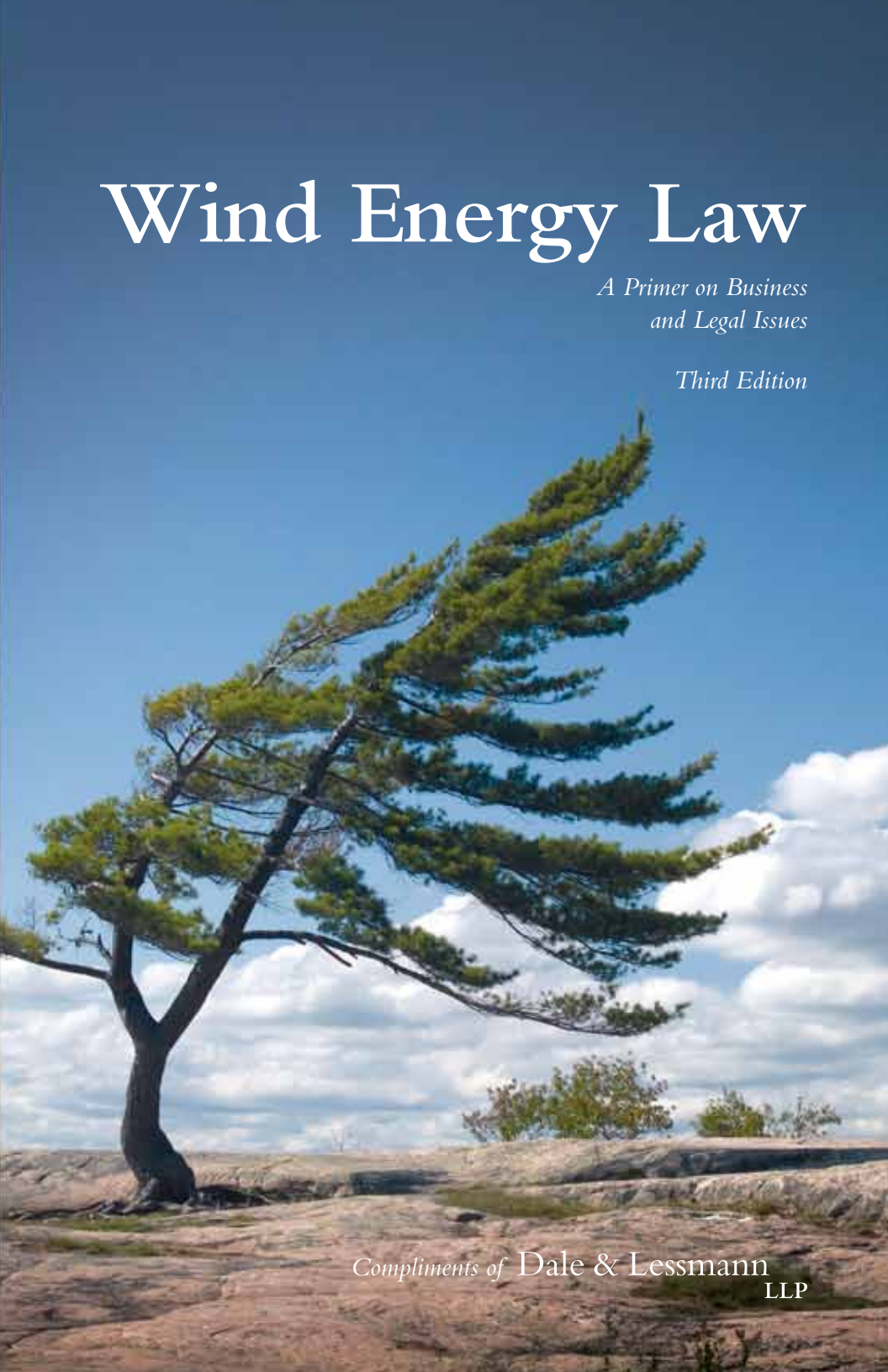
Wind Energy Law

A Primer on Business and Legal Issues

Third Edition



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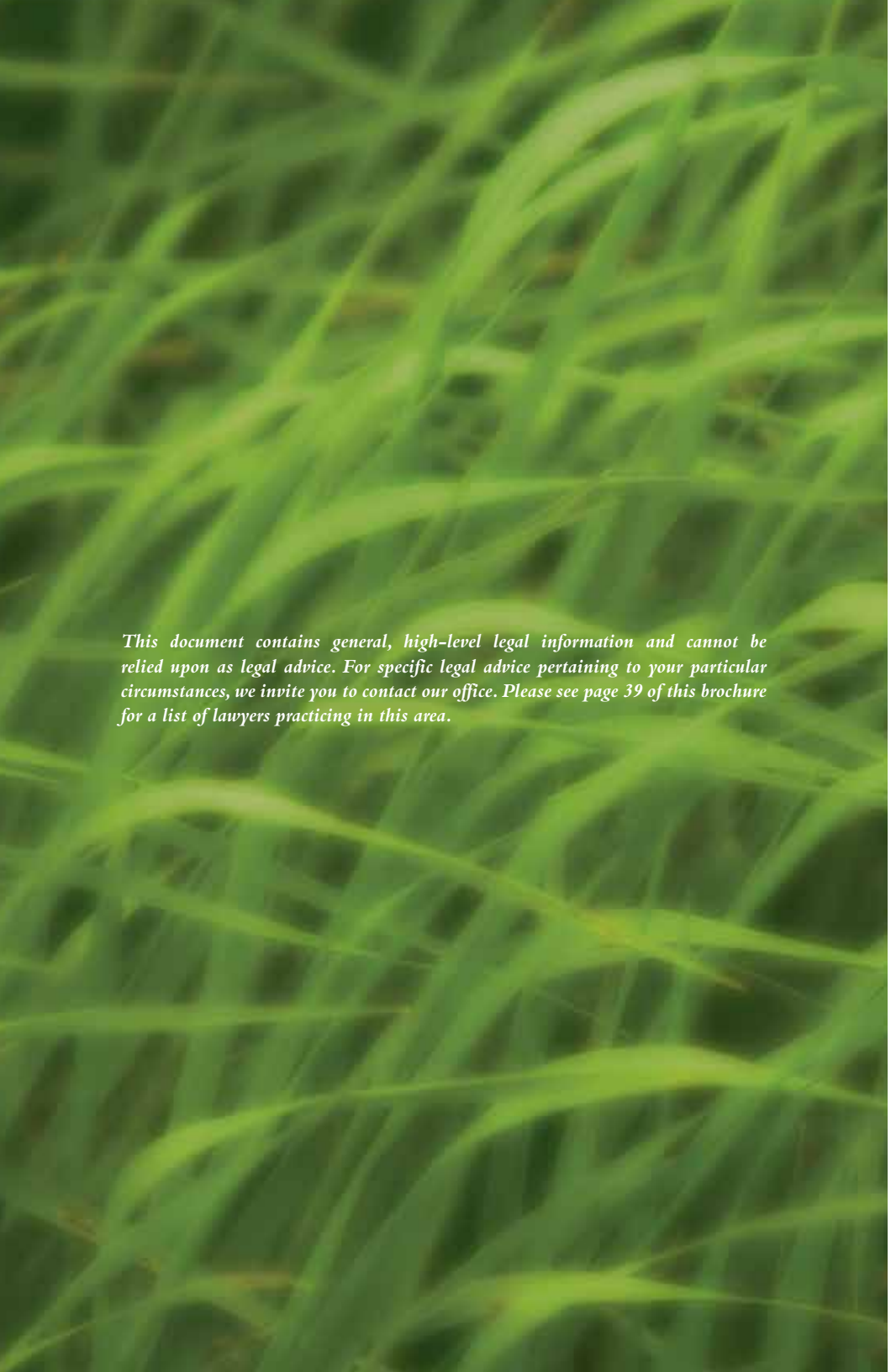

This document contains general, high-level legal information and cannot be relied upon as legal advice. For specific legal advice pertaining to your particular circumstances, we invite you to contact our office. Please see page 39 of this brochure for a list of lawyers practicing in this area.

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INTRODUCTION

In recent years, commercial-grade wind energy projects have proliferated around the globe so that, at the end of 2008, worldwide capacity of wind-powered generators was 120 gigawatts.

Although wind produces just over 1% of world-wide electricity capacity at the present time, it accounts for approximately 19% of electricity production in Denmark, 9% in Spain and Portugal, and 6% in Germany and Ireland and has increased more than seven fold between 2000 and 2008.

By all accounts, despite the recent global economic downturn, the growth trend continues. In 2008, the United States became the world's leading wind energy producer meaning that, for the first time ever, the world's largest economy also became the world's leading wind energy producer. Moreover, the link between access to reliable energy and economic and social development has made wind energy a key component in economic planning models around the world.

Over 1.6 billion people around the world still live without reliable access to electricity. Wind forms an essential part of the solution to that problem. The story has just begun.

Canada has tremendous wind energy resources –much of which are unlikely to be utilized for decades to come. Canada also has deep experience in the renewable energy sector, stable capital markets, an educated and forward looking workforce, an international outlook and the political will to make wind energy development a priority.

Recognizing both the challenges and the opportunities which present themselves to wind industry participants operating in Canada, Dale & Lessmann LLP is delighted to present the Third Edition of its **WIND ENERGY LAW PRIMER**.

We congratulate you on your decision to help develop clean energy solutions in Canada and hope that you will find this Primer to be helpful.

Sincerely,
Dale & Lessmann LLP

WELCOME TO CANADA

Canada is known worldwide for its rich and beautiful landscape and, in particular, for its untapped renewable energy resources. Canada also attracts international attention for its economic output and its high quality of life.

U.S. investors see Canada as a safe and proximate region to grow into, test market strategies and mitigate risk. European investors see Canada as the entry portal to the NAFTA market, with its more than 443 million consumers.

Europe and the USA are Canada's largest trading partners and historically friendly relations have had a positive impact on the trading patterns. Nevertheless, entering any new market is always associated with risk. This risk level increases if language and cultural barriers lead to further challenges. To be successful in the Canadian market, entrepreneurs must understand the Canadian culture, the way business is done in Canada and what the differences are compared to their way of doing business in their home country.

Dale & Lessmann LLP specializes in advising European, American and other non-Canadian corporations as they enter the Canadian marketplace. We offer legal advice to newcomers in the Canadian market and to established companies who are trying to expand their North American business. Our clients are serviced by multilingual lawyers with a profound understanding of the transatlantic business world.

We understand the Canadian way of doing business. In this guide we present a high level overview of the legal and business issues which wind energy industry participants face as part of the development of individual projects. We hope that you will find this primer useful as you move forward with your Canadian wind venture.

WILLKOMMEN IN KANADA

Kanada ist nicht nur für die Schönheit und Weite seiner Natur bekannt, sondern genießt mehr und mehr internationales Ansehen wegen seiner herausragenden Wirtschaftsleistung und seiner einmaligen Lebensqualität. So sehen ausländische Investoren Kanada als Eintrittstor in den NAFTA Markt mit seinen über 443 Millionen Konsumenten. Viele kanadische Produktionsstätten im industriellen Kernland in Quebec und in Südwestontario sind näher an den US Märkten gelegen als einige der traditionellen US Produktionsstandorte in den südlichen US-Bundesstaaten. Nach den USA ist Europa nach wie vor der wichtigste Handelspartner Kanadas. Die historischen Beziehungen zwischen Kanada und Europa begünstigen den Handelsaustausch bis heute. Viele europäische Unternehmen nutzen die Möglichkeit zur unternehmerischen Aktivität in einem attraktiven Markt, der zudem einen relativ geringen bürokratischen Aufwand erfordert.

Allerdings birgt der Einstieg in einen neuen Markt stets auch große Risiken. Diese verschärfen sich noch, wenn Sprachbarrieren und die länderspezifische Art und Weise Geschäfte zu machen zusätzliche Herausforderungen darstellen. Hier sehen sich auch erfahrene Geschäftsleute mit Problemstellungen konfrontiert, die den gelungenen Markteintritt gefährden können. Um erfolgreich in Kanada Fuß zu fassen, müssen Unternehmer verstehen, inwiefern sich die kanadische Kultur und insbesondere das kanadische Geschäftsgebaren von den ihnen vertrauten Verhaltensweisen unterscheiden. Europäische Unternehmen sind sich dieser Gefahr mehr und mehr bewusst und suchen gezielt nach Partnern, die ihnen zur Hand gehen und die die Risiken eines Fehltritts im kanadischen Markt minimieren.

Dale & Lessmann LLP hat sich auf die Beratung europäischer Unternehmen spezialisiert und bietet sowohl Neueinsteigern im kanadischen Markt als auch etablierten Unternehmen mit Ambitionen zum Ausbau der Geschäftsaktivitäten im nordamerikanischen Raum rechtliche Beratung an. Unsere Mandanten werden von mehrsprachigen Anwälten mit einschlägiger Erfahrung in der transatlantischen Geschäftswelt betreut. So verfügen unsere Anwälte nicht nur über das spezielle Wissen sondern auch über die nötige Sensibilität gegenüber Alltagsgepflogenheiten im kanadischen Geschäftsleben. Gemeinsam mit Ihnen entwerfen wir lokale Strukturen und Prozesse, die den Anforderungen Ihrer europäischen Muttergesellschaft gerecht werden. In jeder Phase Ihrer Unternehmung garantieren wir Ihnen persönliche Betreuung durch unsere Fachanwälte und eine unmittelbar auf die Belange Ihres Unternehmens zugeschnittene Rechtsberatung. Wir arbeiten eng mit Ihrem bestehenden Beraterstab zusammen, um die Strategie für den kanadischen Markt auf Ihre globalen Unternehmensziele abzustimmen.

Über die Jahre haben wir uns ein umfangreiches Netzwerk an professionellen Dienstleistern in Kanada aufgebaut, die Erfahrung im Umgang mit europäischen und Wirtschaftsvertretungen der europäischen Länder in Kanada. Dank unserer exzellenten Beratungsleistungen für führende mittelständische Unternehmen mit Stammsitz in Europa hat sich Dale & Lessmann LLP zu einer der ersten Kontaktadressen für europäische Unternehmen in Kanada entwickelt.

THE WIND ENERGY DEVELOPMENT PROCESS

Good selection of a wind turbine site is critical to the economic development of wind power. Aside from the availability of wind itself (the "wind regime"), other factors to be considered include the availability of transmission lines, value of energy to be produced, cost of land rights acquisition, land use considerations, the anticipated environmental impact of construction and operations and market demand and off-take pricing opportunities. Actual generation costs of wind energy are determined by the investment cost, economic parameters, system efficiency, wind speed, annual average power output, technical service staff availability, operation and maintenance costs and anticipated operational lifetime.

In starting-up a wind energy project, developers must first identify and obtain rights to locations that are suitable for wind energy development. By securing option agreements with land owners, wind developers obtain the exclusive right to lease or obtain an easement over the land for a long term period, often for 20 years or more. During the option period, which is generally 5-7 years in length, the developer studies the land, conducting tests and feasibility analyses which test the merit and capacity of the particular site for development. Those same tests inform the developer as to the size, location and layout of wind turbines, the characteristics of the wind resource above the properties in question, soil conditions, environmental conditions and the like. During the option period, the developer will also begin acquiring the necessary permits and licenses required to develop the proposed project, initiate enquiries with local and provincial grid operators, begin the municipal

planning process and initiate relations with local residents and stakeholders who may be impacted by the proposed development.

If the prospective site is determined to be viable, the developer will seek to secure a power purchase agreement, or PPA, from an electricity distributor. In Canada, most PPA's are made with governmental or quasi-governmental power authorities, though private (or "Merchant") power purchase agreements are sometimes entered into with large scale power consumers or re-sellers. A PPA will generally outline the manner in which the distributor purchases wind power from the developer. Through the PPA, the developer maintains and monitors energy production, and sells the electricity to the host at a contractual price for the term of the contract, normally ranging up to 25 years. For the developer and its financiers, the PPA provides a fixed long-term purchase price for the power generated by a project.

With the information obtained from the feasibility, wind resource and engineering studies and a power purchase agreement in place, the developer is ready to begin construction.

CHOOSING A LEGAL STRUCTURE

There are a number of alternative legal structures which should be considered when establishing a new business, including a wind power business. The decision as to which structure to choose is an important one, because certain property rights, permits and contracts acquired as part of the wind power development process may be difficult to transfer, or may actually be non-transferable, at a later date when the legal structure is being reviewed. Transfer approval processes, particularly where the transferring entity is held differently than the receiving entity, can sometimes be cumbersome, time consuming and expensive. They can also, sometimes, result in unanticipated and unavoidable tax consequences. For these reasons, it is a good idea to settle choices relating to legal structure as early as possible.

BASIC CANADIAN LEGAL STRUCTURES

1. Corporations

The most common structure adopted by parties wishing to begin developing a wind industry business in Canada is a limited liability share capital corporation. Such a corporation may be established either under federal legislation or under the legislation of any one of Canada's provinces. Regardless of whether the corporation is established federally or provincially, each corporation has the same basic structure:

- the corporation is owned by one or more shareholders;
- the shareholders of the corporation elect a board of directors which, subject to locally applicable residency requirements, can have as few as one member and as many members as the shareholders decide is appropriate;
- the board of directors appoints officers, which will usually include at least a President and a Secretary (who may be the same person), and may include other officers depending upon the management structure that the board of directors and shareholders wish to adopt.

Generally, the board of directors is legally responsible for the broad oversight of the business, and the officers are responsible for the day-to-day operation of the business. Although there is no requirement that a director or officer be a shareholder, an individual who is a shareholder may be a member of the board of directors, an officer of the corporation, or both. Members of the board of directors may also serve as officers of the corporation.

A corporation is established by preparing and filing Articles of Incorporation with the appropriate government ministry in the jurisdiction of choice. The Articles of Incorporation will set out the name of the business corporation, its registered office address in Canada, the names and addresses of its directors, its share structure, and in most cases, certain private company

restrictions. (Private company restrictions would not be used if the ultimate objective were to issue shares to the "public", although if this is the case, many other legal matters will need to be considered.) In most Canadian jurisdictions, the identity of the shareholders of a private company is not required to be disclosed, and is not a part of the public record.

Once incorporated, the corporation establishes a General By-law which covers various procedural matters relating to the operation and management of the business corporation, and also passes various organizational resolutions relating to the various matters set out above. If two or more shareholders are involved in a business corporation, it is advisable to establish a shareholders' agreement among the shareholders, outlining their respective rights and obligations.

Three frequently asked questions about corporations, and the answers, are as follows:

How do shares work?

- A corporation may have one or more classes of shares.
    - *There is always a class of shares, which are usually called common shares, which have voting rights, and which are entitled to share in the profits of the corporation and the growth in the value of the corporation;*
    - *Common shareholders generally have 1 vote for each share held;*
    - *Sometimes there are "special" or "preference" shares, which have special rights or privileges attaching to them. For example, a corporation may raise money by issuing preference shares which have a fixed value (no growth potential), a fixed rate of return (a dividend), and priority rights in the event of liquidation, and may or may not have voting rights.*
- Shareholders subscribe for shares from the corporation, or buy shares from other shareholders

What is the difference between a "private" and a "public" corporation?

- A "public" corporation has its shares listed for trading on a stock exchange or other public market, and the market establishes the value of the shares and therefore the value of the corporation.
- A "private" corporation does not have its shares listed, and in fact there are usually restrictions on the number of shareholders, and on the rights of the shareholders to transfer their shares. As a result there is no "market" mechanism to establish share values, and the shareholders usually have to agree on how to value the shares – usually through a shareholders' agreement.

What rights do voting shareholders have?

- To attend the Annual Meeting of shareholders at which:
    - *Annual financial statements of the corporation are reviewed and approved;*
    - *Directors are elected for the ensuing year;*
    - *Auditors or accountants are appointed for the ensuing year;*
- To examine, and be provided with copies of, the following records
    - *The articles, by-laws and any shareholders' agreement;*
    - *Minutes of shareholders' meetings;*
    - *Directors' register;*
    - *Shareholders' register;*
    - *Annual financial statements.*
- To approve any fundamental changes in the Articles, such as changing the name, changing the share structure and/or the rights and privileges attaching to the shares, or amalgamating with another corporation – approval of two-thirds of the shareholders is required (called a "special resolution")
- To dissent in respect of fundamental changes with which they disagree, and to be paid a fair value for their shares
- To sue the corporation if the shareholder is treated in a manner that is oppressive, or in a manner that is unfairly prejudicial to, or unfairly disregards the interests of the shareholder

2. Partnerships

There are frequently circumstances in which a general partnership or a limited partnership is the best way to structure an investment in a Canadian business. The choice of either partnership structure may be made for business reasons, tax reasons, or both. One of the principal advantages of the partnership structure in Canada is the ability to pass or 'flow-through' business expenses, profits and losses to the various partners. One of the principal disadvantages, with general partnerships in particular, is that the partners themselves will be held jointly and severally liable for the liabilities of the partnership – in other words, there is no limited liability protection as is the case with a corporate structure.

a. General Partnerships

Occasionally, two or more individuals and/or corporations decide to form a general partnership to carry on business. In these circumstances, it is

advisable to file a partnership declaration with the appropriate government ministry in the jurisdiction of choice. However, because the foregoing declaration only contains minimal information, it is also advisable to establish a partnership agreement among the partners outlining their respective rights and obligations. Such an agreement takes the place of the articles of incorporation, the by-laws and any shareholders' agreement used in the context of a corporation. The biggest drawback to using general partnerships as a business vehicle is that the partners do not have limited liability protection, although if the partners are business corporations incorporated in Canada, the shareholders of the business corporation partners will have limited liability protection.

b. Limited Partnerships

Limited Partnerships usually consist of one general partner and one or more limited partners. The general partner (which is often a business corporation) is responsible for the day-to-day business of the limited partnership, and has unlimited liability in the same manner as the partners in a general partnership, but each limited partner has limited liability protection, provided the limited partner is not involved in the day-to-day business of the limited partnership. As is the case with a general partnership, it is necessary to file a limited partnership declaration with the appropriate government ministry in the jurisdiction of choice. However, because the foregoing declaration only contains minimal information, it is also advisable to establish a limited partnership agreement among the general and limited partners outlining their respective rights and obligations. Such an agreement takes the place of the articles of incorporation, the by-laws and any shareholders' agreement used in the context of a business corporation.

3. Sole Proprietorships

An individual may carry on business on his/her own, using a business name, without the benefit of a corporate or partnership structure, however this would be a very unusual approach for anyone in the wind power business, primarily because there is no limitation on personal liability.

The Use of Single-Purpose Subsidiaries

Because wind power developers will often develop several wind power projects at one time, it is often advisable to make use of subsidiaries which are created specifically for the purpose of individual projects. There are several reasons for this:

Insulation of Risk. Because the shareholders of a corporation are generally not liable for the debts of the corporation beyond their initial capital contribution, the use of a single-purpose subsidiary to own a wind power project can permit the parent company to limit the potential liability arising from the project to the value of the assets in the project. If a single company owns several projects directly, a finance creditor or judgment creditor can seek to recover against all of the company's assets.

Financing and Partnering. Debt financiers will generally rely on the cash flow and hard assets of the relevant project in order to satisfy debt servicing and collateral security requirements. Because of this, owning wind power project assets through a single purpose entity can (a) enable the parent company to limit loan facility liability and (b) permit project lenders to secure first rights to a defined collateral package, which is distinct from the other assets of the parent company which may be subject to other creditors' credit interests.

Acquisitions and Divestitures. Holding project assets in a single-purpose subsidiary can simplify merger, acquisition and divestiture processes and, sometimes, increase the number of transaction structuring options available.

Disadvantages. The primary disadvantage of using single-purpose subsidiaries is that they lend a higher degree of complexity and cost to the corporate and tax affairs of the business.

UNDERSTANDING LAND EASEMENTS, LAND LEASES AND LAND OPTION AGREEMENTS

The soundness of a wind energy project's land rights plays a fundamental role in that project's overall value. With the cost of standard turbines and their ancillary equipment being several million dollars, obtaining reliable land rights where turbines are to be located is crucial.

Option Agreement

Option agreements can be structured to grant a wind developer the exclusive right to lease or obtain easement rights in land at some time in the future. In the Canadian environment, wind developers often begin acquiring rights to real property by securing options before they have enough meteorological data and information about access to transmission facilities and environmental attributes to accurately determine the most productive and cost effective layout for the contemplated wind power facilities.

An option agreement can also provide the wind developer with sufficient rights for the following to be accomplished: (i) testing to be conducted for purposes of determining the feasibility of wind energy conversion; (ii) construction, operation and maintenance of the wind turbines and all ancillary equipment; and (iii) transmission of the wind generated electricity.

An option agreement entered into between the land owner and the wind developer allows the wind developer to register a notice of its agreement on title to the property at the local land registry office, including notice of its right to exercise the option to obtain an easement or lease once it is satisfied that the property meets its installation criteria.

Easement vs. Lease

In our experience, the documentation used to reflect the agreement between the wind developer and the land owner must serve the interests of a variety of stakeholders including not only the wind farm developer and the land owner, but also prospective purchasers of both the real property and the development, prospective bank security holders of both the real property and the development, prospective private and public equity investors, local municipal and provincial government agencies, and of course, prospective energy purchasers.

Depending upon the particular circumstances and the jurisdiction, an easement, rather than a land lease, may be the preferred vehicle for holding wind development land interests. A transfer of easement creates an interest in the land by way of a conveyance by the registered owner which is registered on title, and that interest binds not only the current owner but successors and assigns in title as well. Easement rights can be exclusive or non exclusive, and can be permanent or temporary. Rather than paying rent, one lump sum payment will often be made to the landowner for the granting of the easement rights. In Ontario, every grant of easement must comply with the provisions of the Ontario Planning Act. Accordingly, any easement which is intended to last for twenty-one years or more must fall within one of the exceptions in the Planning Act or the necessary consent must be obtained from the local land division committee. Consent applications add to the cost and complexity of the development. Currently the exceptions set out in the Planning Act do not extend to wind energy projects. However, future amendments to the Planning Act arising out of the Green Energy Act, 2009 include new exceptions which will encompass wind energy projects. For instance, the conveyance of land or land rights for a period of twenty-one or more years but not more than fifty years for the purpose of a renewable energy generation facility or renewable energy project, will be exceptions to the subdivision and part-lot control provisions of the Planning Act. These proposed amendments will provide both time and cost savings to wind energy developers.

A lease also creates an interest in real property and a notice of the lease can be registered on title but, since that interest is based on contract, it may not have the same security of tenure as an easement. As with all leases, the wind developer as tenant will agree to a number of contractual obligations. Failure to meet any of those obligations may be deemed an event of default under the lease and could entitle the landowner to terminate the agreement between the parties. However, a lease may be the favoured manner of agreement between the parties as Land Transfer Tax is not applicable to a lease where the term is less than fifty years and a wind developer may prefer to pay annual rent instalments rather than providing one lump sum payment.

The easement or lease agreement will contain provisions which deal with the scope of the property subject to the easement or lease, the allowable uses of the property, the extent to which the property will be accessible, the manner in which the turbine installation will be implemented, the property owner's obligation to keep the easement lands clear of high buildings and obstructions, the term and any renewal thereof, insurance and liability issues, the payment structure and numerous other legal terms and provisions, as required.

Whether proceeding by way of an easement or a lease, it is important from the outset to utilize well drafted, comprehensive documentation to avoid deficiencies or ambiguities which may have a negative impact on the wind developers' project.

TITLE MATTERS AND REAL ESTATE DUE DILIGENCE

Regardless of whether a renewable energy developer is granted an interest in land by way of easement or lease, conducting a comprehensive title review remains critical to a developer's project. Before entering into an agreement to secure lands, a developer must be diligent in confirming that it is actually acquiring the land rights in its agreement that were bargained for.

Developers may struggle with determining when the best time to conduct a title search on certain lands will be. Most developers prefer to limit their expenses during the early stages of corporate development and may conduct land title searches only when they are prepared to build on the lands or when they are approaching potential lenders to finance a project. The trouble with this approach is that, when a title search is conducted, it may be too late for the developer to remedy the title issue discovered.

First and foremost, a parcel register (or title abstract depending on which Province the lands are situated in) should be obtained. Parcel registers can be obtained by visiting the land registry office in the county of the subject lands or by contacting a real estate lawyer or conveyancer.

Parcel registers are inexpensive and provide a developer with a snapshot of who holds an interest in the lands where the project will be built. At the very least, the parcel register will include the registered owners of the lands so that the agreement entered into between the developer and landowner can accurately include those parties who own the land.

In addition, regardless of whether the agreement contemplates an easement or lease, the parcel register will disclose any parties who hold a mortgage over the lands. This will be important because a developer who is being granted an easement will likely have to obtain the consent of the party who the mortgage is in favour of (referred to as a mortgagee). If no consent is granted, the granting of the easement from the landowner to the developer may in fact breach the terms of the landowner's mortgage, thereby resulting in an event of default under the mortgage.

Similarly, a developer being granted a lease over mortgaged lands will want to consult with any mortgagees to protect the developer's interest under the lease. A developer will want to confirm with a mortgagee that its rights under the lease agreement will not be disturbed in the event that the landowner defaults under the terms of its mortgage resulting in the mortgagee taking control of the lands. The likelihood of financing a project will be nearly impossible where a mortgagee has the right to unilaterally terminate the agreement entered into between the developer and mortgagor.

A developer will also want to know if any other parties hold an interest in the lands by way of easements or leases. The developer will likely have to consult with those parties holding other easement or lease rights before exercising the rights granted under its agreement.

We recommend that developers also conduct a search of all of the lands which neighbour the landowner's lands to determine if the landowner owns other parcels of land which share a point (referred to as "abutting lands").

As the developer's project continues to be developed, it will be necessary to survey the lands and to confirm the boundaries of the landowner's lands in order to meet all of the regulatory processes that are involved in such an endeavour.

Regardless of the form of agreement entered into between the developer and the landowner, great care should be taken by the developer in examining the lands where the project will be developed.

ENGINEERING, PROCUREMENT AND CONSTRUCTION CONTRACTS

Although the appropriate contracts are normally secured early in the planning phases due to their importance to investors, the design, engineering, development and construction of the wind farm occurs after feasibility studies have determined the viability

of the location and rights to the site have been obtained. Specific and technical expertise will be required for the design of the wind farm as well as in-depth knowledge of the procurement and construction required for assembly of the series of turbines, substations, cabling and connectivity equipment, road and access ways as well as other equipment required for a commercial project.

The engineering, procurement and construction of the wind farm all require carefully considered contractual arrangements. Often referred to collectively as "EPC Agreements", engineering, procurement and construction contracts are critical to the development, financing and eventual sale of any wind energy project.

As anyone who has built a wind farm in the Canadian market can attest, this is an area where experience pays off.

EPC Agreements will include:

- Planning for the design and engineering of the project, including such specifications as the configuration, height and size of the turbines;
- The procurement of equipment necessary to carry out the engineering plan (towers, generators, gear boxes, blades, nacelles, transformers and transmission equipment) and materials for construction phases (concrete, fencing and rebar);

Construction, erection and installation services;

- Ownership of and rights related to the design, equipment and the project itself;
- Warranty, repair, risk assumption, insurance arrangements; and
- Performance guarantees.

From time to time it may be possible to consolidate the EPC Agreements into a single document with a single general contractor. This is more likely in the case of small wind developments –where the installer is also the vendor of the equipment.

If they are negotiated early in the development, a developer should make the EPC Agreements conditional on satisfactory results of feasibility studies, the availability of financing and general economic conditions to avoid costly breaches of the contracts if the development can't go ahead. Investors and lenders will want to review EPC Agreements to ensure they are sufficiently protected before committing to funding.

Negotiating positions should contemplate the regulatory climate (at municipal, provincial and federal levels), tax incentives and consequences, and lender or investor requirements. Certain issues, such as deadlines and ownership requirements, can be greatly influenced by these external factors.

Defining the Scope of Work

In negotiating EPC Agreements, emphasis should be placed on preparing a detailed and well articulated scope of work. The scope of work will define the role of the contractor and its responsibilities for its phase of the project development. It should describe in detail the actual design, engineering and construction obligations and fully identify all of the deliverables – including completion and start up obligations – of the contractor and identify any understandings or requirements with respect to third party obligations which rely on completion of contractor milestones. The scope of work should also include specific rules for change orders and other modifications including adjustments to the scope of work itself and, for fixed price contracts, methods in which the price can be altered.

Having experienced engineering support at this stage is critical.

Interim payments are often linked to the completion of certain milestones by the contractor. Payment may be conditional upon completion of a certain percentage of the scope of work or of specific items listed in the scope of work, such as delivery of equipment, installation of turbines or commissioning of the site.

The scope of work will also often include provisions regarding commissioning and start-up of the project. As the contractor will normally have in-depth knowledge of the parts and supplies used in the development, the agreement may stipulate that the contractor is responsible for the start-up of the wind farm. However, this responsibility could also be borne by the project developer or others but often with assistance from the contractor.

Any ambiguity in the scope of work can lead to costly disputes and delays in the eventual completion and operation of the project. Because of the specificity and high level of detail required, EPC Agreements and their scope of work are often sizable documents which can be negotiated and drafted in a multitude of ways.

In order to maximize commercial certainty and minimize exposure to risk, EPC Agreements, turnkey agreements and the scope of work should be reviewed by legal counsel prior to signature.

Warranties

Performance guarantees and other product and service warranties are an important part of any EPC Agreement. Warranties typically requested by developers and lenders include product or service defects, quality of workmanship, and some form of protection for larger scale systemic problems. Warranty negotiations between the developer and engineers or contractors can often become quite protracted,

sometimes leading to warranty terms being broken out from the relevant agreement to form a separate schedule or agreement.

Particular attention should be paid to:

a) The length of the warranty term and any potential extensions or extended warranty options;

b) Coverage of the warranty such as performance guarantees relating to output or consumption or quality in functioning of parts;

c) Making a warranty claim; and

d) The responsibilities and duties of the vendor, contractor or service provider following a warranty claim – e.g. when and how will the problem be solved? Will the vendor pay for lost revenue and other economic damages caused by the defect?

Developers, investors and lenders should be especially cautious of exclusionary language in warranties which may oust the contractor's liability for certain risks.

Related to the general warranties, a developer should also seek assurances from the contractor that no liens will be placed on the project by subcontractors. It is prudent to obtain representations from the contractor that it has a payment bond in place to protect the project in case the contractor has defaulted. If the contractor is unable to provide a sufficient bond, the developer should seek alternative security such as guarantees from solvent parent corporations or other shareholders or a letter of credit. Developers can expect contractors to seek reciprocal assurances to protect against a default by the developer. As subcontractors are paid, the EPC Agreements should provide that the contractor supply evidence that payment has been made and that any lien claim which could be made by the subcontractor against the project has been released.

Limiting Liability

Like many other forms of contract, EPC Agreements will often contain a limitation as to the contracting party's liability for any breach of the contract or of its representations or warranties. The contractor will normally seek to exclude liability for consequential, indirect, incidental or special damages – e.g. loss of profit, other economic loss or other similar types of damages that although not directly linked to the breach were in the reasonable contemplation of the parties. The contractor will likely also attempt to limit its total liability for direct damages often by fixing a percentage based on the value of the contract or by setting an arbitrary maximum.

Although often a point of negotiation, developers should be cautious to ensure any cap on liability is high enough provide them with

enough comfort in case of shoddy workmanship or unexpected latent defects.

Indemnification and Insurance

Sometimes overlooked by developers during the contracting process, indemnities and insurance are important protections in case something should go wrong during the development process.

Linked to a contractor's liability, developers should obtain an indemnity from their vendors supplying turbines and balance-of-plant products and services. Such an indemnity will normally permit the developer to be made whole should any third party make a claim against the developer for a loss or damage caused by the contractor.

A requirement that the contractor have sufficient insurance should ensure there are sufficient funds if any warranty, liability or indemnity claim is made by the developer. The EPC Agreements should require, or permit the developer to demand, that vendors provide proof of insurance for the benefit of the developer and, if the policy lapses, authorize the developer to take out the necessary insurance at the vendor's expense.

REGULATORY MATTERS

Regulatory Environs

In 2007, total electricity generation in Canada surpassed 602 terawatt hours with hydro generation making up 61.7% of generation, nuclear making up 14.8% of generation, hydro carbon based generation making up 24.7% of generation and wind and other non-hydro renewable resources making up less than 1% of generation.

Most of Canada's electricity sector remains publicly owned with some notable regional exceptions, including Alberta and Nova Scotia where many generating and transmission assets are privately or municipally owned.

Licensing, Permitting and Approvals Required for Electricity Generation

All electricity generating development requires a number of permits and approvals in order to (a) be constructed and (b) operated. These requirements are dictated, primarily, by Canada's provincial and municipal governments, however, depending upon the nature and location of the project, some requirements also devolve directly from federal statutes.

The key to success in licensing, permitting and approval stage processes is to start early, to work with qualified advisors, specializing in the relevant local regions, and to dedicate sufficient time and resources towards ongoing and consistent stakeholder relations.

Municipal Approval Requirements

Across Canada, as of this writing, municipal approvals are required for virtually all wind power installations. Depending upon the municipality, building permits and site plan approvals will be required and, in most cases, an official plan amendment will also be needed. As well, where land rights are required in the form of a long-term lease or easement over less than all of a given parcel, a "Planning Act" consent may also be required from the local Committee of Adjustment (specific requirements will vary province to province).

It should be noted that each of these processes may require public consultation and, in most cases, will take a number of months to complete. Recognizing that local residents and communities are active and direct stakeholders in every prospective wind energy development project, working diligently to understand and meet the needs of local stakeholders can pay significant dividends during the later stages of the development process.

In addition to the above, many municipalities across Canada are now requiring project developers to complete thorough environmental assessment of proposed project impacts prior to submitting planning applications.

Across Canada, many municipalities are beginning to revise their Official Plans to account for the potential for wind energy development in their regions. However, as this process has only recently begun, most project proponents in Canada will be required to submit an Official Plan Amendment application to the municipality in order to obtain approval for their project.

(In Ontario, proposed regulations under the recently enacted Green Energy Act, propose a new "single window" approval process for renewable energy projects. (In Canada, municipal affairs fall under the provincial jurisdiction). The Renewable Energy Approval is intended to replace all of the approvals currently required from the Ontario Ministry of the Environment and also exempt some renewable energy projects from the provisions of the Planning Act. The renewable energy approval will not replace any of the approvals which are required from the Ministry of Natural Resources. Note: The Renewable Energy Approval is not yet in force as of this writing.)

Zoning

Zoning by-laws interpret Official Plan policies into detailed technical planning requirements and regulations. Wind energy projects will normally be required to submit site-specific zoning by-law amendment applications even where the project is proposed to be located in a location which has been designated for power development under the municipality's Official Plan. For example, if a given parcel of land has been zoned for commercial or agricultural use, a zoning by-law amendment will still need to be filed in order to include wind power as a permitted use in that particular zone. Municipal land use planning is largely a local matter and, as a result, it is advisable for developers to retain qualified local planning and use experts to assist them in the planning and use development process.

Site Plan Control Approval

After the project has received official planning approval, zoning by-law approval and, where necessary, minor variance consents, developers will still need to complete what is usually referred to as a "Site Plan Control" approval. The Site Plan Control is required in order to permit the municipality to review the layout and design of the site, to review mitigation and decommissioning requirements and to clarify ownership and maintenance responsibilities. Generally, Site Plan applications are submitted for each parcel of land in the proposed project and will be approved (parcel by parcel) by the municipality with the assistance

and recommendations of planning department staff and outside consultants.

After completion of the Site Plan Control Application, municipal building permits will still need to be acquired. This is where the foundation, tower and general structure of the turbines and associated equipment are reviewed by the municipality together with the required certification of a professional engineer.

Provincial Approval Requirements

At the provincial level, Ministry of the Environment approvals and Ministry of Culture approvals will be required. This will vary province by province, but the basic premise is the same: project proponents are responsible for assuming the cost of conducting numerous studies with respect to the environmental impact of the proposed project, including bird and bat surveys, archaeological studies, social and economic impact assessments, vegetation mapping, storm water management, as well as pedestrian and traffic safety concerns. They are then required to submit these independent studies to provincial authorities to obtain certificates of approval prior to development.

Federal

At the federal level, developments affecting waterways, fisheries or federal lands will require screening, studies and authorization by applicable federal government ministries. Developers utilizing turbine structures in excess of 90 metres will also need to be aware of Transport Canada letting requirements with respect to civil aviation.

Grid Connection

Interconnection requirements for transmission and distribution vary significantly from province to province across Canada. In Ontario, required approvals include those from the Local Distribution Company (the "LDC"), the Ontario Energy Board (the "OEB") and the Electrical Safety Authority (the "ESA").

Through the approval process, electricity regulators will seek to ensure that a given project meets the safety, design and operational characteristics necessary to protect the reliability of the transmission and distribution network. Unless a project is being built for on-site use, most wind energy projects will connect to local distribution lines below 50 kv rather than to the main transmission lines which traverse the province.

Wind projects will require the following approvals:

a) a Connection Impact Assessment ("CIA") - usually conducted by the Local Distribution Company ("LDC");

b) Connection Cost Estimate ("CCE") -also usually conducted by the Local Distribution Company;

c) Connection Cost Recovery Agreement ("CCRA") –entered into between the developer and the Local Distribution Company; and

d) an electrical safety inspection conducted by the local electrical safety authority ("ESA").

In addition to the above, electricity generators intending to sell electricity will also need to obtain an electricity generation license from the local electrical regulatory board (in Ontario the Ontario Energy Board, also called the "OEB" or the "Board"). In most cases, professional consultants will be needed to assist developers in navigating the technical approvals process. Having seasoned technical experts on staff or on retainer can be very helpful in navigating the complex and technical concerns

relating to generation, transmission and distribution. Developers will be required to assume the costs of upgrades to substations and associated infrastructure in order to connect and, in some cases, these costs can be quite substantial.

WIND ENERGY FINANCE

With the development costs and production capacity calculated using the feasibility analyses and the cash flow calculated by the prospective PPA, the information is available for prospective early stage investors and later stage development and/or take-out lenders to calculate viability and finance terms.

Subject to anticipated overhead, which should be calculable by the developer and verifiable by prospective financiers, the operating proceeds of a given project can be estimated using the PPA business terms in combination with the wind resource studies which have been commissioned by the developer and, if applicable, verified by the prospective investor. Although there is risk in assuming that the wind will blow to generate the power, wind resource studies provide substantial certainty for feasibility analyses and project risk analysis.

Wind resource consultants will usually advise the developer on the acquisition and placement of meteorological towers ("Met Towers" or "Met Masts") to acquire 12-60 months worth of environmental data. Using this data, the wind resource consultants will then extrapolate the local wind regime characteristics against local and regional data available from government sources, airports, research stations and the like, to create predictive models which will provide statistical probabilities of future wind patterns. Using anticipated wind patterns, consulting engineers of the developer can then utilize the power generation characteristics (the "power curve") of the various commercial turbines available on the market in order to determine which models will provide the most power output over a given period for each dollar of acquisition cost and anticipated ownership cost.

Although capital structure, anticipated operating costs, off-load pricing and wind regime will vary from project to project and, thus, the credit and risk characteristics of the debt will vary, a comprehensive understanding of the project financial models and risk characteristics will normally be available by the developer in advance to allow the prospective lender to calculate its risk.

Early Stage Capital: Flow-Through Shares and Finance-Related Tax Matters

Flow-through shares - which would have been unfamiliar to most entrepreneurs operating outside of the resource sector a few years ago - are now a wind industry standard. In Canada, these tax-sheltered investment vehicles have traditionally been available to mining and petroleum companies, having been designed to facilitate early exploration and project development financing. However, in recent years, they have been made available to qualifying renewable energy projects.

Like normal common or preferred shares, flow-through shares permit equity investors to receive an equity interest in the company. However, the benefit of flow-through shares is that they permit the income tax deductions associated with expenditures incurred by the company on exploration and development to be passed through to equity investors.

In a simple flow-through share structure, investors would acquire shares of the company (either directly or indirectly through a limited partnership) and, under the terms of the investment, the company would agree, for purposes of the Income Tax Act, to "renounce" (or "pass-along") what are called Canadian renewable and conservation expenses or "CRCE's" (pronounced "ser-see") to the shareholders. The passing of CRCE's effectively reduces the investor's investment amount (commonly by more than a third) and thus reduces the base cost of the investment. This can be a very significant advantage to junior companies which pay little or no tax during their start-up phase and are, therefore, willing to forgo the expense deductions to new investors.

In addition to the advantages offered by the availability of flow-through shares, the Canadian Income Tax Act also provides other incentives which may contribute to the attractiveness of the flow-through share investment vehicle. For example, certain wind power production equipment may be eligible for accelerated and enhanced depreciation expense claims. Similarly, investment tax credits may also be available for "scientific research and experimental development" costs incurred in connection with the development of new energy-saving technologies.

Early Stage Capital - Investment Funds and Angel Investors

Using limited partnership structures, a number of investment funds have arisen since 2003 to raise capital from the public markets taking advantage of the CRCE flow-through share tax incentive. The first public offering of a wind power flow-through fund occurred in December 2003, with the Toronto Stock Exchange listed flow-through offering raising over $42 million. Since then, a number of Canadian and non-Canadian fund managers and venture capitalists have taken great interest in Canada's growing wind energy industry and, for the right companies, these funds have become an important source of investment capital which was non-existent only a short time ago.

Quite often, an investment fund will seek to purchase a wind energy development venture outright and will then continue to operate it. In this case, the transaction becomes an asset or a share purchase transaction and the senior management of the venture, who stay behind after the acquisition, begin reporting directly to the management of the fund. Alternatively, some investment funds will seek only to purchase a part of the growing business –often a single wind farm property which is well along in the development process- hoping to leverage access to capital and/ or internal development expertise or hard assets in order to obtain an attractive return on investment.

The first aspect of equity investment finance which prospective investment beneficiaries should understand is that venture capital investment tends to be active investment. Investors are seeking superior return on investment while simultaneously seeking to mitigate early-stage investment risk. To accomplish this, they will normally want to participate directly in the company's affairs and will also normally want to assume a preferred position in the event of liquidation.

Commonly, the existing equity holders of the venture being funded will be asked to enter into a unanimous shareholders' agreement with the investor. Almost always, the investor will require that one or more of its personnel be appointed as a director of the target company and it will also set a maximum on the number of directors serving on the board of the target company. In addition, the unanimous shareholders' agreement will usually contain a list of matters which require shareholder, and specifically, the investor's approval, including matters such as: senior management appointments, changes to constituting documents, the issuance of shares, the transfer of shares, non-arm's length transactions and loans by or to the company, senior management salary increases, the declaration of dividends, operating expenditures over a certain threshold, and real property transactions.

The unanimous shareholders' agreement will also normally provide the investor with a first right of refusal on all share transfers. Similarly, a pre-emptive right on all future security offerings from the target venture and mechanisms - which will permit the investor to 'tag along' with one or more other security holders if an attractive offer to purchase their holdings is made to them or to 'drag-along' all other security holders in the event that an offer to purchase the securities held by the investor is made - will also be sought.

Quite often, the prospective early stage equity investor will require that the share provisions of the target corporation be amended so that it can obtain preferred dividend rights and a preferred position in the event that the target business becomes insolvent. Financing might

also be by way of convertible debt (that is, secured debt which can be converted into shares at a later date if the business fares well) or by way of a combination of equity and convertible debt – giving the investor some security over the hard assets of the business.

Early stage equity investors may also acquire preferred shares of the business which are convertible into common shares at some point in the future. Conversion may occur at the investor's discretion or at some predefined "qualified liquidity event" –such as an initial public offering, a reverse take-over or a sale of the business to a third party. These preferred shares will often carry a cumulative dividend, payable in preference to the common shares when the business has access to funds over and above those required to finance operations. The preferred shares will rank prior to all other classes of shares in terms of assets to be distributed upon dissolution or wind-up.

Raising Private Equity

A private placement is simply a direct or 'private' offering of securities to a limited number of investors, which does not require the

filing of a prospectus with securities regulators. Private placements provide a powerful alternative to bank financing and public offerings for capital-hungry venture businesses. In wind energy, it is not uncommon to see several successive rounds of financing for amounts ranging between $200,000 and $50 million.

In Canada, private placements are exempt from the universal prospectus filing requirements otherwise applicable under the various provincial securities regimes in accordance with the provisions of National Instrument 45-106 — Prospectus and Registration Exemptions (NI 45-106).

The exemptions from the prospectus and registration requirements of applicable securities laws contained in NI 45-106 are generally classified into four categories: (a) capital raising exemptions, (b) transaction exemptions, (c) employee, director and consultant exemptions, and (d) miscellaneous exemptions. The rules relating to these exemptions are complex and, unfortunately, not yet completely harmonized across Canada. Depending on the specific exemption being relied upon, it may be necessary to obtain specific factual representations from prospective investors, to distribute specific informational items to such prospective investors and to make pre and/or post-closing filings with relevant securities regulators.

To effect a private placement, we recommend the following:

a) **A Business Plan** – The underwriter or securities advisor acting for the venture will normally review this document in order to determine whether the operation is (i) viable and (ii) marketable to investors. This document should not be widely distributed unless reviewed and approved by legal counsel as it may be considered an Offering Memorandum and subject to additional filing and content requirements. It should be well-drafted, clear and compelling;

b) **A Well Formed Team** - Nothing builds credibility with prospective investors and business partners like seeing a team of like-minded individuals who have thought through business concepts together –challenged their own ideas internally and done the multifaceted thinking necessary to bring a great idea to market. A smart team builds deep credibility and will significantly differentiate your company's security offering(s) from the thousands of one-person shows out in the marketplace seeking capital.

c) **Qualified Legal Counsel and Accounting Support** – Securities issuances are highly regulated and can be fertile ground for litigation. Depending on the type of placement, securities regulations may require the issuer to qualify the investors by income and net worth. Law firms and accounting firms which are active in wind energy development and venture capital circles can provide helpful advice and help management teams make the right business contacts. Ask the professionals that serve your company for help;

d) **A Well-honed Financial Package** – The underwriter and the investors will want to see the most recent financial statements of the company including a balance sheet and an income statement. Depending on the size of the offering, these financial statements do not necessarily need to be audited. In addition, cash-flow projections showing where the capital raised will go and how money is expected to flow into and out of the company will help the underwriter determine whether or not the investment meets its underwriting standards;

e) **Legal Documents to Meet Regulatory Requirements and Minimize Risk** – The primary legal document entered into between the company (referred to as the "issuer") and the underwriter is the Underwriting Agreement. Often, the issuer and the underwriter will sign an "Engagement Letter" setting out the basic business terms of the underwriting (issue price, security characteristics, fees and disbursements, basic representations and warrants) and this letter will then be replaced by a more formal Underwriting Agreement –often signed on the day of closing. The basic legal document put in place between the issuer and the investors is the Subscription Agreement. This agreement sets out the name and registration instructions of the investor, the representations and warranties being made by both parties in relation to the securities and the attributes of the investor, the issue price, the number of securities being purchased and a number of other important legal terms. Because securities regulations change frequently, it is important that these documents be reviewed by qualified legal counsel before they are distributed to prospective investors.

Debt Financing

As the wind industry matures, debt financing is becoming more and more available to prospective wind developers, particularly at the latter stages of development. Although most Canadian banks have shied away from the wind energy sector, this will change. We anticipate that Canada's large banks will enter the sector as take-out lenders taking positions in projects already built, with stable predictable cash-flows.

The typical debt financing of a wind power project involves (a) an in-depth review by the prospective lender of the operating viability of the proposed project and the quality of the key project documentation previously put in place by the borrower followed by (b) protracted negotiation surrounding risk assumption and risk mitigation for the lender.

Frequently, a third party consultant will be retained by the lender (at the borrower's expense) to analyze wind resource data, access the developer's financial models, review market conditions for key supply items (such as turbines and concrete), and comment generally on the viability of the project and the likelihood that it will be completed on schedule and on budget. Lender's viability analyses can be quite trying for prospective developers. In order to prepare for this eventuality, it is important to use credible consultants early on in the development process, to continually test and retest resource assessments and financial models based on worst-case data scenarios.

Prior to any institutional lending, developers should anticipate a thorough due diligence process. This is where contracts negotiated by the wind developer years earlier (when the venture was still an undercapitalized start-up) can have a significant impact on whether or not the project is deemed viable for debt financing. Early stage documents, such as land easement/lease agreements with land owners or success-based fee arrangements put in place with development agents, will be carefully audited and 'put to the test' to determine their potential impact on the financial viability of the project. Late stage contract renegotiations with land owners, shareholders, consultants, municipalities, former employees and other stakeholders rarely go well for prospective wind developers and can pose a serious threat to the finance-ability of a project. Using properly prepared documentation from the outset can avoid due diligence woes at later development stages.

Because it represents the primary source of revenue for most wind projects, one of the documents most carefully scrutinized by prospective lenders will be the Power Purchase Agreement (the PPA). Lenders will want to verify that the PPA is structured to provide the project company with sufficient revenue to cover all debt and operating costs and that the PPA has a term that exceeds the term of the loan being provided. Lenders will also want to ensure that the power purchaser will acknowledge the security interest of the lender and that the PPA provides for 'step-in rights' for the lender or its transferees.

Similar scrutiny will be applied to land option, easement and lease agreements to ensure that they are fully enforceable, have comprehensive, well-articulated terms and are properly registered on title. Prospective lenders will also review construction and maintenance contracts, employment contracts, operation and maintenance contracts, insurance contracts, municipal zoning and licensing, transmission plans and permissions, and grid interconnection arrangements.

Once a lender approves the financing and the basic business deal is negotiated, the lender and the borrower will normally enter into some form of loan agreement accompanied by collateral security documents. The typical loan agreement will set forth the standard credit terms (such as the amortization period, the applicable interest rate and the fees payable) and it will typically be secured by all project assets (including a registered security interest over all project facilities, real property and personal property, an assignment of all operating revenues and an assignment of all project agreements and project permits). Parent company guarantees, sister company guarantees and/or personal guarantees by the founders, may also be necessary.

WIND ENERGY SECTOR EMPLOYMENT MATTERS

The field of employment law is arguably one of the most rapidly changing and complex areas of law to navigate in Canada. During the

challenging and busy times associated with the operation of your business and the management of your workforce, it is important not to lose sight of your many legal obligations as an employer. The following overview summarizes some of the key legal considerations employers need to think about when carrying on business in the wind industry. These comments do not include reference to a unionized work environment governed by a collective agreement.

The Employment Contract

The relationship between employers and their employees is based on contract. The parties are generally free to set out the terms and conditions of their relationship by written agreement, provided that the agreement does not violate the employee's statutory rights. However, prior to entering into the written employment contract, the key aspects of the job should be reviewed, including the employee's duties and responsibilities, remuneration and benefits, how the employment relationship will end, and what obligations will survive termination (such as non-competition or non-solicitation obligations). If there is no written agreement, the courts will imply the terms of the contract. For greater certainty, and to ensure that the critical terms of the employment contract are not inferred by a court, it is recommended that the terms of employment be written down in a clear and legally enforceable manner.

Employment Standards Legislation

The employment standards legislation in each Canadian province and territory establishes the minimum rights and obligations which employment contracts must adhere to. Generally, employees and their employer are prohibited from contracting out of these statutory provisions, except to exceed the standards contained in the legislation. In most cases, the employment standards legislation sets out mandatory minimum conditions of employment, governing areas such as hours of work, vacation and overtime pay, minimum wages, public holiday pay, maternity or parental leave and minimum payments to be made or notice to be given to employees in the event of termination of employment.

Termination of Employment without Cause

Unless dismissed for cause, employers are required to provide their employees with reasonable advance notice of the termination of their employment. The purpose of giving notice is to allow the employee a period within which to locate other employment. An employer has the option of either providing the employee with "working notice", whereby the employee is required to work until a specific date, or the employer may terminate the employee's employment immediately and provide the employee with pay in lieu of notice of termination. Where the employer elects to provide the employee with pay in lieu of notice, the employer must compensate the employee for the remuneration and other benefits the employee would have received had the employee continued to work during the period of reasonable notice. Failure to provide reasonable notice of termination or pay in lieu of notice is known as wrongful dismissal.

In all Canadian common law jurisdictions, the employment standards legislation sets out the minimum amount of notice of termination an employer must provide to the employee. The length of the statutory notice period is based on the length of the employment relationship. For example, in Ontario, employees are generally entitled to one week's notice (or payment in lieu of notice) for each completed year of employment, up to a maximum of eight weeks. However, unless the employee's employment contract expressly sets out the amount of notice of termination to be provided to the employee, even where an employer terminates an employee with notice in accordance with the applicable employment standards legislation, the employee may also have the option of bringing a claim for additional pay in lieu of notice under the common law.

At common law, employees are often awarded notice of termination up to a maximum of 24 months – a notice period usually reserved for long-serving, senior executive employees. In determining what constitutes reasonable notice, courts have held that factors such as the employee's age, position, length of service, remuneration, health, and the likelihood of the employee securing comparable alternate employment should be taken into consideration.

The financial consequences can be significant for the employer where the employee is awarded notice under the common law. For greater certainty, the employer should ensure that there is a specific provision in the employee's employment agreement setting out the amount of notice or pay in lieu of notice that will be provided to the employee. At the same time, the employer must ensure that the employment agreement provides for at least as much as the minimum entitlement under employment standards legislation, as otherwise, the contract will not be enforceable.

Termination for Cause

Notice of termination, or pay in lieu of notice, is not required when the employment relationship is terminated for cause. In practice, it is very difficult for an employer to establish that the conduct of the employee was of a serious enough nature to justify terminating the employee without notice or termination pay. In very rare circumstances, an employer can summarily dismiss an employee for a single occurrence, such as theft, serious dishonesty, willful

disobedience, assault, insubordination and sexual harassment. Incompetence can also constitute just cause, but mere unsatisfactory performance is not grounds for dismissal without notice. Economic reasons are not grounds for dismissal without notice. For instance, unless the employee's employment agreement provides otherwise, a lay-off is deemed to be a termination for which the employee is entitled to notice or pay in lieu thereof at common law.

Changing the Terms of the Employment Agreement

During the course of the employment relationship, the employer or the employee may have reasons to amend or renegotiate the terms of employment. Ideally, the ability to make these changes should be contemplated by the provisions of original employment agreement. Any changes should be subsequently identified as amendments to the original agreement. While employers are generally entitled to make minor operational changes to the employee's terms of employment, fundamental changes that negatively impact the employee or result in a significant change to the employee's job, such as a change in the employee's remuneration, job description or working conditions, should be made by providing the employee with new consideration, which must be something of benefit to the employee, such as a promotion, stock option, raise or bonus. Typically, the opposite occurs: changes are made unilaterally or without any new consideration. Employers who conduct themselves in this manner run the risk that the amended employment agreement will be unenforceable and may be faced with a claim for constructive dismissal.

Human Rights

As all jurisdictions in Canada have adopted human rights legislation, employers are responsible for ensuring that the workplace is free from discrimination. Accordingly, an employer must treat every prospective and current employee equally, and not discriminate against a person on the basis of a number of factors, including race, religion, ancestry, nationality, colour, ethnic origin, citizenship, sex, sexual orientation, age, record of offences, marital status, family status or disability. The employer also has a responsibility of ensuring that its employees are free from harassment (including sexual harassment) in the workplace. Finally, an employer has a duty to accommodate an employee's disability if the needs of that person can be accommodated without undue hardship to the employer. Employers will usually be expected to go to considerable lengths to provide time off, modified duties and access to assistance to accommodate such employees' ability to keep working.

Workplace Health and Safety

In Canada, employers have a duty to provide a safe working environment for their employees. This can mean

providing adequate safety equipment on site, and in some circumstances, by creating a joint health and safety committee to monitor and make recommendations about the level of safety in the workplace. Employees have the right to refuse unsafe working conditions, and to refuse work that will put other workers in danger. In Ontario, individuals (including officers and directors) failing to comply with the Occupational Health and Safety Act (OHSA) are subject to fines of up to $25,000.00 and/or up to a year's imprisonment. Corporations can be fined up to $500,000.00. It is worth noting that violations of the OHSA may also lead to potential sanctions under the Criminal Code of Canada.

Workers' Compensation

All Canadian provinces and territories have implemented workers' compensation systems that provide income replacement to workers who are absent from work due to work-related illnesses or injuries. Most employers are required to register for workers' compensation coverage within a few days of hiring their first full or part-time worker. However, in some provinces, employers engaged in low-risk activities, such as office work, are not required to participate. Registration for workers compensation coverage means the employees give up the right to sue their employer for their workplace

accidents or injuries, irrespective of fault, and are guaranteed compensation for accepted claims from an accident fund. Employers, for their part, receive protection from lawsuits in exchange for financing the program through premiums. Premiums payable under the workers' compensation schemes are usually based on rates for particular industries or activities. In Ontario, individuals (including officers and directors) failing to comply with the Workplace Safety and Insurance Act, 1997, are subject to fines of up to $25,000.00 and/or up to six months imprisonment. Corporations can be fined up to $100,000.00.

In Canada, understanding your legal obligations as an employer can help a business attract and retain a talented workforce and build a company's reputation as a good employer - a small effort that can go a long way towards developing a successful business in the Canadian wind industry.

BUSINESS IMMIGRATION IN CANADA'S WIND ENERGY SECTOR

Every year, Canadian employers engaged in the wind industry seek to address labour and skill shortages through the temporary recruitment and relocation of skilled workers from abroad. On the surface, it would seem that this type of recruiting offers employers a simple and valuable opportunity to get the job done. However, bringing a temporary foreign worker to Canada is not without risk. If not undertaken properly, the foreign worker may face unnecessary delays in entering Canada or be denied the opportunity to work in Canada altogether. It is, therefore, important that employers fully familiarize themselves with the Canadian immigration process to avoid impairing the plans and operations of their business. The temporary relocation of foreign workers to Canada may be accomplished in a number of ways. Below, we outline, in general terms, several of the immigration categories under which foreign workers commonly seek entry into Canada.

The Labour Market Opinion

As a general rule, no person, other than a Canadian citizen or permanent resident, may work in Canada without a valid work permit. Unless an exemption is available, bringing a foreign worker into Canada consists of a two-step process. The Canadian employer must first offer the foreign worker a job. Service Canada must provide the employer with a positive "labour market opinion" (LMO), which is a confirmation that the foreign national may fill the position as the employer has satisfied Service Canada that no Canadian worker is available and qualified to do the job. When applying for such validation, the Canadian employer must demonstrate that they have made an extensive effort to recruit an employee from the local labour market for the position but could not find a suitable candidate, as well as ensure that the foreign worker's wages and working conditions are commensurate with Canadian standards.

In order to save time and costs, employers engaged in major business projects which entail the prolonged and extensive recruitment of foreign workers have the option of submitting a single application to Service Canada in order to obtain a pre-approval to fill multiple positions in the same occupation. Once a positive LMO pre-approval has been issued, the employer may proceed with its recruitment of individual foreign workers. The issuance of a full LMO confirmation for each foreign worker will then be a mere formality once the particulars (name, date of birth etc.) for each individual are provided to Service Canada.

The Work Permit

Once a positive LMO has been issued, the foreign worker must apply for and obtain a work permit from Citizenship and Immigration Canada (CIC). Foreign workers who do not require a temporary resident visa for Canada may apply for a work permit upon their arrival at a Canadian port of entry (such as Pearson International Airport in Toronto). Foreign workers from countries that require a visa to enter Canada must apply for their work permits at the Canadian embassy or consular office servicing the foreign worker's country of residence. Generally speaking and depending on the application, it should be noted that work permits are issued for periods ranging from 1 to 3 years, and may be renewed, although not automatically.

Intra-Company Transferees

The Intra-Company Transferee category offers one of the most convenient and efficient methods for multinational companies to temporarily relocate their workers to Canada without first obtaining an LMO. Employers often seek to make use of this exemption in order to avoid the often difficult, costly and time consuming process associated with obtaining an LMO.

In order to qualify as an Intra-Company Transferee, the foreign worker must have been employed with the parent, branch, subsidiary or affiliate of the Canadian company in a senior executive or managerial position, or in a position requiring specialized knowledge, and must be coming to Canada to work in one of those three capacities. The foreign worker must also have been employed with the foreign entity on a full-time basis for a period of no less than one year within the three-year period immediately preceding the date of application. It is worth noting that to qualify as an individual with specialized knowledge requires a demonstration that the foreign worker possesses advanced level knowledge of a company's products or services (including research, equipment,

techniques and management) or expertise in the organization's processes or procedures.

Intra-Company Transferees may apply for a work permit at a Canadian port of entry if they do not require a temporary resident visa for Canada. Intra-Company Transferees from countries that require a visa to enter Canada must apply for their work permit at the Canadian embassy or consular's office servicing their country of residence. Work permits are issued for periods ranging from 1 to 3 years, and may be extended to a maximum of seven years for senior executives/managers and five years for individuals with specialized knowledge.

Spousal Work Permits

The spouse (or common law partner) of an Intra-Company Transferee may be eligible to apply for a work permit without the need for a LMO where the Intra-Company Transferee is authorized to work in Canada for at least six months and qualifies as a skilled worker in accordance with the National Occupational Classification. If these requirements are met, the spouse may apply for an open work permit, which allows that individual to work in any occupation in Canada provided they pass an immigration medical examination. The spouse's work permit will then expire when the Intra-Company Transferee's work permit expires.

Business Visitors: Work Permit Exempt

In special situations, foreign workers may enter Canada to engage in work without holding a work permit and without the need for a LMO confirmation. One such exemption is that of the business visitor, which allows a foreign national to engage in international business activity in Canada for a period of up to six months. In order to qualify under this exemption, the business visitor must not have the intention of entering the Canadian labour market; that is, the foreign worker must not have the intention of being gainfully employed in Canada. In addition, the primary source of remuneration for the foreign worker's business activities, as well the principal place of business and actual place of accrual of profits, must remain predominately outside of Canada.

Business visitors many engage in a number of permissible activities, including: attending business meetings and conferences; providing after-sales service; supervising the installation of specialized merchandise purchased or leased outside of Canada; providing familiarization or training services to prospective users and sales persons for goods and services manufactured and developed outside of Canada; and providing or receiving training at the Canadian subsidiary of the company that employs the business visitor outside of Canada, as long as any production of goods or services that results from the training is incidental.

WIND ENERGY PRACTICE GROUP

Patricia Dunn. *Educated at York University and the University of Toronto Law School, Pat Dunn is a member of Dale & Lessmann's Real Estate Practice Group. Pat's practice is focused primarily on construction and permanent financing, real estate development and land rights acquisition. Pat has years of experience dealing with construction-related issues, including negotiating and drafting construction contracts and dealing with bonding matters on behalf of developers and surety companies.*

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Mark Uster. *Mark practices with Dale & Lessmann's Real Estate Practice Group focusing on land rights acquisition, the purchase and sale of commercial property, commercial leasing and secured lending transactions. Born in Toronto, Mark earned both his undergraduate degree (Honours Physiology) and law degree from the University of Western Ontario.*

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David E. Clark. *David was called to the Ontario Bar in 1976 and has more than thirty years of experience advising business clients in a wide variety of matters including buying and selling businesses, mergers and acquisitions, secured lending, provincial debt financing, shareholders' agreements, partnership agreements, corporate reorganizations, employee share ownership plans, family business planning, franchise agreements, distributorship agreements, and employment law.*

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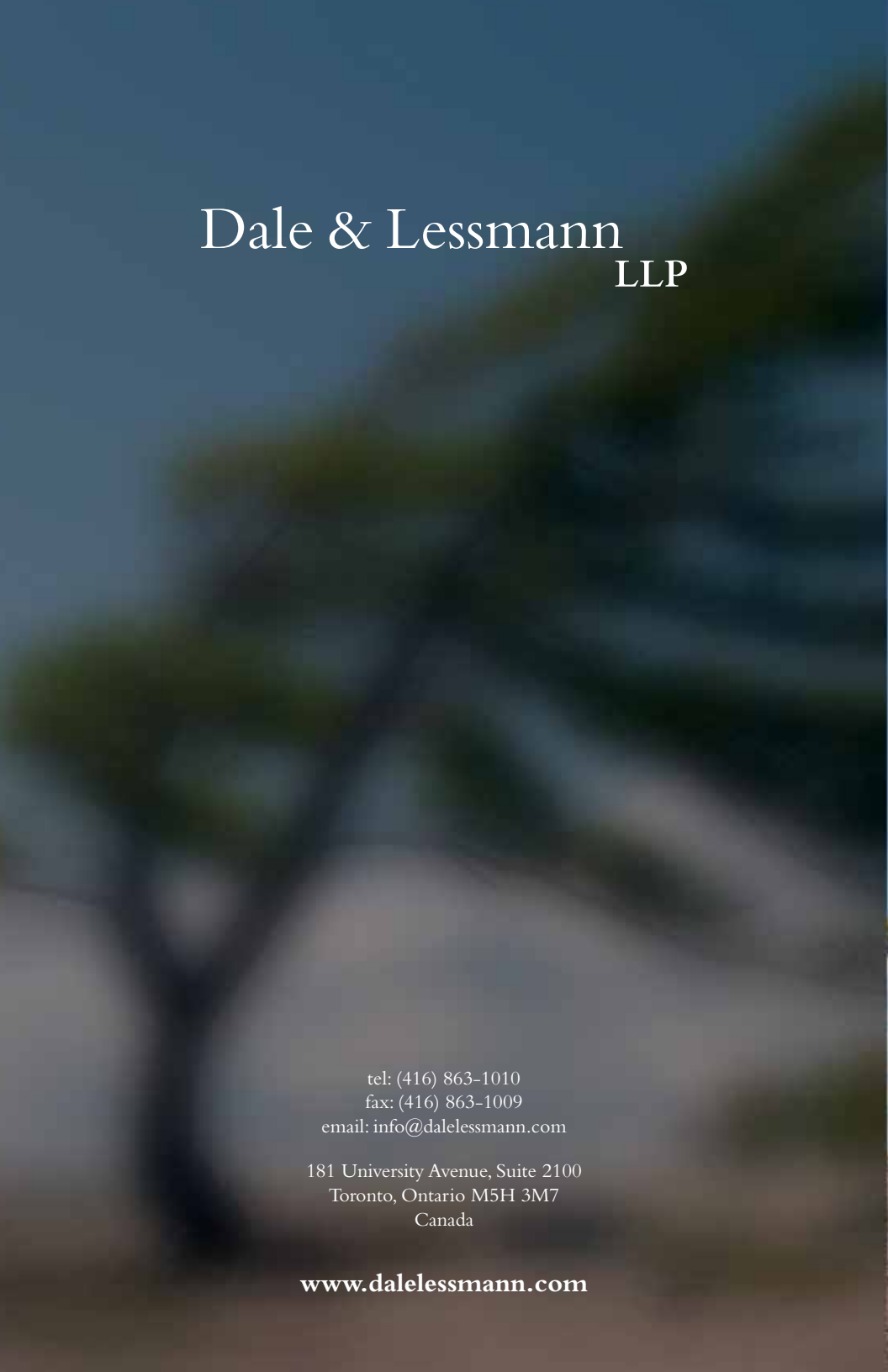
If you have questions about any of the information contained in this brochure or would like to discuss your specific circumstances, we invite you to contact us at (416) 863-1010 or to visit our web-site at www.dalelessmann.com.



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