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## *Passages to India*



(From left to right)

Geoffrey Taber; *Osler, Hoskin & Harcourt LLP*

David Wingfield; *WeirFoulds LLP*

Karim Mahmud; *Fraser Milner Casgrain LLP*

Peter Mendell; *Davies Ward Phillips & Vineberg LLP*



# *Passages to India*

By Julius Melnitzer

The world's largest democracy is on the move, scouring the world for energy, money, infrastructure and legal expertise. Canadian companies—and their lawyers—are helping to meet the demand







When David Wingfield, a star litigator at WeirFoulds LLP, got on a plane headed for New Delhi early last year, he knew that a business contact had been busy setting up some meetings for him. But he was surprised—pleasantly so—when it transpired that an elegant cocktail party held at the International Trade Centre, a posh private club in the city’s embassy district, had been arranged expressly for him. The line up of attendees included B.P. Singh, a justice of the Supreme Court of India, as well as top executives from AT&T’s Asian arm, Pepsi Cola’s Indian subsidiary and a host of other Indian-based business leaders. He was impressed, he recalls, by their enthusiasm for making international connections, and their commitment to using their impressive credentials to help India’s economic boom keep expand-

ing. “Just about everyone I spoke to wanted to know what my firm and I could do to facilitate a greater exchange of business and legal knowledge and expertise,” Wingfield says.

He has been keeping in touch via e-mail since then and will be heading back to New Delhi this year. Among other developments, the trip resulted in an offer to join the Federation of Indian Arbitrators, an invitation he says he was “gratified” to receive; given the country’s vast needs for both foreign investment and the foreign legal advice that goes with it, Wingfield says, there is a good chance he will have the opportunity to use his expertise as a litigator and arbitrator in future business dealings with Indian-based projects.

The same Indian willingness to step out in search of international business extends to connections being made in



David Wingfield; WeirFoulds LLP

Canada. Last April, Peter Mendell, the partner in charge of international strategy at Davies Ward Phillips & Vineberg LLP, made a cold call to Shyamala Cowsik, then the Indian High Commissioner to Canada. He was not, however, overly optimistic about getting a response. A routine call did come, but it was clear the embassy was utterly unfamiliar with Davies. "They didn't know the first thing about us," Mendell recalls. "I had to explain who we were."

Mendell apparently did a good job of filling in the blanks. It wasn't much later that Cowsik visited the firm to make what Mendell calls a "spellbinding" presentation to 65 blue-chip clients.

Among those in attendance was Henri-Paul Rousseau, president and CEO of Canada's largest pension fund, the Caisse de dépôt et placement du Québec. "Rousseau is not a man who comes to our office regularly," Mendell says. "He could have sent anyone, but his attendance and the high level of the audience in general demonstrates the degree to which Canadians have become interested in India."

If India has ever been low on the radar in terms of its importance in international business, those days are gone. India's population of more than 1.1 billion drives the fourth-largest economy in the world, with an anticipated GDP growth rate of 9.7 per cent this year. Last year, the country's exports totalled US\$103.9 and grew at the astonishing rate of 23.4 per cent. Its import statistics are even more staggering, at \$149.16 billion and a growth rate of 33.8 per cent in 2006. The economy creates seven million new jobs annually.

Perhaps more important, foreign direct investment (FDI) stood at \$7.7 billion for 2005-06, reflecting 37 per cent growth.

While that's only a fraction of the \$72.4 billion in FDI that made its way to China, what's clear from these numbers is that India is rapidly integrating into the global system of production, with both trade and capital flows increasing well beyond GDP, a trend that has been consistent for the last decade and looks to continue in the foreseeable future. Most recently, Kamal Nath, India's minister of commerce and industry, predicted that FDI would double in 2006-07.

This frenetic pace means that India is coming up short in several areas where it needs resources of one kind or another. And one of those areas includes certain kinds of legal advice. "The Indian economy has outstripped the ability of the domestic legal services industry to accommodate its needs," Wingfield says. "Because there are no large Indian law firms that have the international sophistication that the globalized economy now requires, the opportunities for foreign firms abound."

It is true that India currently keeps a tight lid on foreign competition in this area. And it is also true that it is doing a good job of exporting certain types of legal services, especially research and routine matters. But it is also a reality that, like other emerging economies, it will eventually have to open its market, if only to ensure the easy flow of money and information that is like oxygen to the most sophisticated international transactions. One way or another, Wingfield predicts, the legal market will eventually include lawyers from other countries. "The opportunities for foreign firms are spectacular," Wingfield says. "As soon as

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India's legal system opens up—and it will—foreign firms will rush to fill the gap."

Most Canadian firms, though, are barely aware of the potential, much less hot in its pursuit. Davies and WeirFoulds are certainly not the only ones that are already in the game. But for

## *Lifting the Lid on India's Treasure Box*

It makes sense that Canadian resource law powerhouse firms would help Indian oil and gas companies go global, either to Canada or elsewhere. But what has received little attention so far are the opportunities presented by the untapped potential of less combustible natural resources.

McKinsey & Company, for example, estimates that India has 8 per cent of the world's coal, 7 per cent of its bauxite (the raw material of aluminum), and 4 per cent of its iron ore. India's natural resources are similar to those of South Africa and Australia, which abutted India during the Cambrian era.

These are the known reserves. But because the country's resource surveys have relied only on geological and seismic analysis, which are conducted on the surface, the results can be misleading because they provide little information about what lies deep below the ground. Estimating that potential requires geophysical and geochemical mapping, which has not been done.

The problem lies with protectionist mining laws that have denuded incentives for foreign prospectors. The most glaring example lies in the failure of the mining laws to provide protection for explorers' right to their discoveries. This may change. Following recommendations from the government planning group known as the Hoda Commission, the secretary of the Ministry of Mines recently told a conference in Australia that his government was considering granting exploration companies the "absolute right" to obtain mining leases for their discoveries.

The commission also recommended that Indian states lose the right to force mining companies to process their extractions locally, a provision that has discouraged efficient international miners from developing Indian properties.

State governments, however, are expected to oppose these measures vigorously. If and when they do, and if the impressive headway made in the oil and gas sector following deregulation in the 1990s is any indication, Canadian law firms, relying on their global reputation for exporting mining sector know-how, should be well-placed. The extent to which they will be able to take advantage of the opportunity is somewhat less clear: Australian law firms, much closer to India geographically, are already hot on the case.

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the most part, the profession is lagging behind the efforts of its American and British counterparts.

"Canadian law firms are notoriously reticent about a new initiative, but that's part of the Canadian business psyche," observes Vern Krishna of Borden Ladner Gervais LLP. "A lot of what's happening now in India involves the legal front, and even at that we're only at the beginning stages of the potential that is about to explode. That's why the Americans have been in India in a big way for about five years now."

The story's much the same for inbound work from India: a relatively small number of Canadian firms are out there, trolling for work from Indian companies looking to invest in Canada. "Lawyers follow their clients but it's just recently that the federal government has undertaken to make Canada a high priority destination for Indian investment," says Subrata Bhattacharjee of Heenan Blaikie LLP.

But things are changing rapidly. So much so that the biggest obstacle to writing this piece was the difficulty of contacting many of the interviewees: they were either doing legal work in India or on their way to the country with Ontario Premier Dalton McGuinty's January trade mission. "We'll have at least one lawyer in India every day from mid-January to the end of February," says Neena Gupta of Gowling Lafleur Henderson LLP.

Like China, it is the scale and speed of change that takes North Americans by surprise. Gary Comerford is vice-president and managing director, international, at Sun Life Financial, a Canadian company that has invested heavily in India. Until recently head of Sun Life's operations in India, Comerford has made 70 trips to the country since 1996; during that period he oversaw the progress of the Birla Sun Life group of companies, formed in 1999 as a joint venture between Sun Life and Aditya Birla Management Corp. The venture has been a huge success, to say the least; Sun Life currently writes more life insurance in India than it does in Canada. Indeed, Birla's insurance arm is one of the top five privately owned life insurers in India, boasting a sales force of 21,500 advisors in 116 branches serving 95 cities. Birla's operations also include what is now the seventh-ranked mutual fund company in India, with \$3.9 billion in assets under administration.

It's not that Canadian businesses have been slow to enter India. Nortel, for example, played a significant role in the creation of India's IT offshoring industry when the company (then called Bell Northern) moved its product development work there in the '80s.

"Are there opportunities in India for Canadian business?" Comerford asks. "The answer is a hands-down slam dunk 'yes.' And whether it's by way of acquisition, partnership or a green-



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field operation, there's no escaping the need for a legal base for the business.

"Canadian businesses are most comfortable with the counsel they know, because they are the ones who give boards and CEOs investing in a foreign country the ability to sleep at night."

Comerford—who made a keynote presentation to the McGuinty trade mission—has personal experience using Canadian counsel in Canada/India deals. "We used Geoff Taber at Osler Hoskin, our in-house department, and local lawyers when we set up our joint venture," he says. "Canadian lawyers have a part to play. They just need to identify what they do better than Indian lawyers, and what value-added they bring to the equation of a transaction."

One firm that is already way out in front is Macleod Dixon LLP; relying on its strength and reputation in the resource area, the firm has been building a significant practice in the area for years. "We are developing relationships with major resource players interested in India so we can service them there and internationally," says Bill Tuer, the firm's managing partner. "We also service Indian clients in Canada and in other parts of the world, including Russia."

With offices in Calgary, Toronto, Caracas, Moscow, Almaty (Kazakhstan) and Rio de Janeiro, Macleod Dixon is particularly well situated to pursue this strategy—which has already paid off. Several years ago, representatives of Oil and Natural Gas Corporation Limited (ONGC), the largest company in India by market capitalization, met one of Macleod Dixon's Venezuelan partners, Adriana Lezcano Huncal, at an industry conference. About the same time, ONGC, acting on a third-party referral, contacted Glenn Faass, the firm's managing partner in Rio, regarding an oil and gas venture in Brazil.

"The good impression Adriana made, combined with the third-party recommendation to Rio, went a long way to securing our mandate as lead counsel on what turned out to be a \$300 million transaction," Faass recalls.

Macleod Dixon now regularly advises ONGC regarding international expansion of the company's energy operations. "Glenn Faass and I spent a week in India in January leading a training session on international petroleum regime agreements and transaction for 16 ONGC executives," notes the firm's Jay Park.

Still, the idea is to work with Indian lawyers, not bypass them. "You need to get to know the law firms and the accounting firms in India if you're hoping to give your clients any meaningful help

there," says Taber, who used to manage Osler's now defunct Singapore office.

Things can get uncomfortable, however, because India has severe restrictions on the activities of foreign firms. "Right now, Indian regulations don't even allow foreign firms to practise in collaboration with Indian lawyers, in the sense of setting up shop and adding Indian profes-

"In my view, India is a country that we in Canada should watch even more closely than China."

sionals," Krishna says.

And the barriers are real.

"Unlike the Chinese, the Indians enforce these restrictions," says Sunny Handa of Blake, Cassels & Graydon LLP. "When UK firms tried to skirt the rule, they got a prompt slap on the wrist."

But times are changing in the legal market too: both the American Bar Association and representatives of the UK bar have been working with the Bar Association of India to facilitate the entry of foreign firms. Meanwhile, White & Case LLP is pursuing a lawsuit challenging the firm's exclusion from the Indian market. "But any litigation in India is a long, slow process," Krishna says.

Whether or not Canadian firms profit from a relaxed regulatory climate in the future ultimately depends on how far and how fast the Indian juggernaut steams along. At the moment, it looks like everything is on full throttle. In addition to the massive inflow of foreign capital, Indian companies are increasingly active and visible on the world's commercial stage. Even putting aside the fact that Mittal Steel—which purchased Luxembourg-based steelmaker Arcelor for \$32.2 billion to create the world's largest steel company—is technically a European company even though Indian-born tycoon Lakshmi Mittal and his family control 46 per cent of the merged entity, Indian firms announced 131 foreign acquisitions for \$18.7 billion in the first 10 months of 2006.

India's global push embraces a wide range of hot industries, including pharmaceuticals, IT, outsourcing and auto parts. In pharmaceuticals, Ranbaxy, a generic drug maker, bought Belgium's Ethimed and GlaxoSmithKline's generic operations in Spain. Wipro, one of India's largest IT companies, has gone shopping in California, Finland and Portugal. Bharat Forge,

which makes vehicle components, has purchased six companies in Europe and China since 2004. An Indian wind turbine manufacturer, Suzlon, bought Hansen of Belgium; and United Breweries, based in Bangalore, is making a hostile bid for Scottish whisky maker Whyte & Mackay.

ICICI, India's largest private bank, has chosen not to stay home either, despite domestic credit growth averaging 30 per cent annually. The bank has branches in various countries, including the UK, Belgium, Russia and Canada. Its international loan portfolio rose 56 per cent in 2006.

And this year promises more of the same. For starters, there's the dramatic \$10 billion takeover battle between India's Tata Steel and Brazil's CSN for Anglo-Dutch Corus Steel. If Tata succeeds, it will move from 56th to 6th among the world's steel-makers.

Outside Canada, interest in India and its companies is growing among multinationals. Swedish telecom equipment-maker Ericsson announced in January that it would invest \$500 million to exploit growth in India over the next five years. And observers widely predict that Vodafone, the world's largest mobile operator, will soon be party to a \$20 billion international bidding war over Indian wireless carrier Hutchison Essar Ltd. Sparking the bidding is the fact that India's wireless market is largely untapped. Only 15 per cent of the population (150 million people compared to 430 million Chinese) has a cellphone, and cellular networks cover only half the country. With six million people (roughly the population of Denmark) signing up for wireless service each month, communications minister Dayanidhi Maran has predicted that mobile subscribers will more than triple to 500 million in the next three years.

**A**s stunning as these numbers are, it's not likely that the pace of growth will slow soon. While India has been cautious in opening its economy compared to China, progress has been more steady over the last few years. And by all accounts, the world is responding. Since India enacted new patent laws in 2005 that allowed pharmaceutical and agro-chemical firms to patent their products, inventors have filed more than 25,000 patent applications and 180,000 trademarks.

Hedge funds have also taken a serious interest in India. GFIA, a Singapore-based hedge fund consultancy, reports that some 45 Indian-dedicated offshore hedge funds with a total asset base of \$2-\$3 billion have emerged in the last two years. In December, the Indian government announced that it is considering allowing hedge funds to operate domestically.

The NYSE Group Inc., which lists 10 Indian firms, purchased a 5 per cent stake in India's largest exchange, the National Stock

Exchange, early in the new year. And three private equity investors, Goldman Sachs & Co., General Atlantic and Softbank Asian Infrastructure Fund took up an additional 15 per cent.

**T**hese numbers are impressive and speak volumes about the potential for foreign business and foreign law firms in India. But prospects for foreign law firms are one thing, and prospects for Canadian law firms quite another. The reason—apart from the obvious differences between the US and UK multinationals and Canadian firms—is that Canada's trade relationship with India has a long way to go.

"More could be made of the bilateral relationship with India," writes Professor Wendy Dobson, director of the Institute for International Business at the University of Toronto's Rotman School of Management, in a recent study for the C.D. Howe Institute entitled *The Indian Elephant Sheds its Past: The Implications for Canada*. "The two countries share many of the same institutions and language of commerce [not to mention a common-law legal system] because of their common colonial heritage. There is a sizeable Indian diaspora in Canada. Business ties will continue to grow, but incrementally, unless government facilitates this mutual interest."

A recent report in the UK by the House of Commons committee on trade and industry echoes Dobson's notion that a common language and heritage is not enough. With only 0.5 per cent of UK FDI going to India in the past few years, the authors noted, India has left British business behind.

As Dobson sees it, foreign policy differences over India's nuclear program, combined with the distance from and lack of familiarity with the Indian market, have contributed to a "mutual indifference"; that has, in turn, resulted in "small trade flows" between Canada and India. Also responsible are India's reputation for restrictive trade and FDI regimes, and significant infrastructure difficulties, including uncertain electrical power services.

An overzealous bureaucracy doesn't help much either, though it may be more familiar to Canadians than the Chinese regime. "In China, you can never be sure you're dealing with the right people," says Terry Dobbin of Ogilvy Renault LLP. "But a Canadian would have more of an intuitive feel about where someone fits into the Indian system."

Dobson does, however, see hope in the FDI statistics. Between 1990 and 2004, the stock of Canadian FDI in India tripled to between \$250 million and \$300 million. An Asia Pacific Foundation study of 43 firms that provided most of the Canadian investment stock found that 50 per cent of total investment was in financial services, with the power sector and IT accounting

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for another 35 per cent. In addition to Sun Life, Canadian players include Scotiabank, SNC-Lavalin (the international engineering firm that entered the Indian market 40 years ago), and Calgary-based Niko Resources Ltd., which has partnered with state-owned ONGC and the privately held Reliance Group to develop domestic oil and gas properties.

According to Dobson, the steady liberalization of India's FDI regime will engender a wealth of opportunity. Nowhere is this opportunity greater than in the financial services sector, where the market will be liberalized in 2009. Ironically, this potential has so far been largely unrecognized.

"The fastest-growing sector is the service sector," Comerford says. "But I challenge you to

find any Canadian government statistics that include the contributions that companies like Sun Life have made to this sector."

In other words, Comerford—like Dobson—suggests that official statistics tend to under-report Canadian involvement in India. But even if that's the case, it's apparent that there's a long journey ahead in developing the trade relationship between the two countries.

**F**ortunately, the journey is underway and Canadian firms are on the train. "India is no longer beneath the radar," says Patricia Koval of Torys LLP. "We've been watching closely for about three years." Still, no Canadian law firm is so much as thinking about setting up an office in India, as Blakes did in China. Even Macleod Dixon, which has been the most aggressive Canadian firm in terms of setting up branch offices in emerging countries, naysays the idea. "We don't have the resources to tackle setting up in India," Tuer says frankly. "We're concentrating on our international resource expertise to attract Indian clients."

The approach at Fraser Milner Casgrain LLP, which has been working on Indian oil and gas and power projects for the past 15 years, is similar. "We've done regulatory work for ONGC, advised resource sector interests from Canada about moving into India, been counsel on international joint ventures there and represented the World Bank on loans to Canadian companies investing in India," says the firm's Karim

Mahmud. "We were early into the Indian market and we understand it very well."

Fraser Milner's resource practice, like that of Macleod Dixon, is global in scope. The lack of foreign offices (other than in New York) hasn't prevented lawyers like Frank Alexander, Don Bews and others from working in Central Asia, the Middle East, and Africa.

To succeed in India and elsewhere internationally, Canadian firms have to focus on areas where they are world-beaters.

"To succeed in India and elsewhere internationally, Canadian firms have to focus on areas where they are world-beaters because they're competing with the international legal behemoths," Mahmud says.

Indeed, Canadians who do that by focusing on sectors such as resource and energy have advantages over their

larger competitors. "We don't have the international baggage that comes with being a firm of American or British origin, we have a reputation for getting along with people, and we're relatively cost effective," Mahmud says.

Firms with infrastructure expertise may also find themselves in demand.

"There is tremendous interest in Indian infrastructure both on the part of Canadian equity funds and companies that have business connections with India," Koval says. "We have already structured some deals for private equity infrastructure funds in India."

The opportunity is not all on the solicitors' side. Because India's courts operate at a snail's pace, arbitration is a popular form of dispute resolution. "The Federation of Indian Chambers of Commerce and Industry Arbitration and Conciliation Tribunal, which is the main Indian arbitral institution, has 20 foreign nationals on its panel," says Wingfield, who is himself a member and whose firm has developed a niche in international litigation and dispute resolution. "I think the day will come when Canadians will be able to plead in Indian courts because there will simply not be enough Indian lawyers who have sufficient experience in complicated cases with global overtones. Also, because the system is very similar to the Canadian and English systems, we will have a leg up on US firms."

On the other side of the equation, Indian companies are starting to bid for Canadian interests. "There's been an M&A



and investment upsurge from Indian companies in the last 18 months,” Koval says.

Some of the activity is on the cusp of making headlines. All eyes focused on China, for example, when China’s National Petroleum Corp. (CNPC), China’s largest oil company, paid \$5 billion to purchase PetroKazakhstan Inc. of Calgary. But what most observers don’t remember is that ONGC came second in the bidding.

Torys’ clients ICICI and Sun Life’s joint venture partner Aditya Birla are other notable Indian companies that have invested in Canada, as has the State Bank of India. Most recently, Osler client Subex Azure of India, an IT services provider, made its seventh acquisition in seven years when it announced in February that it had agreed to buy Toronto-based software developer Syndesis for \$165 million.

“When you see world-class players investing real money by taking major initiatives or setting up shop in Canada, you start to get some idea of just how much potential there is,” says Dee Rajpal of Stikeman Elliott LLP.

**T**his kind of potential, Dobbin says, makes India a “very high priority” for his firm.

“In my view, India is a country that we in Canada should watch even more closely than China,” he says. “Apart from the common heritage, language and legal system, democracy and capitalism have been operating there for some time. In many ways, it’s easier for an Indian company than a Chinese company to make an investment in Canada. There may also be considerably less culture shock for Canadian companies in India than in China.”

Quite apart from the comparisons with China, India has become a priority for many of Canada’s major firms, most of which have individuals or groups spearheading a range of initiatives. Blakes has established an India working group co-chaired by Sunny Handa. BLG is counting on Krishna’s tax expertise and experience in negotiating the 1979 tax treaty with India to open doors to the sub-continent.

Cassels Brock & Blackwell LLP is relying on a strong government relations group that includes former Ontario Premier David Peterson, Ralph Lean and Noble Chummar. “We also work very closely with the World Services Group, an international network of professionals that includes Indian members,” Chummar says.

Peter Mendell at Davies has built on the firm’s international reputation in competition law to attract mandates involving the impact of India’s newly enacted competition regime. Gowlings is in the first year of a “Focus India” initiative, while Lawson Lundell LLP has Mandeep Dhaliwal actively involved

in the South Asian Bar Association of British Columbia, a group of 50 lawyers who are predominantly of Asian descent and form a chapter of the North American South Asian Bar Association. Osler’s management has put Taber in charge of an “India initiative” and Torys’ Koval is focusing on M&A opportunities for Indian companies in Canada.

For the most part, firms are focusing their efforts on building relationships with India’s law firms and accounting concerns, government sources in Canada and India, and contacts within the domestic Indian business community. But Gary Comerford, who should know, warns that energy, knowledge and good intentions are not enough. Above all, perseverance is crucial.

“When Sun Life set up in India, there was no shortage of instances when we asked ourselves why we didn’t just walk away,” he says. “It takes a great deal of tenacity to find the right partner, the right terms of reference and the right way to navigate through the bureaucratic regulatory environment.

“What I say to those who want to do business with India is, ‘be deliberate, be determined and be prepared. But most of all, be patient.’”

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*Julius Melnitzer is a freelance legal affairs writer.*