REGIONAL DEVELOPMENTS

Canada*

The following are some of the changes that have taken place in 1986 in Canada at the federal level and in the Province of Ontario.

I. Foreign Investment Policy

The Investment Canada Act (the Investment Act) has replaced the Foreign Investment Review Act (FIRA). The Investment Act gives Investment Canada, a federal agency, a mandate to encourage both foreign and domestic investment in Canada and the right to review the takeover of important Canadian businesses and the establishment of new businesses in culturally sensitive sectors, to ensure net benefit to Canada. The Government has estimated that as many as 90 percent of the transactions previously reviewable under FIRA will not be reviewable under the Investment Canada Act.

Most foreign investments made in Canada require only a notice to Investment Canada. These foreign investments include the establishment of a new business, acquiring assets or shares of a Canadian business having assets less than Can$5 million, and acquiring shares of the non-Canadian parent of a Canadian business with assets under Can$50 million (unless its assets represent more than 50 percent of the whole international transaction, in which case the Can$5 million limit applies). Government approval is not required for these transactions.

All investments above these thresholds are reviewable by Investment Canada. Specific acquisitions of new businesses in designated types of business activities related to Canada's cultural heritage or national identity (e.g., within the publishing or entertainment industry), which would normally only be notifiable, could be reviewed if the Minister considers such review to be in the public interest.

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A venture capital exception is available under strict conditions. The investment must be made for the purpose of eventual resale and must be made in anticipation of realizing capital gain on the resale.

Notification of a new business is not required for an expansion by a non-Canadian of its existing Canadian business or for a new investment in a "related" business, other than one that falls in one of the national identity or cultural heritage categories.

The application form is substantially abbreviated as compared to that required under FIRA, and the net benefit to Canada test is easier and will be determined by the Minister rather than by the Cabinet as was the case under FIRA. The time periods for the review process have been abbreviated so that decisions should be issued within seventy-five days after a complete application has been filed.

II. Immigration

New regulations affecting business immigration to Canada are intended to encourage immigration into Canada by prospective residents who have business or investment objectives. A new category under the Immigration Act has been established for "investors," that is, prospective Canadian residents who have a proven track record in business and a personal net worth of Can$500,000 or more. They are required to make an investment of a minimum of Can$250,000 for at least three years in a project that will contribute to employment opportunities for Canadian residents and that has been assessed by the province in which it is located as being of significant benefit. Investors will not need to become actively involved in a management aspect of the proposed business venture.

The investor category supplements Canada's existing business immigration program affecting entrepreneurs and self-employed persons. "Entrepreneurs" are prospective residents who have the ability to make a substantial investment in a business venture in Canada that they will actively manage and that will result in the creation or maintenance of jobs for Canadian residents. This category accommodates experienced business persons whose background is oriented towards managing small to medium-sized business. The "self-employed" category consists of prospective residents who have the ability to contribute to the economy or to Canada's cultural or artistic life. This category accommodates persons who may not create or preserve jobs, but who may make a significant cultural contribution.

Under the new conditional admission program, qualified entrepreneurs will have a period of up to two years after entering Canada to establish a suitable business. This time span will allow visa officers to issue visas to qualified entrepreneurs on the basis of a general business proposal with an adequate amount of time to implement the proposal after arrival in Canada. A "busi-

ness visa" has also been introduced for business persons who wish to visit Canada from time to time to oversee their investments without taking up residence in Canada. The visa will be valid for a one-year period and will allow multiple entry into Canada. In view of the employment opportunities that the business immigration program are designed to create, all three categories of prospective business residents will be given priority in entry to Canada second only to family class members and refugees.

III. Industrial Property

A. Extension of Copyright Protection to Computer Programs

The Federal Court, in *Apple Computer Inc. v. Mackintosh Computers Ltd.*,[1] held that copyright protection was afforded not only to the original written form of a computer program, but also to its embodiment in a silicon chip. It is the first Canadian case to hold that software programs are entitled to full copyright protection under the current Copyright Act, and it follows similar decisions in Britain and Australia.

The defendants were accused of breaching Apple's copyright by copying their chips. The defendants "burned" the plaintiffs' program into blank chips and then placed the chips in their own computers, which they sold as "Apple-Compatible," that is, capable of running software programs designed for Apple Computers. The defendants never copied the original written forms of the programs. The copying was effected from the chips directly.

The fact that the original written assembly language code versions of the programs fell within the protection of the Copyright Act was never disputed. The trial judge held that the conversion of the programs from the original assembly language code into machine language binary code was a translation for the purposes of the Act. Under the Act, translations are entitled to the same legal protection as the original. The court then held that the embodiment of the binary code translation into a silicon chip "retains the form of expression of the original work." The court emphasized that copyright protection encompassed the sole right to reproduce the work "in any material form whatever."

B. Registration of Industrial Designs

As a result of *Doral Boats Ltd. v. Bayliner Marine Corporation*,[2] those who wish to protect the aesthetic or ornamental features of articles that are to be

1. [1986] 10 C.P.R.3d 1.
2. [1986] 10 C.P.R.3d 289.

mass-produced must register such features as industrial designs under the Industrial Design Act.

The case involved reverse engineering. Bayliner's designers prepared design drawings of the hull and superstructure sections of runabout boats. These drawings and plans were used to create molds, and material was then inserted in the mold to create the hull and superstructure. Doral, the defendant, purchased one of Bayliner's boats and stripped it down. Doral then created its own molds using the stripped down parts of Bayliner's boat.

The Court of Appeal found for Doral, basing its decision on section 46 of the Copyright Act, which excepts from the protection of the Copyright Act designs capable of being registered under the Industrial Design Act and intended to be used as models or patterns to be multiplied by any industrial process. The court held that the Industrial Design Act's rules should be read so that a design is deemed to be excepted pursuant to section 46 where the design is intended to be reproduced in more than fifty articles (not comprising a "set") or where the design is to be applied to certain listed types of goods.

The court was required to determine whether Bayliner's designs qualified as designs capable of being registered under the Industrial Design Act. The court held that the sort of design that can be registered is a design that is to be "applied" to the "ornamenting" of an article. While the essential functional aspects of a product or a process are not registerable, in this case the court found that the details of the shapes of the hull and superstructure of the boat were essentially ornamental. The designs were therefore capable of being registered as industrial designs and were excluded from copyright protection.

The court also found that delaying registration of an industrial design so that a design was no longer capable of being registered because the one year statutory period had lapsed would not qualify the design for copyright protection. The court refused to allow designers to extend their statutory protection from ten years, under the Industrial Design Act, to life of author plus fifty years, under the Copyright Act, merely by ignoring timely registration.

IV. Environmental Law—Extended Liability for Owners of Spilled Pollutants

In November 1985 the Province of Ontario proclaimed Part IX of the Ontario Environmental Protection Act. The "Spills Bill" has greatly expanded the liabilities that may be incurred as a consequence of a spill in the Province of Ontario, and the rights of owners and controllers of spilled pollutants to obtain compensation are very limited.

A spill is a discharge of a pollutant into the natural environment that is abnormal in quality or quantity. The Act imposes obligations and duties upon "the owner of a pollutant and person having control of a pollutant that is spilled." These duties include: an obligation to notify the appropriate government authority of the spill; and an obligation to do everything practicable to prevent, eliminate, and ameliorate the adverse affects of the spill and to restore the natural environment.

The Act creates an absolute liability on the owner and the person in control of the pollutant for the costs of the clean-up. They are also responsible for any loss or damage resulting from the spill, including economic loss; however, liability may be avoided if such persons can show that they took all reasonable steps to prevent the spill or that the spill was caused by some uncontrollable act by another person or some natural phenomenon. The liability for the costs of the clean-up or for any loss or damage that is a direct result of neglect in carrying out a duty imposed by the Act cannot be avoided under any circumstances.

The Ministry of the Environment has broad powers to order persons associated with the spill, including municipalities and affected property owners, to clean up the spill and restore the natural environment.

The Spills Bill creates three possible avenues for an affected third party to claim compensation in the event of a spill: (1) a court action against the owner or person in control of a spilled pollutant; (2) a court action against the provincial Crown for expenses incurred in carrying out a clean-up order made by the Ministry of the Environment; and, (3) an application for compensation for loss or damage to the newly created Environmental Compensation Corporation (the ECC). These remedies are in addition to common law remedies in tort and contract.

An owner or controller required to pay compensation to third parties can also apply to the ECC for compensation. Two important prerequisites will, however, have the effect of excluding most owners or controllers. First, the owner or controller is subject to a Can$1 million "specified deductible," which is increased in the case of corporations by an amount equal to 10 percent of the value of a corporation's assets. Secondly, the owner or controller must not have been legally liable to the person to whom compensation was paid; that is, the owner's or controller's liability must arise only as a result of the operation of the Act. Owners or controllers that have been required to pay compensation for the costs and expenses in complying with a Ministry order to clean up and restore the environment cannot recover such costs from the provincial government; their only remedy is a court action against the person at fault.

V. The Competition Act, 1986

All of the provisions of the new legislation, which renamed and amended the former Combines Investigation Act, were proclaimed in force in 1986, except for the merger prenotification provisions. The bar against conspiracies to lessen competition "unduly" is still the basis of Canada's legislation. Anyone who contravenes that prohibition is exposed to criminal prosecution. The amendments provide for an increase in the penalty from a maximum fine of Can$1 million to Can$10 million. The Act provides a defense from the conspiracy provisions in the case of agreements that relate only to the export of products from Canada and an exemption for export-oriented companies wishing to join forces with competitors for the purpose of exporting.

The amendments create new investigative powers for the Director of Investigation and Research. The Director will be able to obtain, without prior notice to any person, an order from the court compelling any person to submit to an examination under oath, to produce documentary evidence, or to make returns of information under oath. The Director may also obtain warrants for search and seizure from the courts.

The legislation creates a new body called the Competition Tribunal to adjudicate questions arising under the new merger and monopoly provisions. The Competition Tribunal has broad powers to order the taking of any act it considers necessary to overcome the effects of an abuse of dominant position in the market.

Under the former Act it was an offense to be a party to the formation of an illegal merger. The new Act repeals and replaces this offense with a process for review by the Competition Tribunal. The Tribunal is given extensive powers to deal with an anticompetitive merger. However, even if the Tribunal decides that competition would be substantially lessened as a result of the merger, the merger must be permitted if the Tribunal concludes that it will bring about gains in efficiency that will more than offset the effects of lessening the competition. The Act allows a party to obtain the Director's approval prior to the completion of the merger.

The Act also includes complex prenotification provisions in the case of large mergers. It is expected that these provisions will be proclaimed into force in 1987. The prior notice provisions will only apply if the parties to the transaction and their affiliates have consolidated assets or gross revenues in Canada in excess of Can$400 million.

The new Act also allows the Tribunal to issue orders prohibiting "delivered pricing" practices. This practice is sometimes associated with a policy of the supplier's refusing to allow a customer to take delivery at certain normal places of delivery in order to deprive the customer of the opportunity of paying lower transportation costs. The amended legislation