and is not intended to be, and should not be, relied or acted upon as legal advice.

INTRODUCTION

Under the Canadian constitution, property and civil rights are matters of Provincial jurisdiction. Consequently, most commercial laws are provincially enacted and may, therefore, vary from Province to Province. This memorandum summarizes commercial legal matters peculiar to Alberta. The reader is reminded, however, that there are still many Federal laws applicable in Alberta (e.g. competition, foreign investment, trade marks, patents, Federal Income Tax) which are not discussed in this memorandum.

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ARBITRATION

Parties to a commercial agreement may agree to submit matters of dispute to arbitration under the Alberta *Arbitration Act*. The Act is broad in its scope and applies to any arbitration conducted under an arbitration agreement. If the parties agree to submit a matter to arbitration the Act applies, even if the arbitration agreement does not expressly refer to the Act. The parties can also agree that the Act will not apply in its entirety or that only certain provisions of the Act will not apply. If the parties exclude the application of the Act then the rules of the common law will apply to their arbitration. Further the parties may agree that the law of another jurisdiction applies to their arbitration. However if the parties decide to exclude only part of the Act they are limited in what they may exclude. For example they may not exclude the requirement of fairness and equal treatment of the parties and the ability to recourse the Courts to the extent permitted under the Act.

The Act does not apply to arbitrations governed by the law of jurisdictions other than Alberta, labour relations arbitration, arbitrations under the *International Commercial Arbitration Act* (Alberta), or any other Alberta statute that specifically excludes the Act.

Under the Act there are no formal requirements as to who can be an arbitrator other than the arbitrator must be independent of the parties and impartial between the parties. The Act provides for a number of powers of the arbitral tribunal including powers relating to: the detention, preservation and inspection of documents, procedural matters, oral and written proceedings, the appointment of experts and the awarding of costs.

The Act provides that an appeal of an arbitration award to Court is allowed in only limited circumstances unless otherwise agreed by the parties. However, if the Act applies, a party may apply to Court to set aside an arbitral award on a number of grounds including: (1) entering into the arbitration agreement while under a legal incapacity; (2) an invalid or non-existent arbitration agreement; (3) the award or decision is beyond the scope of the agreement; (4) the applicant was manifestly unfairly and (5) an arbitrator has acted fraudulently.

Also see [Enforcement of Foreign Arbitral Awards](#) below.

BUILDERS LIENS

In Alberta, the *Builders' Lien Act* provides special secured protection for unpaid sub-contractors and workers on most building projects. The Act does this by establishing a "lien fund" which is a notional amount equal to 10% of the value of work done plus any amounts paid out by the owner after a lien has been properly filed. The practical effect of the Act is to oblige the land owner to retain from the general contractor 10% of each progress claim and to retain such holdback until the expiry of the applicable lien period (generally 45 days after the contract has been substantially performed). Owners must also check title to their land on the day of making any progress claim so as to ensure that no liens have been filed.

Persons wishing to make claims under the Act are obliged to file an appropriate form of lien against the improved land's title to the improved land prior to the expiry of the applicable lien period. If done properly, the lien holder then has security against the equity in that land and has priority over security interests registered in the PPR. The lien holder's remedy then is to take action to have the land sold.

The Act is fairly complex in its application and the above is an extreme simplification.

BULK SALES

Alberta no longer has a Bulk Sales Act and consequently it is no longer necessary, when selling all or substantially all of the assets of a business, to obtain consents from trade and other creditors. It remains the case, however, that express contractual obligations with secured or unsecured creditors to allow such consents, would be enforceable as a matter of contract law. Also, encumbrances against assets sold (if properly registered under the *Alberta Personal Property Securities Act* - see below) would follow those assets.

CONTRACT LAW

Contract law in Alberta is based upon English common law and, except for certain statutory exceptions, there is no general code or statute respecting commercial contracts. Common law principles of contract law such as offer and acceptance, capacity, the requirement of certainty and remedies in the event of breach are largely as established by English and Canadian case law and is not peculiar to Alberta. See: [Contract Law Primer for Business People and Administrators](#).

In accordance with those principles (except with respect to certain legislative protections for the public), it is usually permissible for the parties to agree upon the law that will apply to their contract. In the absence of an express agreement, the courts will look for an implied choice or, failing that, will look to the jurisdiction in which the contract was actually made. Generally this uncertainty can be avoided by having the parties express the law of the jurisdiction which is to apply to the contract.

CORPORATIONS (ALBERTA)

A. FOR PROFIT

General

(Also see: [Basics of Incorporation](#))

Business corporations incorporated in Alberta are governed by the provisions of the Alberta Business Corporations Act (the "ABCA"). Incorporation is effected through the registration of Articles of Incorporation. Articles of Incorporation are matters of public record but there is no principle of constructive or deemed knowledge of their content. Articles of Incorporation deal primarily with a corporation's authorized capital, share transfer restrictions, if any, and the number of directors that the corporation may have although the ABCA sets out a number of other issues which may be contained in the Articles. The regulation of the corporation's business and affairs is governed by the corporation's bylaws. Bylaws are not a matter of public record except where coincidental with public filings required in connection with offerings governed by the Alberta Securities Act. Generally an ABCA corporation may not impeach a contract or other transaction on the grounds of constitutional limitations or lack of officer's authority unless those limitations were actually known to the other party to such transaction.

Unlimited Liability Corporations

The ABCA now authorizes the incorporation of "unlimited liability" corporations (an "AULC"). An AULC is of particular use to US owned operations because it is regarded as a distinct entity for Canadian tax purposes but for US tax purposes is treated much like a partnership, with a resulting flow through of income and losses. The Province of Nova Scotia also authorizes unlimited liability companies (an "NSULC"). An AULC has several advantages over an NSULC including a much reduced incorporation fee (and no annual filing fees), the availability of the unanimous shareholder agreement as a method of corporate governance and the fact that, generally, the ABCA is a much more modern statute than its Nova Scotia counterpart. However, an NSULC can also have advantages over an AULC; although usually (but not always) they are not of significant practical importance. In particular shareholder liability under an NSULC may be more limited in some respects than under an AULC and, unlike an NSULC which has no director residency requirement, at least ¼ of the directors of an AULC must be resident Canadians.

Professional Corporations

The ABCA also authorizes the incorporation of the so called "professional corporation". Lawyers, doctors, accountants, dentists and certain other professionals are permitted to incorporate but without the benefit limited liability (at least in connection with liabilities attendant with their professional activities).

Pre-Incorporation Contracts

The ABCA expressly authorizes so called "pre incorporation" contracts pursuant to which a person may enter into a binding contract on behalf of a corporation yet to be incorporated. On incorporation the person signing retroactively ceases to be a party.

Corporate Finance

The ABCA does not authorize par value shares although shares may be stated to be redeemable at a fixed or determinable price. All shares in the authorized capital of an ABCA corporation are without nominal or par value and are non-assessable. The entire consideration for shares must be paid at the time of their issuance. Consideration for shares issued out of treasury may be given in the form of property or past services (provided that the value of same is not less than what it would have been if paid

in cash) except that consideration may not be given in the form of a promissory note. The value of consideration received for a share issued out of treasury is added into a pooled amount for each class of shares known as the “stated capital account”. The directors may authorize the payment of commissions in respect of the issuance of shares.

The ABCA restricts the declaration of dividends and the repurchase or redemption of shares by requiring that certain solvency and liquidity tests must be satisfied. Monies paid in contravention of these requirements are recoverable by the corporation (or its liquidator, receiver or trustee) and directors who authorize such payments may be liable to the corporation. There is some uncertainty as to whether the test is to be applied as at the time of declaration (or redemption) or as at the time of payment although it may well be both.

An ABCA Corporation may reduce its stated capital for any purpose including, but not limited to, the purpose of distributing capital to its shareholder, provided that it is sanctioned by special resolution and provided that certain solvency and liquidity tests can be satisfied.

Subject to the duty of the directors and officers to act in the corporation's best interests, an ABCA corporation may give financial assistance by way of a loan, guarantee or other means to a related party provided that the same is (subject to certain exceptions) disclosed to other shareholders. There is no longer any requirement for the satisfaction of statutory liquidity or solvency tests in the context of financial assistance.

Directors

The business and affairs of a corporation are managed by the directors although these powers may be usurped or abrogated by the shareholders through a unanimous shareholder agreement (see [Unanimous Shareholder Agreements](#) below).

A corporation may have as few as one director, unless its issued shares have been part of a distribution to the public, in which event the corporation must have a minimum of 3 directors, at least 2 of whom are not officers or employees. At least 1/4 of the directors must be resident Canadians, but there is no requirement for residency in the Province of Alberta.

Unless otherwise restricted in the articles, bylaws or unanimous shareholder agreement, resolutions signed by all of the directors are valid without formal meetings. If the bylaws permit (or all directors agree) directors' meetings may be held by telephone or other communication facility if all participants can hear each other.

Directors and officers owe a statutory [duty](#) to the corporation to act honestly and in good faith with a view to the best interests of the corporation and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. However, where a director is appointed by holders of a class or series of shares or by employee or creditors, that director may, in determining what are the corporation's best interests, give special but not exclusive consideration to the interests of those who elected or appointed the director.

With some exceptions, directors may not vote on contracts in which they have an interest unless otherwise permitted under the terms of a unanimous shareholder agreement.

There are numerous statutes both within and without Alberta which may make [directors personally liable](#) for obligations of the corporation including unpaid salaries, payment of dividends or redemption price in contravention of statutory liquidity and solvency tests, environmental offences, failure to make remittances of Goods and Services taxes, and failure to make employee remittances of source tax deductions. To the extent that the powers of the directors are abrogated by unanimous shareholder agreement (see [Unanimous Shareholder Agreements](#) below) the attendant directors' liabilities are assumed by the shareholders (and the directors are exempted) but this exemption may not apply to

director liability legislation under federal legislation or under the legislation of jurisdictions other than Alberta.

Fundamental Changes

Fundamental changes such as amalgamations, arrangements, continuation into other jurisdictions, amendments to the articles of association or the sale of all or substantially all of the corporation's assets require the authority of the shareholders by special resolution (2/3 vote). Amalgamations between a parent corporation and its wholly owned subsidiary (a "vertical amalgamation") or between two wholly owned subsidiaries of the same parent corporation (a "horizontal amalgamation") require only the authority of the respective corporations' directors.

Non-voting shareholders are permitted to vote on a resolution to affect an amalgamation, a sale of all or substantially all of the corporation's assets or, generally, any fundamental change in which their rights as shareholders are particularly affected. In some cases they may also be entitled to vote on the resolution as a separate class and in such case may, as a class, defeat the resolution.

In the event that the required majority is obtained to authorize a fundamental change, a dissenting shareholder may in some cases (e.g. on resolutions to amalgamate, continue into another jurisdiction, sell of all or substantially all of the corporation's assets or amend the articles of incorporation in a manner which has special impact on the shareholders of that class) exercise formal dissent rights under which the dissenting shareholder can compel the corporation to repurchase the dissenting shareholder's shares at fair value.

Shareholders' Meetings

This first shareholders' meeting must be called by the directors within 18 months of incorporation or amalgamation, and then annual general meetings must be held no more than 15 months apart. A shareholder entitled to vote at a meeting may appoint a proxy holder to attend at a particular meeting and act on behalf of that shareholder. If a corporation has more than 15 shareholders, it must send a prescribed form of proxy to each shareholder who is entitled to receive notice of the meeting. A person may only solicit proxies if a management proxy circular or a dissidents' proxy circular in the prescribed form has been sent out.

Shareholders may participate in a meeting by telephone or other communication facility if all participants can hear each other, if the by-laws so provide or if all the shareholders entitled to vote consent. As an alternative to holding a shareholders' meeting, all shareholders entitled to vote at a meeting may sign a written resolution, and the decisions contained in that resolution are as valid as decisions made at a shareholders' meeting.

Shareholder Rights

A present or former shareholder, director, officer or creditor (or any other person that the court deems is proper) has the right to seek judicial relief where the powers of the corporation or its directors are exercised in a manner that is oppressive, unfairly prejudicial or which unfairly disregard the rights of the complainant. The powers of the court to affect a remedy are broadly stated and include the ability to stop or reverse the action complained of, to allow the complainant to take derivative legal action in the name of the corporation, to order compensation, to require the purchase of the complainant's shares and to order the winding up the corporation. It is unclear to what extent, if any, that minority shareholder rights may be curtailed by shareholder agreement.

The ABCA also preserves the right of a shareholder to seek the winding up of a closely held company under the "just and equitable" rule.

Minority shareholders also have a right to dissent in the event of a fundamental change to the corporation (see [Fundamental Changes](#) above), and to compel a repurchase of their shares at fair value.

Take Over Bids

Where a take over bid has received acceptance from 90% or more of the holders of shares of each class to which the take over bid relates, the remaining shareholders are obliged to sell. However such remaining shareholders are entitled to invoke a procedure to value their shares and to receive fair value for the same.

Where a take over bid involves some condition or aspect to the transaction which involves more than a pure purchase and sale of shares it is common in Alberta to make use of a court ordered "arrangement". Doing so generally provides a simpler and more controlled method of affecting the transaction, sometimes at a lesser threshold than 90%, although dissenting shareholders are still given the opportunity to insist on a fair value valuation.

Unanimous Shareholder Agreements

The ABCA has statutorily authorized the "unanimous shareholder agreement" which, by definition, is any agreement to which all of the shareholders (voting and non-voting) are party and which deals with corporate affairs. The unanimous shareholder agreement provisions of the ABCA are likely the most flexible in Canada and, in consequence, the unanimous shareholder agreement can be an extremely useful tool in terms of corporate governance and shareholder protection.

In addition to inter-shareholder matters such as buy sell arrangements, a unanimous shareholder agreement allows the shareholders to take greater control over the direct operations of the corporation and, in particular, allows the shareholders to fetter or abrogate the discretion of the directors and to control or dictate their decisions. The other major advantage of a unanimous shareholder agreement is that a transferee of shares (whether from treasury or from another shareholder) is deemed to be "a party" to the agreement even though he or she may not have expressly agreed to it. This would likely include heirs and persons who acquire such shares through involuntary means such as bankruptcy or matrimonial proceedings (although there is some creditor rights legislation in Alberta which provides limitations in that regard).

To the extent that a unanimous shareholder agreement restricts the powers of the directors, the directors' liabilities associated with the exercise of those powers are assumed by the shareholders. It is unclear if this assumption of liability extends to shareholders who, under the agreement, do not participate in the exercise of the powers so restricted. To the extent that the powers of the directors are abrogated by unanimous shareholder agreement the directors are exempted from the associated liabilities but this exemption may not apply to director liability legislation under federal legislation or under the legislation of jurisdictions other than Alberta.

B. NOT FOR PROFIT

Not for profit bodies corporate may be incorporated under the Alberta Societies Act or under Part 9 of the Alberta Companies Act. In both cases the legal capacity of the body corporate is limited by its objects. Also, in both cases the company's objects as well as its internal rules of corporate governance and indoor management are a matter of public record and members of the public are deemed to have knowledge of the same whether they are actually aware of them or not. Consequently, in commercial dealings with societies or Part 9 companies it is important that the constitutional documents be reviewed.

C. PRIVATE ACT COMPANIES

Some corporations in Alberta (both for profit and not for profit) are incorporated by private act and in commercial dealings with such corporations it is extremely important that their governing statutes be reviewed, particularly as regards such issues as capacity and indoor management.

EMPLOYMENT

The Alberta *Employment Standards Act*, together with other employment legislation, imposes upon employers certain minimum employment obligations pertaining to occupational safety, statutory holidays, hours of work and minimum notice and/or pay in lieu upon dismissal. The common law also imposes a requirement of “reasonable notice” of termination (or payment in lieu of same) that is dependant upon various factors most notably length of service but sometimes also age, health, employability and circumstances of dismissal. The statutory notice minimums do not generally supplant ordinary common law requirements of “reasonable notice” of termination unless varied by contract (employment agreements or collective bargaining agreements). Statutory rights to termination pay or other employment entitlements cannot be waived or varied by contract.

Depending on the nature of employee duties, it may also be necessary for the employer to pay premiums to the Alberta Workers’ Compensation Board in respect of the persons it employs in Alberta. Generally speaking, this requirement does not apply to sales people and office staff. The purpose of the Workers’ Compensation Plan is to provide an alternative means for employees to seek redress if they suffer injuries in the workplace. The Act prevents suits against the employer for these injuries, while providing a means for no fault compensation to employees injured on the job. However the Act may not prevent persons from suing their “employer” where the employer has failed to provide the necessary WCB coverage or where the person was retained as an independent contractor.

Anyone considering employing individuals in Alberta should also be aware of the rules regarding discriminatory practices (see [Human Rights](#) below). Discriminatory rules or practices which are not bona fide occupational requirements will be struck down by the courts and the Courts may give compensatory entitlements to the aggrieved employee. “Adverse effect” discrimination is also dealt with judicially. It occurs where a non-discriminatory rule has a discriminatory effect on an employee (based on a prohibited ground) because it imposes a penalty or restrictive condition on a particular employee, but not on others. In this circumstance, the Supreme Court has ruled that the employer must take reasonable measures, short of undue hardship, to accommodate the circumstances of the employee. What is reasonable depends on the facts of the case.

Rules regarding probationary employees may be of interest to those starting businesses in Alberta. During a probationary period, an employer may terminate an employee without actual cause. The employer only needs to show that the person was not suitable for the position. The employer must have given the employee reasonable opportunity to demonstrate his or her suitability for the job and the employer must have made an honest and fair assessment of that ability.

Also see [Labour](#) below.

ENFORCEMENT OF FOREIGN JUDGMENTS

There are two ways to enforce a foreign judgment in Alberta: by registering the judgment as provided for by statute or by obtaining recognition of the foreign judgment and enforcing the judgment under the rules of private international law (common law).

Registration of Foreign Judgments in Alberta

A foreign judgment can be registered in Alberta pursuant to the *Reciprocal Enforcement of Judgments Act*. Registration of a foreign judgment under this Act is only possible if the Alberta Government has declared by regulation that the jurisdiction in which the foreign judgment was granted is a “reciprocating jurisdiction”. As of this writing the declared reciprocating jurisdictions are, all of the Provinces and Territories of Canada, including Nunavut, and the States of Washington, Idaho and Montana. A judgment from outside of these reciprocating jurisdictions can only be enforced in Alberta under the rules of private international law.

Under the Act the judgment to be registered must be a judgment or order of a Court in a civil proceeding whereby a sum of money is payable. The Act provides for a number of defences for the judgment debtor including, the original court acting without jurisdiction, lack of service or atonement, fraud, appeal pending, public policy and a good defence if an action were brought on the original judgment. Although the last defence appears to be rather broad the Alberta Courts have interpreted this to mean that the “good defence” must relate to the *judgment* not the *cause of action* on which the judgment was given.

After the foreign judgment is registered it is of the same force and effect as if the judgment had been originally given by an Alberta Court.

The Convention between Canada and the United Kingdom providing for the reciprocal recognition and enforcement of judgments in civil and commercial matters has also been adopted as law in Alberta pursuant to the Alberta *International Conventions Implementation Act*. Canada is also party to a similar convention with France, however, as of this writing, that convention has not yet been implemented in Alberta.

Common Law Enforcement of Foreign Judgments in Alberta

A creditor with a foreign judgment, whether or not the judgment was obtained in a reciprocating jurisdiction, can enforce the judgment in Alberta under the rules of private international law. Under the common law a judgment creditor can attempt enforcement by either suing on the foreign judgment or suing on the cause of action on which the judgment was based.

The basic prerequisite to enforcement of a foreign judgment in Alberta is that the foreign Court had jurisdiction when the judgment was granted. A foreign Court will be found to have had jurisdiction if, at the date of the commencement of the proceedings in the foreign Court (a) the defendant was resident or present in the foreign jurisdiction, or (b) in the case of a business if the corporation was carrying on business in the foreign jurisdiction, or (c) if the defendant agreed to or submitted to the jurisdiction of the foreign court (often by a term of a contract or agreement).

In 1990 the Supreme Court of Canada adopted a new common law test for determining whether at the Court of one Province or Territory of Canada had jurisdiction to give a judgment entitled to recognition and enforcement in another Province or Territory of Canada. The Court determined that jurisdiction will be found to exist where there is a real and substantial connection between the Province that granted the

judgment and the subject matter of the proceeding or the defendant. In some circumstances Alberta Courts have applied the real and substantial connection test to judgments registered outside of Canada.

The defences available to the judgment debtor in resisting the enforcement of a foreign judgment in Alberta under the common law are similar to those outlined above under the *Reciprocal Enforcement of Judgments Act*.

Generally non-money foreign judgments, such as injunctions, are not entitled to enforcement in Alberta under either statute or the common law.

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Registrations of Foreign Arbitration Awards in Alberta

Under the *Reciprocal Enforcement of Judgments Act* a “judgment” is defined to include an award in an arbitration proceeding if the award has become enforceable in the granting jurisdiction in the same manner as a judgment given by a Court. As with foreign judgments the registration of a foreign arbitration award pursuant to the *Reciprocal Enforcement of Judgment Act* is only possible in jurisdictions declared by the Government of Alberta to be reciprocating jurisdictions

Further statutory mechanisms for the enforcement of foreign arbitration awards in Alberta are found in the *International Commercial Arbitration Act*. This Act adopts and incorporates as Schedules to the Act the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the Model Law on International Commercial Arbitration (1985).

Common Law Enforcement of Foreign Arbitration Awards in Alberta

A foreign arbitration award which does not fall within the statutory provisions outlined above may be enforced in Alberta by an action at common law to recover the award. The action may be based either on the judgment which confirms the award, or on the award itself. The Court will treat such an action in a manner similar to the enforcement of foreign judgments at common law although there will be minor differences, such as in the defences available to the party against whom the award was ordered.

ENVIRONMENTAL LAWS

Alberta has a number of statutes dealing with environmental matters, the most important of which is the Alberta Environmental Protection and Enhancement Act. (“AEPEA”). The AEPEA is intended to provide for an aggressive enforcement of environmental laws.

Under the AEPEA, any new development is potentially subject to the Environmental Impact Assessment process (“EIA”). EIAs are mandatory for cement plants, dams over 15 metres and pesticide plants. With all other types of developments, EIA is not mandatory but may be imposed if the Minister or government thinks it is in the public’s best interest to do so. An EIA will consider a number of things including: potential positive and negative environmental impacts; social, cultural and economic impacts; human health related issues; and contingency plans for unpredicted negative impacts. Furthermore the Director appointed under the AEPEA has the ability to further define the requirements of the EIA depending on the circumstances of the developer. This process may be costly and therefore developers should consider its effects on their development plans.

The AEPEA also provides for the identification and designation of contaminated sites. The owner or person responsible for a contaminated site may be required to develop and implement a remedial action plan. If this is not done, the Director has the power to issue an environmental protection order and to require the person responsible for the site to take whatever actions are required to clean it up.

The AEPEA is strictly enforced and penalties for not complying may be harsh. The maximum penalty for individuals is a \$100,000 fine and/or two years in jail. Fines for a corporation can be as high as

\$1,000,000. Individuals also have a right under the AEPEA to sue those convicted for any damages they have suffered as a result of a breach of the Act. Directors and Officers of a corporation who participate in, authorize or fail to prevent any breach of the Act may be liable for prosecution.

The *Canada Environmental Assessment Act* may also be applicable to developments in Alberta, and there will be situations in which some form of assessment will be required under both provincial and federal legislation.

EXTRA-PROVINCIAL REGISTRATION

Part 21 of the Alberta *Business Corporations Act* requires every extra-provincial corporation to register within 30 days of it commencing to carry on business in Alberta. The definition of "carrying on business" is broad and, generally, any corporation that solicits business in Alberta will be deemed to be carrying on business in the Province, whether it has resident sales persons here or not. Following registration, there are annual filing obligations, and a continuing obligation to file notifications of certain corporate changes including constitutional amendments, amalgamations and changes in the head office and directorship.

FAIR TRADING ACT

The *Fair Trading Act* ("*FTA*"), is a comprehensive consumer protection statute designed to regulate so called "consumer transactions" i.e. transactions between business and individuals consuming a product or service for primarily personal or household purposes. Any waiver of rights, benefits or protections given under the *FTA* is void except for releases made in settlement of dispute. The *FTA* provides for both civil and quasi-criminal sanctions in the event of non-compliance. The *FTA* has several components:

Collection Practices

The *FTA* applies to a collection agency that collects or attempts to collect debts for others and to individual collectors who are employed by a collection agency (although there are exceptions). The *FTA* requires collection agencies to be licensed and imposes obligations collection agencies must meet in the collection of debts.

The *FTA* also governs the regulation of credit and personal reports.

Credit Transaction Requirements

A lending or credit granting entity must disclose to consumers all rates (hidden and stated charges). These provisions apply to consumer loans but also to sales of goods under conditional sales contracts and any other deferred payment arrangement. However, disclosure is only required when the loan is made for non-business or farming purposes, where the borrower is an individual and where the loan is made by a creditor in the course of carrying on business.

The lending entity must present the borrower with written disclosure statements of the terms of the loan at least 2 business days before the borrower incurs any obligation to the grantor or the borrower makes any payment other than for things like loan insurance fees or appraisal fees.

Direct Sales Cancellation

The *FTA* also provides protection to consumers where high pressure sales are notorious (eg: door to door sales, sales fairs). Essentially, the consumer has ten days from the date he/she receives a copy of the written sales contract to cancel a direct sales contract.

Furthermore, in certain circumstances, the consumer enjoys a one year period to cancel the contract from the date the contract was entered into if (a) at the time the contract was concluded the supplier was not licensed under the Act, (b) the direct sales contract did not include all the information prescribed in section 35 of the Act (consumer's name and address, salesperson's name etc.), (c) the supplier did not deliver the goods to the consumer within 30 days of the delivery date specified in the contract OR (d) the supplier did not begin the services he said he would supply within 30 days from the commencement date specified in the contract.

Time Shares

The Act also provides that a consumer may, without any cause whatsoever, cancel a time share contract at any time after the contract is entered into up to 7 days after the consumer receives a copy of the time share contract. In addition, a consumer may cancel a time share contract within one year from the date the contract is entered into if the contract does not set out the consumer's rights of cancellation within the 7 day period set forth above. Within 15 days after a time share contract is cancelled, the supplier must refund all money paid by the consumer.

Unfair Trade Practices

There are 35 different unfair practices set out in the Act. Commission of an unfair trade practice gives rise to civil remedies and in some cases may be prosecuted as an offence. A number of them are presently unique to Alberta legislation. For example the *FTA* attempts to limit "puffery" or the use of exaggeration, innuendo or ambiguity as a sales tactic. Suppliers will be held responsible for representations made to consumers regardless of whether the consumers knew them to be correct or not. The *FTA* also attempts to negate so called "Negative Option Practices" i.e. one in which a supplier provides goods or services *unless* the consumer tells him otherwise.

FRANCHISES

Alberta has a statute which restricts and governs "franchise agreements". Under the *Franchises Act* it was once necessary to file and obtain approval for prospectus-like documents before marketing franchises. The amended *Franchises Act* no longer contains this requirement. However, subject to certain exceptions, certain financial and other information must be provided to the franchisee. Furthermore, the franchiser is placed under a duty of "fair dealing" in the enforcement and performance of the franchise.

The Act also purports to have application to franchise operations outside of Alberta if the offer of sale is accepted in Alberta or is made from Alberta.

FREEDOM OF INFORMATION

See [Protection of Privacy](#) below.

HUMAN RIGHTS

In providing employment, accommodation or any other goods or services customarily available to the public, it is unlawful to discriminate on any of the prohibited grounds specified in this Act. These prohibited grounds include grounds of race, religious belief, colour, gender, physical disability, mental disability, ancestry, place of origin, family status, source of income, marital status and sexual orientation. It is conceivable that the Courts would extend the Act's protection to any other identifiable group, characteristic or belief that they determine is in need of protection.

The Act contains an exception which permits discrimination on any of the above grounds where the discrimination is based upon a bona fide occupational requirement or is otherwise reasonable and justifiable in the circumstances.

LABOUR

Employees are free to unionize in Alberta. There are two ways that a union can gain the ability to represent the employees of an employer. The less formal process is voluntary recognition. The employer recognizes a union for a group of employees and a voluntary recognition collective agreement is entered into.

The formal process is done by a union making an application for certification to the Labour Relations Board when there are 40% of the employees in the unit applied for in favour of the union. When that initial threshold is met, a vote of the employees in the unit is conducted by the Labour Relations Board. If the majority of employees voting are in favour of the union, the employer is certified and then is obligated to bargain in good faith with the union to enter into a collective agreement.

When a collective agreement is in effect, there are certain open window periods where another union can raid and apply to the Labour Relations Board for certification. When there are open window periods in a collective agreement, employees can apply to the Labour Relations Board for decertification. At least 40% of the employees in the application must initially be in favour of decertification. When that threshold is met, the Labour Relations Board conducts a decertification vote. If the majority of employees vote in favour of decertification, the union's bargaining rights are revoked. There are only limited circumstances when an employer can apply for decertification.

When a unionized business, or part of it, is sold, leased, transferred or otherwise disposed of, a union's bargaining rights and collective agreement transfer to the successor if the successor carries on the business, or part of it, as a functional economic vehicle. Associated or related companies can be found to be common employers when one of the companies is unionized and it designs its operations with other related companies that are under common control and direction to thwart the bargaining rights of a union.

See also [Employment](#) above.

LAND TITLES SYSTEM

Alberta has a "Torrens" system for the public registration of interests in real property under the *Land Titles Act*. The essence of their system is that members of the public are entitled to rely upon existing, and officially issued, certificates of title which set out the state and ownership of title to land. Generally, unregistered interests are not valid against innocent third parties, although there are exceptions including, for example, leasehold interests for a term of less than three years. In order to be valid against third parties, persons claiming an interest in land (e.g. mortgages, leases, easements or rights-of-way) are generally required to register those interests. There are some other statutes that impact on the Land titles system. Outstanding municipal taxes, for instance, are given priority even though they may not be registered against the title.

LICENSING

While registration with the Registrar of Corporations is a basic requirement to conducting business in Alberta (see [Extra-Provincial Registration](#), above) there may be other federal, provincial or municipal

licensing registration requirements applicable, depending upon the nature and location of the operations. A listing of suggested government contacts in that regard follows:

In Edmonton:

Alberta Consumer and Corporate Affairs

Licensing Branch
3rd Floor, Commerce Place
10155 - 102 Street
Edmonton, Alberta T5J 4L8
Telephone: (780) 427-4088

City of Edmonton
Licensing Department
5th floor, 10250 - 101 Street
Edmonton, Alberta
T5J 3P4
Telephone: (780) 496-5233

In Calgary:

Alberta Consumer and Corporate Affairs
Licensing Branch
301, Centre 70
7015 Macleod Trail South
Calgary, Alberta
T2H 2K6
Telephone: (403) 297-5743

City of Calgary
Assessment, Tax and Licence Department
3rd Floor, City Hall
800 Macleod Trail South
Calgary, Alberta
T2P 3L9
Telephone: (403) 268-5521

LIMITATIONS ACT

Alberta legislation provides for certain statutory limitations on the ability of a party to commence legal proceedings for a wrong committed against it. Very generally, an action may not be commenced more than 2 years after the wrong became known to the aggrieved party. Whether the wrong is discovered or not, there is an outside limitation of 10 years from the time when the wrong was actually committed. There may be extensions in circumstances of disability, acknowledgement or fraudulent concealment. The statute is of general application only and there are numerous other statutes that provide for specific statutory limitation periods which are different from those contained in the *Limitations Act*.

MUNICIPAL REQUIREMENTS



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Municipalities generally require businesses within their boundaries to obtain a business license and pay annual business taxes. See [Licensing](#), for useful contact numbers.

Also, municipalities have land use bylaws which regulate the location of business operations and which frequently impose conditions concerning development, fire regulation, transportation, construction and general operations. For the most part, these limitations are designed to ensure public safety, compatibility with existing uses, and a minimization of disruption to neighbouring businesses and residences.

PARTNERSHIPS

General partnerships, as opposed to “limited partnerships”, are not required to be registered in Alberta although to the extent that they are carrying on business under a trade name, the trade name must be registered (see [Extra-Provincial Registration](#) above). Also, extra-provincial corporations carrying on business in Alberta, whether in the context of a partnership or not, must be registered (see [Extra-Provincial Registration](#) above).

The question of whether a partnership exists or not is dependant upon the nature of the relationship and a partnership can exist in the absence of a written partnership agreement. Generally speaking where two or more entities pool their resources and agree to share in expenses and profits, a partnership will likely exist. The partners of a general partnership are jointly and severally liable for the obligations and liabilities of any of them.

In Alberta it is possible to constitute a “limited partnership”. A limited partnership must be registered and it requires a written partnership agreement. A limited partnership is not a separate entity at law but is comprised of “general partners” who manage the operations of the partnership and incur all risk of liability and “limited partners” who have limited liability but may not involve themselves in management. If a limited partner does involve itself in management, the protections of limited liability may be lost. Also a limited partner who advances money to its limited partnership by way of loan is restricted in repayment of that loan and may not validly secure it against partnership assets.

Even in the absence of a true partnership arrangement the *Alberta Partnership Act* does treat some forms of commercial relationships similarly. In particular a loan under which the rate of return varies with profits will be treated as capital and will rank behind unsecured debts.

PERSONAL GUARANTEES

Personal guarantees (given by individuals) are unenforceable in Alberta unless they are in writing and a completed certificate by a Notary Public in prescribed form is attached to the guarantee. The certificate confirms that the Notary has examined the guarantor and is satisfied that he or she understands the guarantee’s meaning and import. There is no such requirement for guarantees given by bodies corporate.

PERSONAL PROPERTY SECURITY

Registration and Priority

Security interests taken against personal property in Alberta must be registered at the Personal Property Registry in accordance with the *Personal Property Securities Act* in order to be valid as against third parties. The Act establishes a hierarchy of priorities based upon several factors, most notably the order of “perfection” and the registration of competing interests. Registration is accomplished through the filing of a “financing statement” which must contain, among other things, an accurate description of the debtor, together with a description of the secured collateral by “item or kind” or, in some cases (most notably, but not exclusively, aircraft, motor vehicles and collateral acquired for personal or householder purposes) by serial number. In some cases, there are important time limits which must be observed in order to ensure priority. Priority may be lost in certain circumstances. For example, if, to the knowledge of the lender, a borrower changes its name, priority may be lost if the registration is not amended to reflect that change.

Under Alberta law, it is possible to register continuing or “floating” interests which attach to property when it comes into the ownership of the particular debtor.

There are numerous other important aspects of the personal property registry system in Alberta, but they are too extensive to deal with adequately in this memorandum.

Searches

When purchasing or taking security in assets in Alberta, it is important to conduct searches with Alberta Personal Property Registry to identify any registrations. However, searches will not always identify valid and enforceable third party interests. Most importantly, Personal Property Registry is not a registry of title to personal property, but is intended primarily as a registry of encumbrances against personal property. A search at Personal Property Registry does not therefore confirm ownership.

The law in Alberta provides for certain other priorities (e.g. unpaid wages, workers’ compensation premiums, possessory liens and business taxes) which do not require registration. Some, but not all of these claims, may be disclosed on searches conducted with other governmental registries.

Unpaid Purchase Price (“PMSI”)

Under Alberta law, title to goods passes on delivery. Consequently, the seller's goods immediately become subject to the claims of the buyer's creditors and with whom the unpaid seller merely ranks pro rata at best. To avoid this, a seller of goods may retain a security interest for the unpaid monies in either of two ways. First, it may, as a term of the contract of sale, retain ownership of the goods until they are fully paid for (usually with clauses which nonetheless pass the risks attendant with ownership on to the buyer). Second, title in the goods may pass to the purchaser, but the vendor of the goods may take a security interest in the goods then sold (or, indeed, in any of the other assets of the purchaser). The first method (a “purchase money security interest” or “PMSI”) is preferred, as it ensures priority over any other “floating” security interests that the buyer may have granted earlier and which would otherwise attach as soon as ownership passed to the buyer. In either case, the security interest will only be valid as against third party creditors if a valid financing statement is registered with the Personal Property Registry within the prescribed time limits and if certain other formalities are observed.

PROTECTION OF PRIVACY

Commercial & Non-Profit Organizations

Personal Information Protection Act (“*PIPA*”) became law on January 1, 2004. This legislation applies to all private corporations, self-governing professions and non-profit or charitable organizations. The purpose of the legislation is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for reasonable purposes. Generally, *PIPA* requires that organizations obtain an individual’s consent prior to the collection, use or disclosure of that individual’s personal information and that personal information be utilized in a reasonable manner.

Private businesses and organizations conducting operations in Alberta should, at a minimum, do the following:

1. **Appoint a Privacy Officer**

Your business should appoint a person within the organization to be its Privacy Officer. This person will be responsible for understanding the basic requirements of *PIPA* and responding to inquires from customers and employees respecting how your business collects, uses and discloses their personal information. Your Privacy Officer will also be responsible for responding to requests for correction and access to personal information from individuals.

2. **Implement a Privacy Policy**

Your business should implement a Privacy Policy that advises your customers and employees how your business collects, uses and discloses personal information. The Privacy Policy should also outline the safeguards your business has put in place to protect personal information in its possession and it should advise customers and employees of the responsible person within the organization who can answer any questions or concerns about how personal information is handled.

3. **Process Requests for Corrections and Access**

Your business should develop an internal process to respond to written requests from individuals for correction or access to their personal information. Your business will be required to respond to a written request within 45 days of receiving the request.

Public Bodies

The Freedom of Information and Protection of Privacy Act (FOIPP) obliges most provincial government departments, hospitals, educational institutions, municipalities and related entities ("public bodies") to provide copies of documents upon request to any member of the public. It is not necessary for the applicant to identify an interest in the matter or a purpose for making the enquiry. The FOIPP sets out instances in which a public body is obliged to refuse such request (for example where it would amount to an unreasonable invasion of a third party's privacy) and instances in which the public body has the option to refuse (for example where the disclosure could harm the public body's economic interests). Where no exemption is available, the public body is required to make the disclosure. Where there is a disagreement about the applicability of a particular exemption or its application, the applicant can appeal the public body's decision to the Privacy Commissioner.

The Act also imposes a positive duty upon public bodies to protect the privacy of individuals from or about whom it has acquired personal information and to take reasonable precautions to prevent disclosure. The Act also imposes limits on the kind and breadth of information that public bodies can gather about individuals and the purposes to which such information may be put.

Persons doing business in Alberta with a public body should be cognizant of the potential for the future release of information that they give to the public body (and how to reduce that risk) as well as the possibility of obtaining useful information that might otherwise have been unavailable.

Health Information

In addition to FOIPP, the Alberta *Health Information Act* (HIA) specifically governs the collection, use and disclosure of health information. The HIA provides a mechanism to protect the confidentiality of personal health information of individuals while enabling health information to be shared and accessed when appropriate in order to deliver health services. It also provides individuals with the right of access to health information about themselves.

The HIA applies to any "custodian" of health information including hospitals, nursing homes, provincial health boards, regional health authorities, community health authorities, licensed pharmacies and health service providers paid under the Alberta Health Care Insurance Plan. Hence, unlike FOIPP it can be of application to private individuals and corporations. As well, it regulates employees, contractors, volunteers, students and other persons who provide services for a custodian.

A custodian has a duty to collect, use or disclose health information with the highest degree of anonymity possible and to use such information solely for the purposes for which it was collected. A custodian also has a duty to take reasonable steps to protect health information, to ensure the accuracy of health information and to establish or adopt policies and procedures that will facilitate these objectives.

The HIA outlines the procedure for requesting personal health information, as well as the custodian's right to refuse access to health information under certain circumstances. The HIA sets out the accepted uses and sharing of health information by custodians and prohibits disclosure of health information except in accordance with the Act.

Disclosure of individually identifying health information may or may not require the consent of that individual. If consent is required, the authorization must be in written or electronic form and must specify the health information that may be disclosed, identify the purpose for which the health information may be disclosed, identify the person to whom the health information may be disclosed as well as contain an acknowledgment of the risks and benefits of consenting to disclosure. Consent may be revoked at any time by the individual providing it.

PROVINCIAL INCOME TAX

Any business which establishes a "permanent establishment" in Alberta is subject to Alberta income tax, and businesses locating in Alberta should obtain advice on how that tax will be allocated and how and to what extent cross border tax treaties will be applicable. The definition of "permanent establishment" is broad enough to include a resident agent.

PROVINCIAL SALES TAX

Alberta does not have a Provincial Sales Tax, although the 7% Federal Goods and Services Tax does apply. Also, Federal import duties may be applicable upon the importation of goods from outside Canada.

SALE OF GOODS (DOMESTIC)

To the extent that domestic Alberta law applies to the sale of goods in Alberta, the Alberta *Sale of Goods Act* would apply. Its most important provisions are as follows:

- a. Contracts for the sale of goods with a value over \$50 (this would likely include amendments to existing written contracts) are not enforceable against a party unless that party has signed some form of agreement, document or memorandum containing the essential terms of that contract.
- b. To the extent that a buyer of goods makes known to the seller the purpose for which the goods are required and relies on the seller's judgment or skill, and the goods are of a type that is in the seller's business to supply, there is an implied condition that the goods are reasonably fit for the intended purpose.
- c. There is an implied warranty that where the goods are sold by description, the goods will correspond with that description.
- d. When the goods are bought by description from a seller who deals in goods of that description, even though the seller is not the manufacturer, there is an implied condition that the goods are of a merchantable quality, unless the buyer has examined the goods and the defects are ones that such examination ought to have revealed.
- e. An implied warranty or condition as to quality or fitness for a purpose may be implied by the usage of trade. In other words, to the extent that there are "usual" warranties given on the sale of a particular type of good (and, perhaps if there is a reasonable expectation of such warranties), such warranties will be implied if not expressly accepted.

- f. There is an implied warranty on the part of the seller that he has the right to sell the goods, that the buyer will (have and enjoy quiet possession) of the goods, and that the goods are free from any charges or encumbrance in favour of any third party.
- g. Property in the goods passes upon their delivery to the purchaser (or its carrier), whether or not the full purchase price has yet been paid.
- h. Where for some reason a price for the goods is not specifically agreed upon, the contract will not be void for uncertainty, but rather the buyer will be required to pay a "reasonable price".
- i. The time of payment is not automatically deemed to be of the essence.
- j. The buyer is deemed to have accepted the goods if he intimates to the seller that he has accepted them or, following delivery, if the buyer does anything that is inconsistent with the ownership of the seller or when, after the lapse of reasonable time, he retains the goods without indicating that he has rejected them.
- k. An unpaid seller has a lien on the goods for the amount unpaid so long as he has possession of them. The seller is entitled to retain possession until payment is made.

All of the above are subject to deletion or modification by way of contract and frequently, it is the practice to do so. It is common in Alberta to expressly accept out warranties that might otherwise be implied by law and to limit warranties to those expressly contained in the agreement.

SALE OF GOODS (INTERNATIONAL)

Canada is a signatory to the United Nations Convention on the International Sale of Goods and, by statute; this Convention has been formally imported into domestic Alberta law. Consequently, in any contract with a party located in another treaty jurisdiction (e.g. the United States), there is some risk that under Alberta law; the Convention would automatically apply unless it is expressly accepted. While there are many similarities between the International Convention on the Sale of Goods and the Alberta *Sale of Goods Act*, it is often preferable to except out the Convention where the Alberta Act is an available alternative. The Convention has been subject to little judicial interpretation in Canada and some of its terms are rather vague. Furthermore, the remedies it offers to a buyer are arguably broader than those offered under the Alberta *Sale of Goods Act*.

SECURITIES LAW

The *Securities Act* of Alberta governs the trading of securities by individuals, corporations and other entities. Under the Act, unless an exemption is available, certain registration and prospectus filing requirements must be satisfied if a person intends to "trade" in any "security". The terms "trade" and "security" are very broadly defined in the Act to include most dispositions of shares, debts, options and contractual rights or other choses in action (including, in some cases, rights to real estate).

There are numerous exemptions available under what are commonly referred to as "Multilateral Instruments" or "National Instruments" that are incorporated into Alberta law. Most important among these is National Instrument 45-106. Some of the more commonly relied upon exemptions available in relation to either (or both of) the registration and prospectus requirements include the following:

- a. Trades in the securities of a "private issuer" corporation (a corporation which has 50 or fewer security holders, has securities that are subject to transfer restrictions in the constating documents or a security holders' agreement, and such securities are not offered for sale to the public) that are offered to persons who are not the public;

- b. A trade in a security of a single issuer which has an aggregate acquisition cost of not less than a prescribed amount (at this writing, \$150,000);
- c. An isolated trade in a specific security not made in the course of other trades of like nature;
- d. A distribution where the acquisition cost to the purchaser does not exceed \$10,000 or the purchaser is an “eligible investor” i.e. has net assets or income exceeding certain prescribed amounts, and the purchasers have received an “offering memorandum” in prescribed form and in which there are no omissions or misstatements of material facts;
- e. Trades to family, friends and business associates;
- f. Trades to certain “accredited investors”, a term which includes governments, pension funds and individuals meeting specified minimum income or net worth thresholds; and
- g. Trades to employees or senior officers in certain circumstances.

In the interests of brevity, the above requirements and exemptions have been paraphrased and are only summarily described. There are a number of important requirements and other exemptions which have not been mentioned.

NI 45-106 was adopted by the securities commissions in a number of provinces in an attempt to make the securities rules more uniform across Canada. Several other national and multilateral instruments have been adopted as rules by the Alberta Securities Commission in an attempt to further harmonize the securities legislation in the various Canadian jurisdictions.

TRADE NAMES

Any person or corporation carrying on business in Alberta under a trade name is required to register that trade name with the Alberta Registrar of Corporations. This requirement is solely for the purposes of public protection and, aside from potential evidentiary value in establishing a time of first use; this registration does not create any priority or property rights in the trade name beyond what is created at common law. Persons wishing to legally protect their business name should seek formal trade mark registration under the *Federal Trade Marks Act*.