Luxury & Fashion 2021

Contributing editors
Meryl Rosen Bernstein, Sahira Khwaja and Kelly Tubman Hardy

LEXOLOGY®
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

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Lexology Getting The Deal Through is delighted to publish the second edition of *Luxury & Fashion*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on France and Hong Kong.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Meryl Rosen Bernstein, Sahira Khwaja and Kelly Tubman Hardy of Hogan Lovells, for their continued assistance with this volume.

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Adam Ship, Carmen Francis, Dana Siddle, Dominic Thérien, Lara Nathans, Martha Harrison, Michael Scherman, Nicolas Désy, Selina Lee-Andersen, Trevor Lawson and Vincent K S Yip*

McCarthy Tétrault LLP

MARKET SPOTLIGHT

State of the market

1 | What is the current state of the luxury fashion market in your jurisdiction?

Canada has a vibrant luxury market, which includes department store or multi-brand locations (eg, Holt Renfrew, Saks Fifth Avenue), individual apparel and leather goods brands (eg, Chanel, Prada, Gucci, Bottega Veneta, Louis Vuitton), hospitality (eg, Ritz Carlton, St. Regis, Fairmont hotels), automotive and cosmetics and personal care. The luxury market includes not only physical stores and hotels, but also wholesale brand distribution, direct to consumer sales and e-commerce.

As in other jurisdictions, luxury businesses in Canada have been significantly impacted by the covid-19 pandemic and related government orders and restrictions. As well as managing the restrictions on businesses, luxury businesses have had to manage, where applicable, reopening regulations and guidance across various levels of government (federal, provincial and municipal). Another impact of the pandemic has been the acceleration of e-commerce and brands selling direct to consumer.

Particularly in Canada's major cities (such as Vancouver, Toronto, Montreal), we continue to see new entrants to the market and others entering by way of e-commerce. Foreign luxury businesses continue to see Canada as an attractive market in which to launch international expansion efforts.

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

2 | What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

There are a number of legal frameworks that apply, including intellectual property, manufacturing process safety standards, product regulatory standards, and international trade law. Generally speaking, product development contracts contemplate intellectual property ownership and the application of royalties, design and fabrication methodologies, and sourcing strategies or restrictions. From the manufacturing and supply chain perspective, effective contractual agreements will contemplate risks and liabilities from the point of manufacture all the way through to retail sale.

Manufacturing contracts are often executed between a producer and a brand owner, a distributor, or directly with a retailer. Terms that are particularly important to include are those governing manufacturing processes, finished product standards, design execution expectations and liability for sub-standard or non-compliant product. Potential corrective measures such as recall protocols are also important to include. On the supply chain side, key issues to consider are production and distribution rights, transportation and shipping, title transfer, import / export compliance and supply chain safety. Currently, emphasis on corporate social responsibility and its interplay in supply chain management has become more important with respect to brand protection and consumer interest. In fact, Canada has recently enacted additional measures relating to human rights violations within the supply chain, especially as they relate to imported goods that have been produced in whole or in part by forced labour.

Distribution and agency agreements

3 | What legal framework governs distribution and agency agreements for fashion goods?

In Canada, commercial distribution and agency relationships are primarily governed by contract law. There is no federal or provincial legislation that specifically targets distributorships or agency agreements in Canada, nor legislation that specifically targets these arrangements for fashion goods.

While there have been Canadian cases in which courts found certain automotive dealers were 'franchisees' under the relevant Canadian franchise legislation, it is unlikely that typical distribution relationships between suppliers of fashion goods and retailers that carry multiple fashion brands would be treated as franchises. Nonetheless, parties should take care to consider if the terms of a particular relationship could constitute an unintended franchise.

A number of courts in Canada have ruled that because distribution relationships require mutual trust between the parties, either party may terminate a distribution agreement by giving reasonable notice to the other party in the event of a breakdown in that trust. To enforce this common law right in court, the terminating party would normally need to put forward evidence to demonstrate that the relationship of trust between the parties is broken.

There is also a line of case law dealing with claims brought by customers and other third parties that claim that a franchisor or manufacturer is legally responsible for the acts of its dealers, distributors or franchisees. While it is rare for a distributor to be treated as an 'agent' of its supplier (and distribution agreements will normally disclaim an agency relationship), the case law has developed a principle known as 'apparent authority' (also referred to as 'agency by estoppel'). Under this principle, where a supplier causes third parties who transact with distributors to reasonably believe they are transacting with the supplier, the supplier may be directly liable to the third party. To mitigate the risk of this outcome, distribution agreements in Canada would normally require distributors to identify themselves as being owned and operated independently from the supplier.

4 What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

Retailers often deal with a fashion brand supplier directly, a distributor representing a particular brand or distributors that represent multiple brands. Typically, the distribution agreements will include provisions that specify whether or not the rights are exclusive, if the rights are limited to a particular territory and any specific rights and obligations associated with the marketing and sale of the products, including (but not limited to) the use of associated trademarks. These agreements also usually specify the relevant ordering procedure, shipping and delivery terms (including title, risk of loss, inspection and acceptance) and payment terms, as well as termination rights and the allocation of risk and liability between the parties.

Import and export

5 Do any special import and export rules and restrictions apply to fashion goods?

Canadian import and export laws do not impose restrictions specific to fashion goods as such. However, Canada is a party to a number of bilateral and plurilateral free trade agreements (FTAs) that establish preferential tariff provisions for certain textile and apparel goods that are imported or exported within recognised free trade zones (including, for example, the United States, Mexico, Chile, Costa Rica, Honduras, Vietnam and Singapore). These FTAs present an opportunity for textile and apparel products that satisfy prescribed rules of origin to be imported into Canada under preferential trading conditions, often including lower rates of duty. In some instances, textile and apparel goods imported into Canada pursuant to Tariff Preference Level arrangements in FTAs may require an import permit issued by Global Affairs Canada under the authority of the Export and Import Permits Act.

In addition, Canada's Textile Labelling Act and Regulations prohibit the importation of consumer textile articles that are not labelled in accordance with that statute. Specific labelling requirements vary depending upon the article at issue, but generally consumer textile goods must display the fibre content and percentage by mass of the article (in both French and English), and the identity of the manufacturer, processor, finisher, retailer or importer of the product.

Fashion and luxury goods not subject to the Textile Labelling Act (ie, non-apparel and non-fabric goods) may instead be required to comply with Canada's Consumer Packaging and Labelling Act and Regulations (CPLA). Like the Textile Labelling Act, the CPLA prohibits the importation of consumer prepackaged products that do not comply with the specific labelling requirements prescribed in the Regulations. Consumer prepackaged products are broadly defined as including any product (subject to limited exemptions) that is packaged in a container in such a manner that it is ordinarily sold to or used or purchased by a consumer, without being repackaged. Accordingly, a wide variety of luxury and fashion accessories, cosmetics and non-textile goods can be expected to be subject to the CPLA.

Finally, Canada is a signatory to the Convention on International Trade in Endangered Species of Wild Flora and Fauna and has implemented it domestically by way of the Wild Animal and Plant Trade Act and Regulations (WAPTA). Pursuant to the WAPTA, the Canadian government maintains a list of endangered and protected species, the bi-products of which (fur, pelts, skin, etc) can only be imported pursuant to a permit. This includes a number of reptile skins, ivory products and furs of various endangered or protected species.

Corporate social responsibility and sustainability

6 What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

Securities legislation in Canada requires reporting issuers to disclose the material risks affecting their business and the financial impacts of the risks. This includes material information about environmental and social issues. Issuers may have additional disclosure obligations under the timely disclosure policies of the relevant stock exchange, which require the immediate public disclosure of material information about a company that has a significant effect, or would reasonably be expected to have a significant effect, on the market price of the company's securities.

In October 2010, the Canadian Securities Administrators published Staff Notice 51-333, Environmental Reporting Guidance (the Staff Notice) to assist issuers in understanding their reporting requirements in respect of environmental issues. The Staff Notice does not specifically address social information, but it can be interpreted to include material social information, as disclosure requirements in the Annual Information Form and Management's Discussion and Analysis cover all material issues. Disclosures may be required in connection with risks, environmental trends and uncertainties, environmental liabilities, asset retirement obligations, financial and operational effects of environmental protection requirements, and risk oversight and management.

There are also several internationally recognised frameworks and guidelines that Canadian businesses use to voluntarily report on their sustainability initiatives, including the Global Reporting Initiative (GRI) Sustainability Reporting Guidelines, the Equator Principles, the International Integrated Reporting Framework, and the Sustainability Accounting Standards Board (SASB) Standards. The GRI guidelines have been widely adopted by Canadian companies (both publicly traded and privately owned) across industries.

Due diligence of sustainability reporting should consider how companies are managing and informing stakeholders about the company's social, environmental, governance and economic performance, as well as communicating the company's values, priorities and action plans and demonstrating how sustainability is linked to the company's strategy. In addition, the company's key performance indicators, performance and impacts should be considered in assessing the effectiveness of the company's sustainability reporting processes.

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In response to the increasing global regulatory focus on supply chain risks, Global Affairs Canada and the Canadian Trade Commission Service issued several measures in 2020 to Canadian businesses designed to address human rights violations in global sourcing and impose greater obligations on companies doing business abroad. These measures address ongoing reports of human rights violations in Xinjiang, and set out the Government of Canada's compliance expectations with respect to Canadian entities doing business with that region in China. Other regulatory initiatives include the enactment of new authorities under the Special--Economic Measures Act and the Justice for Victims of Corrupt Foreign Officials Act, which allow the government to impose economic sanctions against parties involved in or facilitating gross violations of human rights or acts of significant corruption. In addition, the Customs Tariff was amended effective 1 July 2020 to prohibit the importation of goods from any country that are produced wholly or in part by forced labour. Further, An Act to enact the Modern Slavery Act and amend Customs Tariff was re-introduced in the Canadian Senate in October 2020**.** This proposed legislation imposes an obligation to publicly report on an annual basis the measures taken to prevent and reduce the risk that forced labour or child labour is used in any step of the production (1) of goods in Canada or elsewhere, or (2) of goods imported into Canada. It also introduces a prohibition on importation of goods produced in whole or part by child or forced labour.

7 What occupational health and safety laws should fashion companies be aware of across their supply chains?

There is federal and provincial or territorial occupational health and safety (OH&S) legislation across Canada that outlines the general rights and responsibilities of employers, supervisors and workers. Provincial or territorial legislation usually applies to all workplaces, except for private homes where work is done by owners or occupants. At the federal level, legislation covers employees of the federal government. OH&S legislation in Canada emphasises the importance of internal responsibility. One of the key elements of an internal responsibility system is the mandatory establishment of joint health and safety committees, where both workers and management are able to provide input to effectively address workplace health and safety issues.

Stakeholders in Canadian workplaces, including employers, supervisors, officers, directors, suppliers, and workers, have legal duties under OH&S legislation. Although Canadian jurisdictions have generally been consistent in establishing the legal duties of workplace stakeholders, specific responsibilities may vary from jurisdiction to jurisdiction. Generally, employers' responsibilities for OH&S matters include providing a safe work environment, appropriate education and training, first aid facilities and written instructions in respect of procedures, reports and notices. Workers' responsibilities for OH&S matters generally include following prescribed procedures with respect to the health and safety of employees, reporting workplace hazards to employers, complying with oral or written directions of a health and safety officer and wearing protective equipment where appropriate. OH&S legislation may also require employers and other stakeholders to report workplace accidents, injuries and occupational illnesses to the relevant regulators.

Employers and workers may also face statutory liability under OH&S legislation, which could result in the issuance of orders and quasi-criminal regulatory charges. Generally, offences under OH&S legislation are strict liability offences, where the prosecution need not prove intent. If charged, a defendant may be found not guilty if the defendant can prove, on a balance of probabilities, that due diligence was exercised. Certain OH&S legislation, such as the Ontario Occupational Health and Safety Act, also creates statutory due diligence defences.

Directors and officers of companies operating in Canada face personal liability under both federal and provincial OH&S legislation if they authorised, permitted or acquiesced in an offence (exact language varies by statute), and they may be subject to penalties including significant fines, imprisonment or both. Under certain legislation (such as provincial workplace safety legislation), directors and officers have an additional positive duty to take all reasonable care to ensure that the company complies with the legislation. In addition to statutory liability, directors and officers may also face common law liability for tort-based claims.

ONLINE RETAIL

Launch

8 What legal framework governs the launch of an online fashion marketplace or store?

In Canada, various federal and provincial statutes govern the buying and selling of goods and services over the internet. These statutes contain discrete considerations that require specific legal attention of e-commerce retailers. Broadly speaking, primary issues relevant to establishing an online fashion marketplace or store in Canada include compliance with Canadian provincial e-commerce, consumer protection and competition legislation, French language requirements, privacy and security requirements and domain name acquisition including meeting 'Canadian presence requirements'.

Provincial e-commerce laws impose obligations on e-commerce retailers before and after the sale of goods and services to consumers. In general, these laws require: (1) pre-sale disclosure of information (such as the seller's contact information, a description of the goods or services, purchase price, delivery arrangements and shipping and return information); and (2) delivery of a copy of the agreement to the consumer. Further, these disclosures must be prominent, clear, comprehensible and available in a manner that: (1) requires the consumer to access the information; and (2) allows the consumer to retain and print the information. In some provinces, these rules only apply to sales over C$50. Note that doing business online in the province of Quebec (or available to Quebec consumers) attracts other legal considerations, such as French language laws and specific consumer contractual requirements.

E-commerce fashion retailers should also be aware of consumer protection rules under the federal Competition Act that prohibit businesses from engaging in deceptive marketing practices for the purpose of promoting a product or a business interest. This prohibition applies to all representations, in any form, that are false or misleading in a material respect.

Canada also has strict private sector privacy legislation, both at the federal and provincial levels, which must be taken into account in the planning and launch of an online fashion marketplace or store. This is

discussed in further detail below. Also, organisations conducting transactions via payment cards may be required to comply with the Payment Card Industry Data Security Standard (PCI-DSS) and ensure the terms of those standards bind their service providers or their service providers are PCI-DSS certified.

Online fashion retailers also need to take notice of the Web Content Accessibility Guidelines (WCAG) 2.0, an internationally accepted standard for web accessibility developed by the World Wide Web Consortium. WCAG 2.0 explains how to make web content more accessible to people with disabilities. The Ontario Integrated Accessibility Standards require private sector organisations with 50 or more employees as well as designated public sector organisations to conform to WCAG 2.0. The Ontario government has provided a useful guide for companies to follow to ensure compliance, which includes recommendations for: (1) testing compliance of current websites; and (2) working with web developers to ensure future websites satisfy WCAG criteria. In the coming years, other jurisdictions in Canada may adopt similar legal requirements.

In terms of selecting a domain name in Canada, the .ca domain name is administered by the Canadian Internet Registration Authority (CIRA). CIRA requires registrants to meet Canadian presence requirements designed to ensure that the .ca domain remains a 'key public resource for the social and economic development of all Canadians'. Retailers typically meet the Canadian presence requirements by creating a Canadian corporation or registering a trademark in Canada that corresponds to the desired domain name.

Because of the widespread accessibility of online vendors, Canadian regulators have been required to determine how and when they will take jurisdiction over a website and its content. The Competition Bureau, for example, will address online marketing and advertising claims if the content is considered to have a fact-based connection to Canadian consumers. Some indicators of a connection include the use of a .ca website, providing pricing in Canadian dollars and offering sales or discounts on transportation to a Canadian jurisdiction.

Sourcing and distribution

9 How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

Sourcing and distribution arrangements are often created to specifically contemplate online sales. From a commercial perspective, standard sourcing and distribution agreements may contain geographic sales limitations that would prohibit online sales to a variety of Canadian and international jurisdictions, so it is often the case that separate and additional agreements are created for online distribution. In addition, where larger retail sourcing arrangements might allow for co-mingling of merchandise, this may not always be advisable for online sales. It is possible that regulated products in one jurisdiction may not be lawfully sold in another if regulatory standards differ - this needs to be clearly addressed in a sourcing strategy for potential international online sales.

Larger online retailers often source bulk product, that is stored in sourcing warehouses in Canada, from which the product is distributed post-online sale. This can streamline the fulfilment process as international issues such as shipping and customs clearance can cause lag in delivery to customers. In these instances, contractual arrangements between the retailer and the sourcing partner often call for, for example, a certain volume and value of merchandise to be warehoused, or for drop sales arrangements. This largely depends on whether the online retailer is selling direct to consumer, or whether the consumer is purchasing from a third-party vendor using a marketplace platform. Standard sourcing arrangements are not typically suited to cover risk in either case. Accordingly, the sourcing and distribution contractual arrangements are often executed specifically for online sales supply.

Terms and conditions

10 What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

Online orders are generally considered 'future performance agreements' or 'distance sales contracts' under provincial consumer protection legislation, imposing certain obligations on retailers that sell items online. Various provinces have enacted legislation that requires suppliers to disclose certain information and to memorialise the sale in writing.

While an e-commerce retailer should ensure its standard terms and conditions are posted on its website, in certain provinces, distance sales contracts are not binding unless a copy of the contract is provided within 15 days after its formation. Provincial consumer protection legislation imposes strict requirements regarding what information must be included in the contracts. While this information varies in each province, it generally includes the name of the customer, the date of the contract and the terms and conditions, which must be either linked or referenced. The information must be presented in a clear, prominent and comprehensible manner, and the customer must be able to easily retain and print the information. The customer must also be provided with an express opportunity to correct errors in the contract or accept or decline the contract. The practical effect of the legislation is that an internet contract only comes into effect once the retailer sends the customer confirmation of the purchase (along with all the other disclosure required) via email. In many provinces, if a customer is not provided with this disclosure within the required period of time, or if the disclosure they are provided with is deficient, they will be permitted to cancel the contract. Disclosure requirements and timelines vary by province. In British Columbia and Ontario, a customer may also cancel an online order if they are not given the opportunity to accept, decline or correct the contract immediately before entering into it. In the latter case, acceptance of the contract would be acceptance of the terms and conditions upon confirmation of the order.

In drafting internet contracts, an important consideration for retailers is whether to include a clause selecting the governing law or forum for any dispute. With the exception of Quebec, an online contract may include a forum selection clause and governing law clause, selecting the law and forum of another jurisdiction. However, recent jurisprudence from the Supreme Court of Canada casts doubt on the enforceability of such clauses. In Quebec, it is expressly prohibited to include any stipulation that a contract be governed by law other than Quebec's consumer protection legislation. In general, whether the terms of a consumer contract can be found online or are in hard copy written form presented to a consumer, provisions mandating arbitration or waivers of class action proceedings are not enforceable.

Tax

11 Are online sales taxed differently than sales in retail stores in your jurisdiction?

Online sales are not, in principle, treated differently from sales made in classic brick and mortar retail settings. In general terms, the consumer is liable to pay taxes based on the taxes applicable in the province of the place of delivery of the goods and the supplier is liable to collect such taxes and remit them to the relevant Canadian tax authorities. However, there are situations where customers are not charged the applicable taxes and must self-assess such taxes and pay them directly to the authorities. This may be the case because the supplier is not registered for Canadian sales tax purposes and does not carry on business in Canada. Also, in certain cases, the postal carrier collects the taxes applicable at the Canadian border and collects the provincial sales taxes on behalf of the Canadian tax authorities.

Non-resident suppliers must determine whether they are carrying on business in Canada. If they are, they will have the obligation to register for goods and services and harmonised sales tax and perhaps, for Quebec sales tax. Canadian residents must register for sales taxes if they are making taxable supplies in Canada. Registration for British Columbia, Saskatchewan and Manitoba provincial sales taxes may also be required.

As part of the global trend to tax digital economy and with the increasing importance of e-commerce, the federal government announced in its Fall Economic Statement 2020 on 30 November 2020, its intention to enact new legislation providing for goods and services tax / harmonised sales tax registration and collection obligations for non-resident vendors and digital platform operators effective 1 July 2021. Interestingly, the new proposed rules virtually mirror those adopted in Québec almost two years ago for Québec sales tax purposes regarding supplies made to Québec consumers by foreign suppliers and operators of digital accommodation platforms.

It is also noteworthy that such measures have been released at a time when provincial governments, such as Saskatchewan and British Columbia, have also recently enacted or announced their intention to adopt similar measures for non-resident suppliers and platform operators in their provincial sales tax regime.

Accordingly, under these new specific taxation regimes, non-resident suppliers as well as Canadian sellers of corporeal movable property may be required to collect sales taxes on their taxable supplies of corporeal movable property (ie, tangible personal property delivered of made available in the harmonised sales tax jurisdiction, such as Ontario, in Quebec or in the provincial sales tax jurisdictions).

Any online retailer should be vigilant on the application of sales taxes and monitor its sales tax obligations and ensure its systems are programmed accordingly and in a timely manner.

INTELLECTUAL PROPERTY

Design protection

12 | Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

In Canada, fashion designs can be protected through copyright, trademark rights, and industrial design rights. If a useful article is reproduced more than 50 times, reproducing the article will not infringe copyright (and the rights holder would need to rely on industrial design rights). This 'more-than-50' rule does not apply if the copyright work is used as a trademark, a graphic or photo representation applied to the product, a material that has a woven or knitted pattern or that is suitable for piece goods or surface coverings or for making wearing apparel, or a representation of real or fictitious beings, events, or places. If these exceptions apply, then copyright and industrial design rights can be enforced at the same time. Rights holders often use industrial design registrations in combination with trademark protection under Canadian practice. The rights holder would first file and obtain an industrial design registration for a fashion design and then later file a trademark application for the same design once the design has achieved the requisite distinctiveness. While the design has yet to mature into a trademark registration, the industrial design registration can be enforced against copycats.

13 | What difficulties arise in obtaining IP protection for fashion goods?

Any features that are primarily functional in nature cannot be registered as a trademark. Also, to obtain a trademark registration in fashion designs, a rights holder may need to show that its design has become distinctive in the marketplace, which requires evidence showing extensive use of the design over a fairly long period of time.

Brand protection

14 | How are luxury and fashion brands legally protected in your jurisdiction?

Luxury and fashion brands are legally protected through unregistered and registered trademark rights. Domain names are protected through the CIRA Dispute Resolution Policy (CDRP), which is similar to the Uniform Domain Name Dispute Resolution Policy process.

Licensing

15 | What rules, restrictions and best practices apply to IP licensing in the fashion industry?

The Canadian Trademarks Act requires that a licensor maintains control over the character and quality of the goods and services that are provided under the licensed trademarks. To create a presumption of control, the licensee should be obligated to provide notice indicating its use of the trademark under licence.

Enforcement

16 | What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

Rights holders can enforce their IP rights in provincial or in federal courts. For .ca domain names, rights holders may utilise the CDRP. Pursuant to the Combating Counterfeit Products Act, brand owners can now file a 'request for assistance' with the Canadian Border Services Agency in pursuing remedies under the Trademarks Act and the Copyright Act.

DATA PRIVACY AND SECURITY

Legislation

17 | What data privacy and security laws are most relevant to fashion and luxury companies?

There are several provincial and federal laws in Canada that deal with privacy rights and the collection, use and disclosure of personal information. By default, the handling of personal information by fashion and luxury companies in the private sector is governed by the Personal Information Protection and Electronic Documents Act (PIPEDA), a federal statute enforced by the Office of the Privacy Commissioner of Canada (OPC). However, PIPEDA will not apply where a province has enacted privacy legislation that is deemed substantially similar to PIPEDA (currently British Columbia, Alberta and Quebec), in which case the province's legislation will apply instead of PIPEDA for actions that take place entirely within its borders (with some exceptions).

Further, Canada's Anti-Spam Legislation (CASL) places restrictions and obligations in relation to the sending of commercial electronic messages (defined broadly to include text, sound, voice or image messages) and also includes provisions related to the installation of computer programs and alteration of transmission data. CASL is generally much more strict than the United States' CAN-SPAM Act of 2003. Fashion and luxury companies will need to carefully structure their electronic messaging (eg, email and SMS) campaigns to comply with Canadian laws.

There are a number of legislative reform activities that got underway in 2020. This includes the introduction of Bill C-11 by the federal government in November 2020 that, if passed, would replace PIPEDA with a new privacy law titled the Consumer Privacy Protection Act, as well as Quebec's Bill 64 that would result in sweeping changes to Quebec's privacy regime if it becomes law. As such, it is likely that 2021 will see major changes to Canadian privacy law.

Compliance challenges

18 What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

Canada's privacy laws are relatively strict, at both the federal and provincial levels. Compliance with Canadian privacy legislation requires more than simply drafting or revising a website privacy policy. It requires conducting a privacy audit to assess data flows, retention periods, the purposes of collection, the means of collection, and the technological, administrative, and contractual protections that have been put in place to ensure compliance. An ongoing compliance programme is then required to ensure that compliance is maintained. Additional privacy measures may be required for organisations handling sensitive personal information, such as financial or transaction data.

As well, it is noteworthy that PIPEDA has mandatory reporting and record keeping requirements that are triggered if an organisation experiences a breach of security safeguards involving personal information. All breaches will trigger the requirement to retain records of the breach for a period of 24 months. Breaches that create a real risk of significant harm will trigger obligations to report the breach to the OPC and to notify the affected individuals and any organisations that may be able to reduce the risk of, or mitigate, the harm (which could include law enforcement). Alberta's Personal Information Protection Act also has mandatory breach notification requirements that organisations need to consider when preparing for and responding to data breaches.

In relation to electronic messaging marketing (eg, using email or SMS), organisations will need to pay particular attention to compliance with the strict requirements of CASL, including obtaining consent to send commercial electronic messages, the form and content of the messages themselves, and the manner in which unsubscribe requests must be processed.

Innovative technologies

19 What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

At a high level, to the extent that an individual's personal information is used in connection with any technology, whether new or old, an organisation must ensure that the use is permissible under applicable privacy laws (which may include providing notice to, or obtaining consent from, the individual regarding the use).

More specifically, AI and automated decision making is an area that is expected to evolve in the coming months and years. While Canada's privacy laws do not currently explicitly address use of personal information in connection with automated decision making, this may well change in 2021. In particular, it is noteworthy that the draft laws proposed by the federal government (Bill C-11) and the Quebec government (Bill 64) both have provisions setting out requirements applicable to automated decision making.

Content personalisation and targeted advertising

20 What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

When using personal information for targeting content or advertising, organisations will need to ensure compliance with applicable privacy laws including in relation to transparency and consent. Further, individuals generally have a right to withdraw consent in relation to use of their personal information at any time (subject to legal or contractual restrictions), so organisations will need to maintain processes that allow for this withdrawal.

Legislative reforms are also likely to provide individuals with additional rights in relation to their personal information, including a right of portability, increased transparency and rights of erasure. As such, it will be important to keep an eye on these legislative reforms as they progress.

ADVERTISING AND MARKETING

Law and regulation

21 What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

The Competition Act is the key statute that governs advertising and marketing in Canada. Of most relevance for luxury and fashion companies is the Competition Act's core prohibition against making representations to the public, for the purpose of promoting any business interest, that are 'false or misleading in a material respect'. Complementing this general prohibition are a number of more specific restrictions with respect to particular types of representations that promote a business interest, including with respect to a product's performance or efficiency (among other things). The Competition Act also includes specific 'ordinary selling price' provisions that prohibit promoting rebates or discounts on the basis of unsubstantiated regular prices. Under those provisions, an ordinary selling price indicated in support of a rebate must meet one of two tests: either a substantial volume of the product was sold at the advertised ordinary price or a higher price, within a reasonable period of time (volume test); or the product was offered for sale, in good faith, for a substantial period of time at that ordinary price or a higher price (time test). Note also that certain market sectors are subject to more stringent advertising and marketing restrictions pursuant to specialised regulatory regimes. These sectors include alcohol, tobacco, food, and automobiles, for example.

In addition to the Competition Act, marketing and advertising claims in Canada are monitored by Advertising Standards Canada, which is an industry self-regulating body that administers the Canadian Code of Advertising Standards (Code). Although it does not have the force of law, the Code applies to an array of advertising forms, establishes various parameters for specific advertising modes and content and includes a consumer complaint procedure. Where Advertising Standards Canada determines that there has been a breach of the Code, it may ask the advertiser to correct the advertisement in question.

Online marketing and social media

22 What particular rules and regulations govern online marketing activities and how are such rules enforced?

Canada's Competition Bureau (responsible for enforcing the Competition Act) and Advertising Standards Canada have each published guidance in relation to the use of social media influencer marketing. In short, this guidance underscores the Competition Bureau's position that material connections between advertisers and influencers must be disclosed in a conspicuous manner, using clear and widely accepted hashtags or other disclosure mechanisms. Furthermore, disclosure of material connections should appear in close proximity to the endorsement. Material connections may consist of various types of compensation, including free products, samples, financial payments, discounts, free trips or tickets to events, or media exposure. Where influencer endorsements are replicated across various social media platforms, advertisers have the obligation of ensuring that the disclosure transfers properly across platforms (and isn't tied exclusively to the disclosure mechanisms

embedded in any single social media platform). The Competition Bureau's policy position in relation to social media influencer marketing and the attendant disclosure obligations, as well as in relation to online marketing activities more generally, derives directly from the general prohibition against false or misleading representations and deceptive marketing practices.

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

23 What product safety rules and standards apply to luxury and fashion goods?

The Canada Consumer Product Safety Act (CCPSA) and regulations enacted under the CCPSA are Canada's core consumer product safety instruments relevant to luxury and fashion goods. The CCPSA applies to 'consumer products' and prohibits the manufacture, importation or sale of consumer products that pose a danger to human health or safety. 'Consumer products' is defined as including all products that may reasonably be expected to be obtained by an individual to be used for non-commercial purposes. There are limited exemptions to this definition, but fashion and luxury brands should generally anticipate that their products may be subject to the CCPSA.

With respect to luxury food, natural health and cosmetic products, the Food and Drugs Act (FDA) establishes highly specific standards and requirements with which manufacturers, importers, distributors and retailers are required to comply.

Finally, apparel products are subject to specific advertising and labelling requirements pursuant to the Textile Labelling Act and regulations. These include mandatory disclosures with respect to fibre content, and prescriptive terminology for describing textile materials and their composition. While largely separate from product safety regulations, the requirements of the Textile Labelling Act constitute a central set of compliance obligations applicable to textile and apparel products imported into or sold in Canada.

Product liability

24 What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

The manufacture, importation, distribution and sale of consumer goods are the subject of heavy regulation in Canada. Various federal statutes impose stringent obligations on retailers and grant regulators broad powers to enforce compliance, including through compliance audits, and to impose fines and penalties. The regulatory regime can directly affect luxury and fashion goods in Canada because goods that fail to comply with the statutory requirements may not lawfully be sold in Canada and may be subject to recall.

For example, the CCPSA prohibits the manufacture, importation or sale of consumer products that pose a danger to human health or safety, and grants the federal government powers to regulate, inspect, test and recall consumer products and creates a wide array of related offences and penalties. Manufacturers, importers, distributors and retailers need to comply with stringent requirements to maintain certain records concerning their products and report 'incidents' to Health Canada within short time frames. Health Canada has broad audit and inspection powers to assess compliance with reporting obligations.

There are various labelling, advertising and marketing requirements for consumer products prescribed under the Competition Act, provincial consumer protection legislation, the Textile Labelling Act, the Consumer Packaging and Labelling Act (CPLA), the Precious Metals Marking Act, the CCPSA, the FDA, and regulations related to the foregoing. Certain regulations may impose additional requirements on certain specific categories of products, such as cosmetics and natural health products.

Sellers of luxury and fashion goods could also be potential defendants in individual and class action product liability litigation relating to allegedly defective products. For example, product liability litigation could include claims to be compensated for the cost of the defective product, as well as damages for any injury or damage arising therefrom. Claims may be based on breach of a contract, negligence or both.

M&A AND COMPETITION ISSUES

M&A and joint ventures

25 Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

In addition to shareholder approval requirements for some acquisitions of private businesses (eg, a sale of substantially all of the assets of a corporation generally requires the approval of a special majority (usually 66.6 per cent) of its shareholders) and take-over bids of publicly held businesses (which include stipulations regarding the consideration being offered, the period of acceptance and disclosure requirements), luxury businesses should be aware of Canada's Competition Act and Investment Canada Act requirements. In particular, some luxury businesses may be subject to the more stringent thresholds under the Investment Canada Act for 'cultural businesses'.

Acquisitions of Canadian businesses are subject to the Competition Act and acquisitions by foreign acquirors are subject to the Investment Canada Act. Certain transactions require pre-closing notice and approval under the Competition Act and the Investment Canada Act. In addition, some businesses are considered 'cultural businesses' under the Investment Canada Act, such as the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form, the production, distribution, sale or exhibition of film or video recordings, the production, distribution, sale or exhibition of audio or video music recordings, the publication, distribution or sale of music in print or machine readable form, any business activities involving radio communication intended for direct reception by the general public, or any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services. These businesses have different review and approval thresholds under the Investment Canada Act.

Competition

26 What competition law provisions are particularly relevant for the luxury and fashion industry?

The Competition Act's non-criminal or civil provisions allow the Competition Tribunal, on application by the Commissioner of Competition (who heads the Competition Bureau), to review certain business practices, and, in certain circumstances, to issue orders prohibiting or correcting conduct to eliminate or reduce its anticompetitive impact. Reviewable practices include agreements among competitors outside the scope of the criminal cartel provisions, abuse of dominant position, and a number of vertical practices between suppliers and customers, such as price maintenance, tied selling, refusal to supply and exclusivity arrangements. Private parties are also able to apply to the Competition Tribunal to challenge certain types of reviewable conduct, such as price maintenance, exclusive dealing, tied selling and refusal to deal. It should be noted that there are no price discrimination provisions (similar to the United States Robinson-Patman Act) in the Competition Act.

The luxury and fashion industry should also note that price maintenance is one of the main civil or reviewable practices under the Competition Act with respect to relations between suppliers and retailers. Price maintenance occurs when a person influences upward selling or advertised prices or discourages the reduction of another person's selling or advertised prices by means of a threat, promise or agreement, or when a person refuses to supply another person or otherwise discriminates against that person because of its low-pricing policy, in each case with the result that competition in a market is likely to be adversely affected. For example, price maintenance may occur when a supplier prevents a retailer from selling a product below a minimum price (ie, minimum advertised pricing (MAP) policies). The Competition Bureau recognises that price maintenance practices are common in many markets and can be pro-competitive in many circumstances. However, in some circumstances, price maintenance may adversely affect competition. For example, price maintenance may raise concerns if: (1) price maintenance facilitates less vigorous price competition among suppliers, (2) retailers compel a supplier to adopt price maintenance to facilitate less-vigorous price competition among retailers or to exclude discount retailers, or (3) an incumbent supplier uses price maintenance to guarantee margins for retailers to make them unwilling to carry the products of rival or new entrant competitors to the supplier.

Exclusive dealing, tied-selling and market restrictions may raise concerns if any such practice is engaged in by a major supplier, and the practice has substantially lessened competition (or is likely to). It is therefore prudent for suppliers to consider the competition law risks before engaging in such conduct given the possibility of a Competition Bureau inquiry or application to the Competition Tribunal by the Competition Bureau or private parties.

A 'refusal to deal' situation most frequently occurs where a supplier ceases to supply a retailer or distributor, and the business of such retailer or distributor is seriously affected because none of the potential suppliers are willing to deal with the company. If all the legislative requirements are met, the Competition Tribunal may, on application by the Commissioner of Competition or a private party, order the supplier to accept the customer who was refused supply.

EMPLOYMENT AND LABOUR

Managing employment relationships

27 What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

The types of employment-related legislation with which fashion companies should be familiar, as employers operating in Canada, include legislation dealing with employment standards, labour relations, human rights, occupational health and safety, accessibility standards, federal and provincial privacy rules, and employment benefits, including pension, employment insurance and workers' compensation.

The employment relationship in Canada is governed by a broad array of legislation and common law principles. Employers need to be aware of the various legal considerations to avoid attracting liability in the workplace.

All jurisdictions in Canada have enacted legislation that establishes certain minimum employment standards. Generally, employment standards acts (ESAs) are broad and apply to employment contracts, whether oral or written. The standards defined in the ESAs are minimum standards only, and employers are prohibited from contracting out of or otherwise circumventing the established minimum standards. These laws spell out which classes of employees are covered by each minimum standard and which classes of employees are excluded.

Unlike employers in the United States, Canadian employers may not terminate employees 'at will'. Generally, employers must provide required notice of termination, unless they have just and sufficient cause to terminate an employee without notice. The length of the required notice period varies among jurisdictions, but generally increases with an employee's length of service.

In addition to minimum statutory termination and severance pay entitlements, a terminated non-union employee may be entitled by common law (or civil law in Quebec) to additional notice of termination or pay in lieu of notice. This right may be enforced before the courts. The amount of notice will depend on the employee's individual circumstances, including length of service, age, the type of position held and the prospect for future employment. In most jurisdictions, an employer can limit its liability to the statutory minimum in an employment contract. Employers who wish to avoid or limit liability for common law pay in lieu of notice should therefore have clear terms in written contracts.

Trade unions

28 Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

Fashion companies should note that the federal government and each province have enacted legislation governing the formation and selection of unions and their collective bargaining procedures. In general, where a majority of workers in an appropriate bargaining unit are in favour of a union, that union will be certified as the representative of that unit of employees. An employer must negotiate in good faith with a certified union to reach a collective agreement. Failure to do so may result in penalties being imposed. Most workers are entitled to strike if collective bargaining negotiations between the union and the employer do not result in an agreement; however, workers may not strike during the term of a collective agreement.

Immigration

29 Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?

As a general principle, any foreign national who is neither a Canadian citizen nor a permanent resident of Canada cannot work in Canada unless authorised to do so. For Canadian immigration purposes, work is defined as an activity giving rise to the payment of a salary or commission, or that competes directly with activities of Canadian citizens or permanent residents in the Canadian labour market.

If the foreign national is considered to be seeking to work in Canada, the immigration officer will then determine whether: (1) a work permit is required; or (2) the work in question falls into one of the categories of work for which a work permit is not required (work permit exempt).

Canadian immigration authorities have outlined specific situations in which work completed in Canada will be work permit exempt, including, subject to certain conditions, where providing after sales or lease services, acting under a warranty or service agreement, acting as installation supervisors, acting as trainers and trainees, providing intra-company training and installation activities, for board of directors' meetings, short-term work visits for highly skilled workers, researchers and foreign students studying in Canada.

As a general rule, work that is not work permit exempt requires a work permit under one of two programmes in Canada, namely the Temporary Foreign Worker Program and the International Mobility Program.

The federal Immigration and Refugee Protection Act was recently amended. It imposes a rigorous compliance regime, which is designed to ensure that Canadian employers consistently respect the wage and working conditions of foreign nationals, and imposes serious penalties (including a period of ineligibility for hiring foreign nationals and penal charges) for non-compliance.

UPDATE AND TRENDS

Trends and developments

30 What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?

Canada continues to attract luxury goods manufacturers, retailers and distributors. In addition, as in other jurisdictions, luxury businesses in Canada have been significantly impacted by the covid-19 pandemic and related government orders and restrictions. Brands are also increasingly selling direct to consumer and seeing significant proportions of their businesses shift to e-commerce and digital commerce.

In addition, the luxury and fashion market is being impacted by trade agreement developments; supply chain issues; a focus on environmental, social and governance matters; the entry into the market of disruptors and new ways of doing business, such as rental services and subscription services; intensifying efforts across all channels to deal with counterfeits and maintain brand integrity; and increased scrutiny of influencer advertising and social media.

Recent changes in legislation and regulation include proposed changes to Canadian privacy legislation, through Bill C-11, the Digital Charter Implementation Act, 2020. Bill C-11 seeks to modernise Canadian privacy legislation through the introduction of two acts: the Consumer Privacy Protection Actand thePersonal Information and Data Protection Tribunal Act, which would create a new enforcement tribunal. As of the time of writing, this Bill C-11 has not yet been passed into law, and may still undergo revisions.

Coronavirus

31 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Emergency and relief measures

The government of Canada has implemented several programmes with the aim of protecting jobs and helping businesses across Canada. These include, among others: the Canada Emergency Wage Subsidy (CEWS), the Temporary Wage Subsidy, the Work-Sharing programme and the Supplemental Unemployment Benefit Plans programme (SUB).

CEWS

Under the CEWS programme, Canadian employers who have seen a drop in revenue due to the covid-19 pandemic may be eligible for a subsidy to cover a portion of employee wages. Its goal is to provide a wage subsidy to allow eligible Canadian employers to keep Canadian employees on the payroll and to bring those already on layoff back onto the payroll.

mccarthy tétrault

Adam Ship
aship@mccarthy.ca

Carmen Francis
cfrancis@mccarthy.ca

Dana Siddle
dsiddle@mccarthy.ca

Dominic Thérien
dtherien@mccarthy.ca

Lara Nathans
lnathans@mccarthy.ca

Martha Harrison
mharrison@mccarthy.ca

Michael Scherman
mscherman@mccarthy.ca

Nicolas Désy
ndesy@mccarthy.ca

Selina Lee-Andersen
slandersen@mccarthy.ca

Trevor Lawson
tlawson@mccarthy.ca

Vincent K S Yip
vyip@mccarthy.ca

66 Wellington Street West
Suite 5300, TD Bank Tower, Box 48
Toronto ON, M5K 1E6
Canada
Tel: +1 416 362 1812 / +1 877 244 7711
Fax: +1 416 868 0673
www.mccarthy.ca

The Temporary Wage Subsidy

The Temporary Wage Subsidy is a three-month programme that allows eligible employers to reduce the amount of payroll deductions that they need to remit to the Canada Revenue Agency. It only applies to the federal, provincial, or territorial income tax portion of the remittance and is equal to 10 per cent of the remuneration paid from 18 March to 19 June 2020 up to C$1,375 for each eligible employee. The maximum total is C$25,000 for each eligible employer.

The Work-Sharing Programme

The Work-Sharing programme is an adjustment program aimed to help employers and employees avoid layoffs when a temporary reduction in the normal level of business activity is beyond the employer's control. It aims to provide income support to employees eligible for employment insurance (EI) benefits who work a temporarily reduced work week while their employer recovers. It is a three-party agreement involving employers, employees and Service Canada, as employees must agree to a reduced schedule of work and to share the available work over a specified period of time.

SUB

Generally, an employee is unable to receive EI payments and be paid by their employer for the same period of time, as any income earned is deducted from the employee's EI benefits. However, pursuant to the SUB and where certain conditions are met, employers are able to top-up the EI payment, up to a maximum of 95 per cent of the employee's compensation, without reducing the employee's EI benefits.

Moreover, the government of Canada has also implemented temporary recovery benefits for Canadians who are unable to work for reasons related to covid-19 such as, for example, the Canada Recovery Benefit, the Canada Recovery Sickness Benefit, and the Canada Recovery Caregiving Benefit.

In addition, provincially-regulated employers and employees may also have both provincial and municipal supports available to them. While the supports available will vary by jurisdiction, they may include, for example, extending the timelines of temporary layoff provisions, the addition of job-protected leaves for reasons related to covid-19, provincial tax deferrals, workers' compensation premium relief, tax relief and small business loans.

Covid-19 related best practices in the luxury retail sector

In addition to the relief and support programmes outlined above, various levels of government throughout Canada have enacted both mandatory compliance obligations and public health recommendations with a view to minimising exposure to and spread of covid-19 in retail environments.

In-store experience

Even with the eventual resumption of in-store shopping, a number of mandatory and recommended measures will continue to be integrated into the in-store experience through the medium term. These include mandatory masks inside the store for all customers and employees (subject to legitimate medical exemptions), screening of customers for covid-19 symptoms, and capacity restrictions. Heightened sanitisation protocols – both in terms of frequency and scope – will continue to be an expectation from members of the public and health authorities alike. For this reason, certain jurisdictions continue to recommend against the re-introduction of product samples and testers as part of the in-store experience, and require targeted measures to sanitise changing and fitting rooms.

Customer interactions

While some health authorities recommend against accepting returns while covid-19 lock-down measures remain in place, industry best practice generally acknowledges that subjecting returned items to a quarantine period is an effective means of mitigating transmission risk. In those jurisdictions where only curb-side pickup retail activities are permissible, retailers must ensure customers can execute the pickup without being required to enter the store. Similarly, physical distancing must be maintained in any lineups outside brick-and-mortar stores.

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