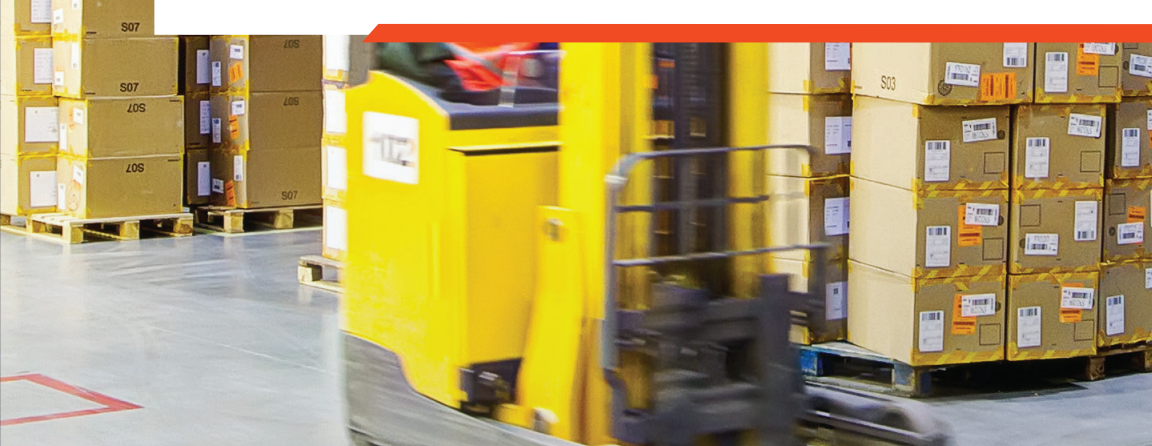
Cross-Border

A Consumer Products Industry Guide to Doing Business in Canada

2021 Edition



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FOREWORD

McCarthy Tétrault LLP's Retail and Consumer Markets Group is pleased to present *Cross-Border: A Consumer Products Industry Guide to Doing Business in Canada*. As we celebrate our 12th anniversary, the Retail and Consumer Markets Group would like to thank our clients and supporters for the opportunity to work together and have an impact on the retail and consumer markets landscape across Canada.

We hope you will find this Guide informative and helpful and look forward to another successful decade.

TABLE OF CONTENTS

INTRODUCTION

INTRODUCTION

What are the key considerations for manufacturers and distributors of consumer products carrying on business in Canada? What are the potential opportunities, and where are the possible pitfalls?

Cross-Border: A Consumer Products Industry Guide To Doing Business In Canada was developed by McCarthy Tétrault's Retail and Consumer Markets Group as a basic guide to the legal aspects of establishing and operating a consumer products business in Canada.

***Cross-Border: A Consumer Products Industry Guide to Doing Business in Canada* was developed by McCarthy Tétrault's Retail and Consumer Markets Group as a basic guide to the legal aspects of establishing and operating a consumer products business in Canada.**

We have organized this Guide into what we hope you will find to be a useful and user-friendly resource. The Guide proceeds through each of the areas of law most likely to affect your business decisions.

The discussion in each chapter is intended to provide general guidance, and is not an exhaustive analysis of all provisions of Canadian law with which your business may be required to comply. For this reason, we recommend that you seek the advice of one of our lawyers on the specific legal aspects of your proposed investment or activity. With offices in Canada's major commercial centres, as well as New York City and London, U.K., McCarthy Tétrault has substantial presence and capabilities to help you successfully establish and operate a consumer facing business in Canada.

For more information about our Retail and Consumer Markets Group, please see Profile.

Unless otherwise indicated, the information in this publication is current as of August 1, 2021.

CANADIAN MARKET ENTRY: KEY CONSIDERATIONS

By Lara Nathans

CANADIAN MARKET ENTRY: KEY CONSIDERATIONS

Canada continues to experience a number of new entrants to its consumer products market, including direct-to-consumer brands that are expanding their business throughout the country. Whether expanding into or throughout Canada by way of acquisition, distribution or e-commerce (or a combination), consumer products businesses will be faced with a number of business and legal considerations. We have set out below some of the legal considerations that arise most often. Many of these are covered in the specific chapters in this Guide.

Tax and Corporate Structure Considerations

Consider tax and corporate law implications. Tax and corporate considerations include: determining whether to operate as a branch or a subsidiary, the type of entity and jurisdiction (in the event of a subsidiary or new Canadian entity), ensuring compliance with Canadian registration requirements; abiding by applicable transfer pricing and customs valuation requirements; and, developing efficient inter-corporate structures for sales, provision of services and licensing of intellectual property. Some Canadian jurisdictions have corporate director residency requirements.

Customs and Trade

Consider administrative and regulatory issues in your supply chain design. A variety of government agencies regulate and/or enforce laws impacting the importation of goods — from product specifications to the application of customs duties and other border charges. Certain categories of goods, such as apparel and accessories, have relatively high duty rates, which should be considered in strategy and projections.

Labour and Employment

Ensure your employment policies and agreements comply with Canadian legislation. It is essential that employment policies, agreements and handbooks comply with applicable provincial and federal legislation. In Canada, approximately 90% of the workforce is regulated by provincial governments. Each province regulates labour and employment matters in a similar, though not identical, manner. If your business has multiple locations in Canada, employment policies and agreements must comply with those jurisdictions' laws.

There is no "at will" employment in Canada. Unlike the United States and other countries, unless the employment agreement specifies a particular termination package, or there is a legal justification for a termination, an employer must provide reasonable notice of termination or pay in lieu of notice.

E-commerce

Canadianize your terms and conditions if you use e-commerce or social media to sell directly to consumers. Issues relevant to establishing a Canadian website include compliance with Canadian provincial e-commerce and consumer protection legislation; security; domain name acquisition and meeting "Canadian presence requirements;" meeting foreign ownership restrictions on the sale of "cultural products;" meeting French language requirements applicable for selling into or in Québec; and legal issues relating to marketing, advertising, contests and promotional programs (including with respect to arrangements with influencers).

Pricing, Marketing and Advertising

Develop a robust compliance program regarding advertising and pricing strategy. Canadian advertising law regulates various aspects of the advertising and pricing of goods, including the advertising of sale and bargain prices, claims of what constitutes "ordinary" prices. Canadian competition laws also apply to issues of price fixing, and price maintenance including Minimum Advertised Price (MAP) policies. Advertising and promotions law in Canada is regulated both federally by the *Competition Act*, and by provincial consumer protection legislation. Contests and sweepstakes are governed federally by a combination of the *Criminal Code* and the *Competition Act*. In addition, there are special issues involving contests and advertising directed to minors that require careful treatment.

Privacy and Cybersecurity

Develop a Canadian-specific privacy and cybersecurity compliance plan (or tailor your existing plan). In addition to international regulations, Canadian privacy laws are complex and differ from province to province. Canada has privacy legislation that applies to businesses from coast to coast to coast, including unique laws in certain provinces. Your plan should start with a customer-facing privacy policy and an incident

response plan, as Canada has mandatory breach notification for data breaches. Also, do not make the mistake of thinking GDPR compliance means compliance in Canada.

Anti-Spam Legislation

Canadian anti-spam legislation (CASL) applies to you even before you enter Canada, as the laws apply even to organizations outside of Canada to messages that are received in Canada. Further, Canada's anti-spam legislation applies to all commercial electronic messages (and not only messages that are commonly thought of as spam) and is one of the toughest in the world, as such a carefully designed compliance program is required. Penalties can be as high as C$10 million and the regulator does enforce the law against legitimate businesses for their email and text messaging practices.

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MERGERS AND ACQUISITIONS

By Lara Nathans and Jessica Cytryn

MERGERS AND ACQUISITIONS

The consumer products industry has experienced significant M&A activity in recent years, including acquisitions by both financial investors and strategic purchasers.

The following sets out certain acquisition structures and key legal issues for mergers and acquisitions in Canada, as well as key issues for consumer products businesses completing these transactions to consider.

Acquisition of a Private Business

A private business in Canada is typically owned by fewer than 50 shareholders and its securities are not offered or sold to the public.

An acquisition may take the form of an acquisition of assets or of the shares of the target (other transaction structures, such as an amalgamation or plan of arrangement, may also be considered). Tax and regulatory considerations should be carefully assessed before determining the desired transaction structure.

An asset transaction typically allows the purchaser to include or exclude certain assets and liabilities from the transaction. A sale of substantially all of the assets of a corporation generally requires the approval of 66 ⅔% of its shareholders.

Pursuant to a share purchase, the buyer purchases the target corporation as a whole from its shareholders, including all of the assets and liabilities of the corporation.

It is not unusual that a business is sold through a sales process that is set up by financial advisors seeking the best offer for a business; however, transactions are also frequently negotiated directly between the parties.

Mergers and Acquisitions of Public Companies

Take-Over Bids

Harmonized provincial and territorial securities laws regulate the conduct of any take-over bid. A take-over bid is defined generally as an offer made to a person in a Canadian province or territory to acquire voting or equity securities of a class of securities, which, if accepted, would result

in the acquiror (together with persons acting jointly or in concert with the acquiror) owning 20% or more of the outstanding securities of that class of securities of an issuer in Canada. A take-over bid must offer identical consideration to all security holders, with no "collateral benefit" to any security holder permitted, and must be open for acceptance for 105 days, subject to abridgement by the target company to 35 days. A take-over bid is subject to a mandatory tender condition that a minimum of more than 50% of all outstanding target securities owned or held by persons other than the bidder and its joint actors be tendered and not withdrawn before the bidder can take up any securities under the take-over bid. The take-over bid must also be extended by the bidder for at least an additional 10 days after the bidder achieves the minimum tender condition and all other terms and conditions of the bid have been complied with or waived.

The bidder must provide security holders of the target company with a circular containing prescribed information about the offer, as well as prospectus-level disclosure about the purchaser (including pro forma financial statements) if its securities form part of the consideration being offered. The directors of the target company must also send a circular to security holders, which includes the board's recommendation as to whether the security holders should accept the offer or, if the board declines to make a recommendation, an explanation of why no recommendation has been made. Toronto Stock Exchange requirements will also apply, if applicable. For instance, if the bidder is a TSX-listed company and is issuing shares under the offer (whether structured as a take-over bid or as a "business combination" as discussed below) that would cause dilution to its shareholders of more than 25%, the TSX requires the bidder to seek approval from its own shareholders prior to completing such an offer. Certain take-over bids are exempt from compliance with the foregoing requirements.[1]

1. These include: transactions involving the acquisition of securities from not more than five security holders of the target company, provided that the price paid does not exceed 115% of the prevailing market price (or value of the securities if there is no published market); normal course purchases on an exchange at the market price not exceeding 5% of the issuer's outstanding securities in a 12-month period; the acquisition of securities for which there is no published market of a company that is not a reporting issuer and has fewer than 50 security holders exclusive of current or former employees; and foreign take-over offers where, inter alia, the number of securities held beneficially by Canadian security holders is reasonably believed to be less than 10% of the total outstanding securities subject to the bid, and Canadian security holders are entitled to participate on terms at least as favourable as other security holders.

Generally, under corporate statutes, where a bidder successfully acquires 90% of the voting shares of a target corporation (other than shares held by it or its affiliates prior to making the offer) pursuant to a public takeover bid made to all shareholders, the shares of those who did not tender their shares to the offer can be acquired at the same price as under the offer pursuant to a statutory compulsory acquisition procedure. Where this procedure is not available because the 90% threshold has not been reached, but at least 66 ⅔% of the outstanding shares have been acquired under the bid, the shares of the remaining shareholders who did not tender their shares to the offer may also be acquired by way of a business combination (see below) at the same price as under the offer.

Other Business Combinations

Acquisitions of Canadian public companies are frequently effected not by way of a take-over bid but through a statutory procedure, such as an amalgamation, consolidation or plan of arrangement, under the target company's corporate statute. These transactions require approval by the target company's shareholders at a meeting held for such a purpose. In such a case, a management information circular containing prescribed information will be prepared by the target company and mailed to its shareholders. The plan of arrangement provides maximum flexibility for various aspects of a transaction that might not be possible to effect under another statutory procedure. Plans of arrangement require both court approval (based on a finding that the arrangement is "fair and reasonable" to affected stakeholders) and shareholder approval (generally by a majority vote of 66 ⅔%).

Related-Party Transactions

The securities laws of certain Canadian provinces contain complex rules governing transactions between a public company and parties that are related to it (i.e., major shareholders, directors and officers) and that are of a certain threshold size. These rules are designed to prevent related parties from receiving a benefit from a public company to the detriment of its minority shareholders without their approval.

If the acquiror in the business combination is related to the target company or if a related party is receiving a "collateral benefit," certain special rules will generally apply, such as approval by a majority of minority shareholders (i.e., shareholders unrelated to the acquiror or any related

party who receives a collateral benefit), in addition to the shareholder approval required under applicable corporate law. Where the related party is acquiring the target company or is a party to a concurrent "connected transaction" of a certain threshold size, then a formal valuation of the target company shares, prepared by an independent valuator under the supervision of the target company's board or an independent committee of directors, may be required.

Key Considerations for Consumer Products Businesses

Key issues consumer products manufacturers and distributors should consider in acquiring new businesses include:

- Due diligence and representations and warranties regarding product compliance, permits and licences, labelling claims, consumer protection, data protection, privacy and anti-spam.
- Other key issues include brand protection and employment law issues, if applicable.
- Potential consents that may be required, such as customer consents, and the relationships with the third parties that require such consent.
- Any restrictive covenants in agreements entered into by the target or the vendor that will present an issue for the purchaser.
- The transfer of some permits and licences, even due to a change of control, may require approval of the applicable governmental authority. Certain types of permits and licences may not be transferred and a new permit or licence of such nature will need to be obtained.
- Acquisitions of Canadian businesses are subject to the *Competition Act* (Canada) and acquisitions by foreign acquirors are subject to the *Investment Canada Act*. See Competition Law for more information on the application of the *Competition Act*. Certain business (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) are considered "cultural businesses" under the *Investment Canada Act*, which impacts the relevant notice, review and approval thresholds under that Act.

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COMPETITION LAW

By Oliver Borgers and Dominic Thérien

COMPETITION LAW

The federal *Competition Act* (Act) contains both criminal and civil provisions aimed at preventing certain deceptive advertising practices (discussed in greater detail in Advertising, Marketing and Contests) and sets out prohibitions on how competitors may deal with each other, as well as how businesses treat their customers and suppliers. There are criminal sanctions against corporations and individuals involved in arrangements with competitors that fix prices, restrict supply or allocate customers or markets, or that are involved in bid-rigging, deceptive telemarketing, or wilful or reckless misleading advertising. The 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 anti-competitive impact. Reviewable practices include mergers and acquisitions, 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 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. The Competition Tribunal has the power to impose monetary penalties for abuse of dominant position and misleading advertising.

Criminal Offences

It is a crime to enter into an agreement or arrangement with a competitor or potential competitor to fix prices for the supply of a product, allocate customers or markets for the production or supply of a product, or restrict the production or supply of a product. It is also a crime to engage in bid-rigging in response to public or private requests for bids or tenders. These agreements between competitors are prohibited regardless of their effect on competition (and subject to very few defences). Deceptive telemarketing and wilful or reckless misleading advertising are also criminal offences.

Penalties for persons found guilty of such activities include imprisonment for up to 14 years and/or multi-million dollar fines. A violation of the

criminal provisions of the Act can also result in a civil suit for damages by persons who have suffered a loss as a result of such violation. Competition class actions involving allegations of price-fixing are frequent.

An area that can represent a significant risk relating to potential or perceived price-fixing behaviour is participation in a trade association, or similar organizations, where competitors get together. While trade associations are legitimate and serve a useful purpose, they are perhaps the most fertile ground for allegations of price-fixing conspiracies. Competition and antitrust authorities are very cognizant of trade associations and carefully monitor them. Businesses must ensure that appropriate safeguards are in place to avoid exposure to risks of breaching competition laws.

There is nothing wrong with tough competition, even from a dominant firm. However, when a firm's intention is to eliminate competition or prevent entry into or expansion in a market, there could be an abuse of dominant position.

Abuse of Dominant Position

Abusing a dominant position in a market constitutes a reviewable practice that could give rise to an order (including monetary penalties up to C$15 million for a first breach) by the Competition Tribunal if it results in a substantial lessening of competition. To start with, there must be a *dominant position or control of a market*. A monopoly is not a prerequisite, but there must be a relatively high market share and barriers to entry, such that the dominant firm or firms can, to a substantial degree, dictate market conditions and exclude competitors.

There must also be an abuse of such dominant position by a *practice of anti-competitive acts*. There is nothing wrong with market dominance as such; what causes a problem is the adoption by a dominant player of predatory or exclusionary business tactics. When a dominant firm attempts to exclude potential competitors or to eliminate existing competition, the Competition Tribunal can be called upon to intervene following an application by the Commissioner of Competition (there is no private right of action for abuse of dominance). It is not always easy to distinguish competitive from anti-competitive practices. There is nothing wrong with tough competition, even from a dominant firm. However, when a firm's intention is to eliminate competition or prevent entry into

or expansion in a market, there could be an abuse of dominant position. The Act includes a non-exhaustive list of anti-competitive acts. Notably, exclusive dealing, in the form of a company requiring its suppliers to deal only with the company itself and not with its competitors (e.g. exclusivity arrangements imposed on suppliers by their customers), is explicitly identified as an anti-competitive act. Other examples from the non-exhaustive list of anti-competitive acts include selling at prices lower than acquisition costs in order to discipline or eliminate a competitor, as well as a vertically integrated supplier charging more advantageous prices to its own retailing divisions. Predatory pricing is also a practice that could constitute an anti-competitive act.

Price Maintenance

Price maintenance is one of the main civil or reviewable practices under the Act with respect to relations between suppliers and customers. 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 (i.e. minimum advertised pricing (MAP) policies). It may also occur where a retailer, as a condition of doing business with a supplier, induces that supplier to refuse to supply another retailer because of that retailer's low-pricing policy.

Price maintenance practices are common in many markets and can be pro-competitive. however, in some circumstances, price maintenance may adversely affect competition.

The Competition Bureau recognizes that price maintenance practices are common in many markets and can be pro-competitive in many circumstances. Depending on the nature of the product, price maintenance conduct can enhance non-price dimensions of intra-brand competition among competing retailers of the same brand of product, and can correct "free-riding" among retailers. Price maintenance can also

stimulate inter-brand competition among competing brands of products by, for example, encouraging retailers to engage in marketing efforts for a particular product. However, in some circumstances, price maintenance may adversely affect competition. For example, price maintenance may be found to be anti-competitive (i.e. has an "adverse effect on competition") if: (i) price maintenance facilitates less vigorous price competition among suppliers; (ii) retailers compel a supplier to adopt price maintenance to facilitate less vigorous price competition among retailers or to exclude discount retailers, or (iii) 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.

Where the Competition Tribunal finds, on application by the Commissioner of Competition or private parties, that price maintenance conduct is likely to adversely affect competition, it can make a remedial order prohibiting the conduct or require the supplier or retailer (as the case may be) to do business with another person on usual trade terms. The Competition Tribunal cannot fine or make other monetary awards for unlawful price maintenance. However, where conduct attracts the Competition Bureau's attention, it is important to keep in mind that suppliers could be put to the time and expense of responding to the Competition Bureau's inquiry and/or application to the Competition Tribunal.

Refusal to Deal

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 is willing to deal with the company. For the Act to apply, the following requirements must be met:

- The would-be customer shows that its business has been substantially affected, or that she or he is unable to carry on business as a result of not being able to obtain adequate supplies of a product on usual trade terms.
- The inability to obtain adequate supplies must result from a lack of competition among suppliers.
- The would-be customer must be willing and able to meet the supplier's usual trade terms.
- The product must be in ample supply.

- The refusal to supply has an adverse effect on competition in a market, or is likely to do so.

If the Competition Tribunal finds, on application by the Commissioner of Competition or private parties, that the above elements are met, it may order the supplier to accept the customer who was refused supply.

Exclusive Dealing, Tied Selling and Market Restriction

Exclusive dealing is the practice, by a supplier, of requiring or inducing (by means of more favourable terms or conditions) a customer to deal only, or mostly, in products supplied by the supplier (or someone designated by the supplier).

Tied selling is the practice, by a supplier, as a condition of supplying a customer with a particular product, of requiring/inducing the customer to buy a second product, or of preventing the customer from using/distributing another product with the supplied product.

Market restriction is the practice, by a supplier, of requiring a customer to sell specified products only in a defined market or penalizing a customer for selling outside a defined market.

For the exclusive dealing, tied selling and market restriction sections of the Act to apply, the following requirements must be met:

- A major supplier engages in the conduct or the conduct is widespread.
- The conduct is a "practice." Different acts considered together, as well as repeated instances of one act, may constitute a "practice."
- For exclusive dealing or tied selling, the practice impedes a firm's entry/expansion in/into the market, impedes the introduction of/expansion of a product into/in a market or has any other exclusionary effect in a market.
- The practice has (or is likely to lead to) substantially lessened competition.

In recognition that exclusive dealing, tied selling and market restriction may be used for pro-competitive reasons, there are some exceptions in the *Competition Act*.

Although exclusive dealing, tied selling and market restriction are not

illegal and would only give rise to a prohibition order in circumstances where all the elements are met, it is prudent for suppliers to consider the competition law risks before engaging in such conduct given the possibility of a Competition Bureau inquiry and/or application to the Competition Tribunal by the Competition Bureau or private parties. Defending allegations of anti-competitive conduct, even if unfounded, is expensive and disruptive.

Merger Regulation

The Commissioner of Competition can review and challenge all mergers (meaning the acquisition of control over a significant interest in the whole or a part of a business), whether or not they are subject to pre-merger notification requirements under the Act (as described below), within one year of closing. If, following its inquiry, the Commissioner of Competition challenges a transaction before the Competition Tribunal on the ground that it is likely to prevent or lessen competition substantially, the merger is then subject to review by the Competition Tribunal. If an adverse finding is made, the Competition Tribunal may issue an order preventing or dissolving the merger in whole or in part. The Act includes a list of criteria to be considered by the Competition Tribunal when determining whether a merger substantially lessens competition. Such criteria are generally similar to those found in U.S. case law, although their application may be different. The Act also provides a uniquely Canadian "efficiencies defence" to anti-competitive mergers, which applies in cases where the efficiencies from the merger are likely to be greater than and offset the transaction's anti-competitive effects.

The Commissioner of Competition can review and challenge all mergers, whether or not they are notifiable, within one year of closing.

Certain types of transactions that exceed prescribed thresholds require pre-merger notification and the filing of information with the Competition Bureau. Generally, pre-notification of such transactions is required if both: (i) the parties to the transaction (together with their affiliates) have combined aggregate assets in Canada, or combined gross revenues from sales in, from and into Canada, exceeding C$400 million; and (ii) the aggregate assets in Canada of the target (or of the

assets in Canada that are the subject of the transaction) or the annual gross revenues from sales in or from Canada generated by those assets, exceeds C$93 million (for 2021; this threshold is adjusted annually). Equity investments are also notifiable if the financial thresholds are met and the applicable equity thresholds are exceeded (more than 20% in the public company context, more than 35% in the private or non-corporate entity context or more than 50% of a public corporation or private entity if a minority interest is already owned by purchaser). In general, and with certain exceptions, these asset and revenue values are calculated using book values based on the most recent audited financial statements for the relevant entity.

Where a proposed merger is subject to pre-merger notification under the Act, the merging parties are required to obtain clearance before completion of the transaction. Clearance can take from two weeks (for non-complex matters) to many months for complex mergers.

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BRANDING AND INTELLECTUAL PROPERTY PROTECTION

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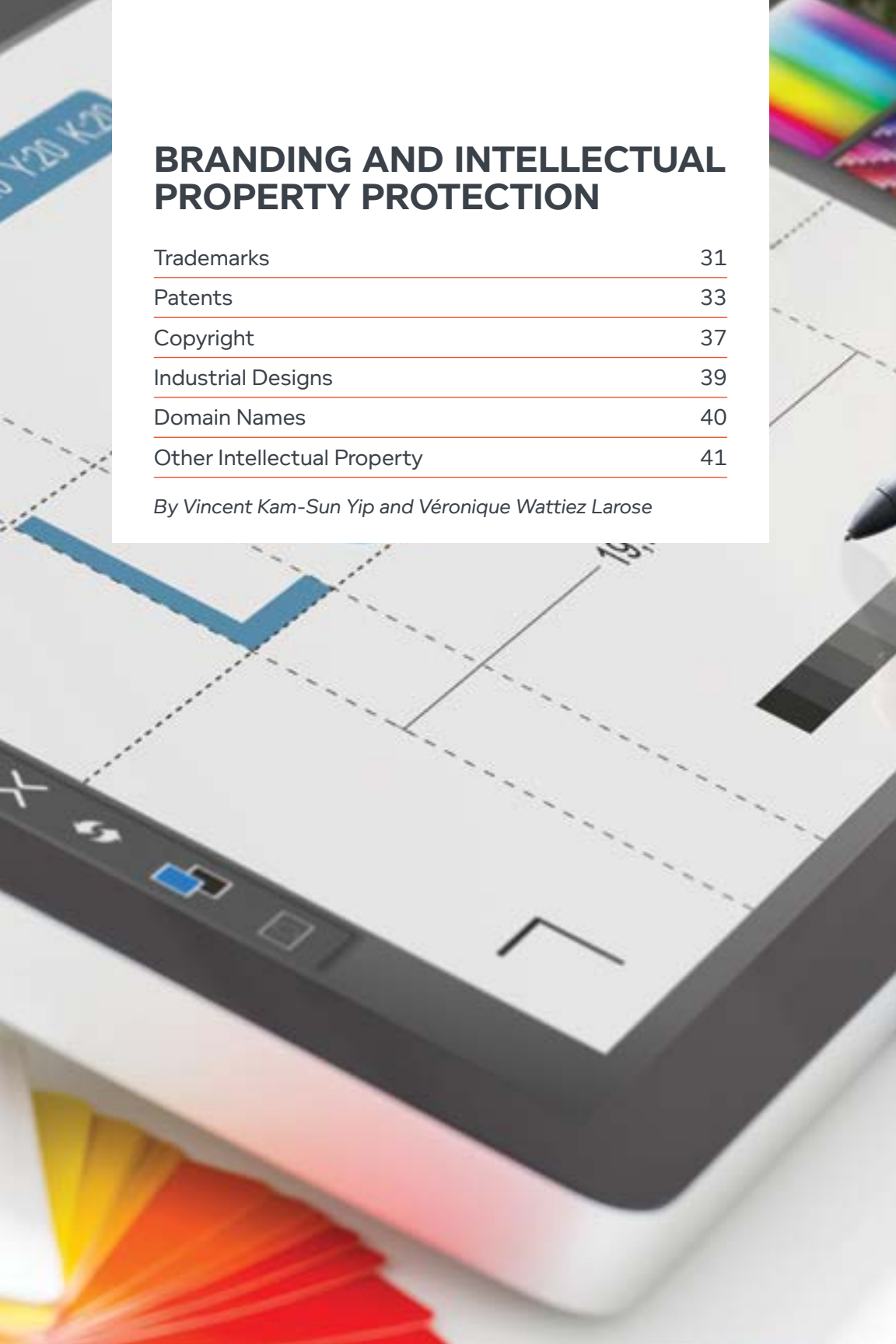

BRANDING AND INTELLECTUAL PROPERTY PROTECTION

Branding and intellectual property protection are key areas of concern for manufacturers and distributors of consumer products.

The federal laws on trademarks, patents, copyright, and industrial design provide the principal protection for intellectual property in Canada. Canada is a member of the World Trade Organization (WTO) agreement on *Trade-Related Aspects of Intellectual Property Rights* (TRIPS) and has agreed to the minimum standards of protection and reciprocal treatment provided in this treaty. Canada is also a party to the 2016 *Comprehensive Economic and Trade Agreement* with the European Union (CETA). In view of the United States' withdrawal from the Trans-Pacific Partnership, Canada subsequently entered into the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* in March 2018. On October 1, 2018, Canada entered into the *United States-Mexico-Canada Agreement* (USMCA), which requires certain changes to Canada's intellectual property laws. Each of trademarks, patents, copyright, industrial designs, and domain names are discussed in this chapter.

Trademarks

A federal trademark registration gives the registrant/owner the exclusive right to use the mark throughout Canada in association with the goods and services covered under the registration. Not only does a trademark registration facilitate enforcement of trademark rights, a trademark registration can also be a shield against infringement claims. Trademark registration is permissive and not mandatory in Canada. While a trademark endures for as long as the owner uses it to identify the owner's wares or services, registrations can be attacked on the basis of non-use or invalid registration. Canadian trademark law also protects unregistered trademarks if the trademark has been used in the marketplace.

In 2019, the *Trademarks Act* underwent significant amendments as a result of Canada acceding to the *Nice Agreement*, the *Madrid Protocol*, and the *Singapore Treaty* (the "Amendments").

The Amendments expanded trademark protection to signs, which includes a word, a personal name, a design, a letter, a numeral, a colour, a figurative element, a three-dimensional shape, a hologram, a moving

image, a mode of packaging goods, a sound, a scent, a taste, a texture and the positioning of a sign. The Amendments also remove the requirement for an applicant to have "used" a trademark in Canada or elsewhere before obtaining registration. Because of this removal, it is no longer necessary to specify a filing basis (i.e. "proposed use" versus "use") when filing a trademark application in Canada. The Amendments also implemented the Nice Classification system in respect of the description of goods and services in Canadian trademark applications and class fees, and the term of trademark registrations have shortened to 10 years from 15. Accordingly, for trademark registrations issued after June 17, 2019, the first term of a trademark registration is for 10 years and is renewable for successive 10-year terms on payment of a renewal fee. While a trademark endures for as long as the owner uses it to identify his or her wares or services, registrations can be attacked on the basis of non-use or invalid registration.

As a result of the implementation of the *Madrid Protocol* in Canada, international companies and Canadian companies can take advantage of the international trademark application through the Madrid system. For existing international trademark registrations, Canada can now be designated. Canadian applicants can now obtain an international registration based on its Canadian trademark application or registration and protection can be extended to one or more member jurisdictions through designation. Almost all major countries, including the U.S., Europe, Australia, China, and Japan are members of the Madrid system.

Without a registration, an owner's unregistered trademark rights are limited to the geographic area where the mark has been used. If the trademark owner intends to license the mark for use by others, even by a subsidiary company, proper control over the character or quality of the goods and services with which the licensee uses the licensed trademark is essential for proper protection. A failure to do so can be detrimental to the trademark owner's rights in the trademark.

Pursuant to the CETA, Canada has also amended the *Trademarks Act* that provides significant new "geographical indication" rights for agricultural foods and products. These rights may impede the use or registration of similarly named products in the Canadian marketplace.

Pursuant to the USMCA, Canada is required to provide a scheme for "pre-established damages" for trademark infringement, with the

damages being "in an amount sufficient to constitute a deterrent to future infringements and to compensate fully the right holder for the harm caused by the infringement." Canadian trademark law has never had pre-established damages; how the Canadian government proposes to do so remains to be seen.

Retailers should also be aware of the rules regarding trademark usage in the province of Québec. This topic is covered in more detail in Language.

Patents

Canada is a member of the Paris Convention for the Protection of Industrial Property (*Stockholm Act*), the *Patent Cooperation Treaty* (PCT) and the *Patent Law Treaty* (PLT).

The *Patent Act* provides that any new, useful and non-obvious invention that falls within the statutorily defined meaning of invention, namely, art, process, machine, manufacture or composition of matter (or any improvement thereof) is patentable. There is no requirement that the invention be made in Canada. Higher life forms per se are not patent eligible, but engineered genetic material and cell lines containing such genetic material may be patent eligible. Algorithms per se are not patent eligible, but computer program products or methods that manifest a discernible effect or change may be patent eligible.

In a landmark decision rendered in October 2010, the Federal Court overturned a rejection by the Commissioner of Patents and the Canadian Patent Appeal Board of a patent application by Amazon.com for its "one-click" online product-ordering technology. The Commissioner of Patents had held that Amazon's claimed invention was not directed toward patent eligible subject matter under the *Patent Act*. In overturning this finding, the Federal Court articulated that computer implemented innovations and business methods may be patent eligible in Canada as long as they meet the general test of what constitutes an "invention" under s. 2 of the *Patent Act*. In late 2011, the Federal Court of Appeal allowed the appeal of the Federal Court decision. The Court of Appeal dismissed the view that a business method should be patent eligible merely because it has a practical embodiment or a practical application. Instead, the Court of Appeal held that the proper approach to determining patentable subject matter is to first "purposively construe" the claims to identify the "essential elements" of the invention and then consider whether

the identified essential elements would be considered patent eligible subject matter. The Court of Appeal agreed with the Federal Court that patentable subject matter could be either something with a physical existence or something that manifests a discernible effect or change. The Court of Appeal remanded the construction of the patent claims back to the Commissioner of Patents, and the application was issued by the Patent Office shortly thereafter.

In 2020, the Federal Court confirmed in *Choueifaty v. Canada*, 2020 FC 837, that a recited claim element is essential as long as the claim element is not clearly intended by the patentee to be non-essential and the claim element could not be substituted without affecting the working of the invention in the eyes of the skilled addressee at the date of publication of the patent. In response to the *Choueifaty* decision, which clarified the correct method of purposively construing the claims to identify the essential elements thereof, the Patent Office published a Practice Notice to provide further guidance to applicants and its patent examiners during prosecution. The *Amazon* and *Choueifaty* decisions are thought by many to herald a new era of increasing acceptance for patents directed to computer-implemented inventions and business methods in Canada.

A patent decision of note in Canada included the judgment of the Supreme Court of Canada in *AstraZeneca Canada Inc. v. Apotex Inc.*, 2017 SCC 36, where our highest court unanimously rejected the so-called "promise doctrine" to assess the utility of a patent. The doctrine requires reviewing the patent as a whole to identify "promises" associated with the disclosed invention, and then determining whether the identified promises are met. Under this approach, a patent could have been held to lack utility even if it had met all but one of the identified promises. The Supreme Court of Canada found this doctrine to be "unsound" and "not good law" for determining whether the utility requirement under s. 2 of the *Patent Act* is met. Instead, the Supreme Court of Canada set out a two-step test that involves first identifying the subject matter of the invention as claimed in the patent, and then asking whether the subject matter is capable of a practical purpose. The Court reaffirmed that "a scintilla of utility will do to meet the utility requirement.

In July 2015, the Federal Court of Appeal held in *Apotex v. Merck*, 2015 FCA 171, that the availability of a non-infringing alternative is to be taken into account in the assessment of damages for infringement. The

decision involved Merck & Co.'s lovastatin prescription drug sold under the brand name MEVACOR®. Based on the facts at hand, however, the court found that the defendant would likely not have replaced its infringing sales with those of a non-infringing alternative, and the trial judge's award of damages to the scale of nearly C$120 million, plus pre-judgment and post-judgment interest, was thereby maintained. Leave to appeal to the Supreme Court of Canada was denied in April 2016.

In another recent patent infringement case between Dow Chemical and Nova Chemicals, the patentee elected to pursue the infringer's profits rather than to seek damages. In the *Dow Chemical Company v. Nova Chemicals Corporation*, 2020 FCA 141 decision, the Federal Court of Appeal upheld the Federal Court's earlier judgment awarding Dow Chemical the largest monetary award for patent infringement in Canadian history, at nearly C$645 million. This amount included the infringer's profits during the life of the patents, legal costs and pre-judgment interest. In determining the infringer's profits, the Federal Court of Appeal, for the first time, took into account the so-called "springboard" profits earned by the infringer during a period of time after the expiration date of the patent. The springboard profits accounted for the accelerated market entry enjoyed by the infringer by making the infringing product prior to the patent's expiration. The magnitude of the remedy awarded by the Federal Court of Appeal in *Dow Chemical v. Nova Chemical*, together with the foregoing decisions of the Supreme Court of Canada, may encourage more parties to file and enforce patent rights in Canada.

A Canadian patent grants its owner the right to exclude others in Canada from making, selling or using the invention during the term of the patent. The term of a Canadian patent is 20 years from the date of filing of the application, provided that all maintenance fees are paid in a timely manner. Since 1989, Canada has adopted a "first-to-file" system which grants patents to the first applicant to file an application for the invention. To be entitled to a patent in Canada, the applicant must file the application in Canada before the invention is made available to the public anywhere in the world. A grace period of one year is permitted for disclosures originating directly or indirectly from the inventor. It is generally recommended for applicants to file as early as possible in Canada or in a *Paris Convention* country, and to not rely on the grace period. Information that has been made available to the public prior to

the date of filing of an application is known as "prior art" and includes prior use of the invention and prior publications (e.g. publication of an earlier patent application). In Canada, patent applications are published 18 months after the earliest filing date claimed by the applicant.

Recent amendments to Canada's patent legislation herald some significant changes. One important change is the implementation of "prosecution history estoppel," or "file wrapper estoppel," in the context of patent litigation. Under this amendment, a patentee's representations regarding the interpretation of patent claims during prosecution are admissible to rebut assertions or representations about the construction of the patent claims made by the patentee during litigation. The newly enacted file wrapper estoppel provision was interpreted by the Federal Court of Appeal in the recent *Canmar Foods v. TA Foods, 2021 FCA 7*, decision where the Federal Court of Appeal held that the trial judge erred in making reference to the patentee's U.S. prosecution history in the circumstances, but refrained from deciding whether statements made during foreign prosecution could ever be considered for the purposes of claim construction.

Another noteworthy change that affects the scope of protection available to Canadian patents is the introduction of a new provision that codifies an "experimental use" exception to shield certain experimental uses of patented inventions from patent infringement liability. The provision also enables the establishment of regulations in respect of factors that should be considered in assessing whether a particular use can benefit from this exception. The scope of this exception remains to be seen, as no regulations have been introduced and the provision itself has not been considered judicially.

Pursuant to the CETA, the *Patent Act* has been amended to provide for the issuance of Certificates of Supplementary Protection. A Certificate of Supplementary Protection effectively extends the term of an eligible patent by up to two years to assist in compensating patentees for the effective loss of patent term as a result of pursuing regulatory approval for drugs in Canada. The CETA also introduced other changes to the *Patented Medicines (Notice of Compliance) Regulations*, which brought in significant changes to the pharmaceutical industry in Canada, including replacement of current Notice of Compliance summary proceedings with full actions that can result in final determinations of patent infringement and validity. The CETA implementations came into effect on September 21, 2017.

As part of the Canadian government's efforts toward ratification of the PLT, amendments to the *Patent Rules* came into force on October 30, 2019. One of the changes is the restoration of priority claims, allowing an applicant a two-month grace period to claim priority to an earlier filed application if the applicant unintentionally failed to meet the 12-month priority deadline. This change aligns Canadian practice with existing restoration of priority mechanisms available under the PCT. Filing requirements have also been relaxed under the amended *Patent Rules*. For example, an applicant can now obtain a filing date even if the filing fee is not paid on the date of filing. However, under the new regime, applicants will no longer be entitled to an extended 42-month national phase entry (i.e. standard 30-month deadline plus a 12-month extension with payment of a late fee) as of right. While a late national phase entry is still available, the applicant will have the onus to show that the failure to meet the set deadline was unintentional. Prosecution deadlines have also been shortened under the new *Patent Rules*. For example, the deadline to request examination of a patent application has been shortened from five years to four years from the filing date, and the standard deadline to respond to an Examiner's Report has been shortened from six months to four months from the date of the Report. Other changes include: a new procedure for reinstating abandoned applications, a new regime establishing deadlines for correcting certain clerical errors, and the introduction of a system of "third party rights" that allows third parties to practice a patented invention in certain circumstances if a Canadian patent or patent application is not in good standing.

Copyright

Canada has acceded to the *World Intellectual Property Organization* (WIPO) *Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT). Many of the substantive provisions in the WCT and WPPT, such as the establishment of a "making available" right and the implementation of technical protection measures, were implemented in a major revision to the *Copyright Act* that came into force in November 2012. The legislation also provides a secondary liability remedy against those who "enable" digital infringements, as well as a series of new exceptions to copyright protection, including in respect of "reproduction for private purposes," "timeshifting," "technological processes," "fair dealing for the purposes of education, parody or satire" and "user-generated content." The legislation also contains safe

harbours for internet intermediaries, including for hosts and internet location tool providers; however, providers should be aware these safe harbour provisions are subject to the "enablement" remedy and are also subject to a "notice and notice" regime requiring intermediaries to relay notices of claimed infringement to their customers and keep records of customers' identities.

Over recent years, there have been numerous important copyright decisions rendered by Canada's highest court. In mid-2012, the Supreme Court of Canada released five new copyright decisions. The most important themes emerging from these decisions include an acknowledgment of the concept of technological neutrality (the idea that digital and non-digital uses should receive comparable treatment under copyright law) and the continued treatment of copyright exceptions as "user rights." However, it should be noted that the decisions were made under the historical *Copyright Act*, and may not apply predictably to the new provisions passed in late 2012. In November 2012, the Supreme Court issued another important copyright decision in which it prohibited the creation of copyright-like rights by anybody other than Parliament, in this instance barring a broadcast regulator from imposing a "value for signal" levy on retransmitters of copyright programming. In late 2013, the Supreme Court issued another important decision establishing the test for when copyrights are infringed by way of imitation. The test imposes a qualitative and holistic assessment of the similarities between works, which can be enhanced in certain settings by expert evidence, including for music and software copyrights. Lastly, in 2015 the Supreme Court issued a decision further clarifying the doctrine of technological neutrality as a guiding principle in the interpretation of the *Copyright Act* and applying it to the valuation of a collective rights society royalty.

Canada is a party to the *Berne Convention* and the *Universal Copyright Convention*. Depending on the nature of the work, the owner of copyright in a work has the sole right to reproduce, perform, publish or communicate the work. The *Copyright Act* provides that copyright arises automatically in all original literary, artistic, dramatic or musical works. The *Copyright Act* provides that registration is permissive rather than mandatory. However, registration does raise certain presumptions in favour of the registered owner that are useful in the context of litigation. In general, copyright lasts for the life of the author plus 50 years. Since 1993, computer programs have been expressly protected, under statute, as literary works.

Recent amendments to the *Copyright Act*, *Trademarks Act* and *Customs Act* have created significant anti-counterfeiting remedies tying to infringements of copyright or trademarks. These amendments permit copyright holders and owners of registered trademarks to submit a "request for assistance" to the Canada Border Services Agency. Through this system, rights holders may request that border officers detain commercial shipments suspected of containing counterfeit or pirated goods, thus enabling the rights holder to begin civil proceedings in court.

The USMCA requires the term of copyright protection to extend from life of the author plus 50 years to life of the author plus 70 years. Canada has yet to implement this requirement.

Industrial Designs

The *Industrial Design Act* protects the original features of shape, configuration, pattern, or ornament, or any combinations of those features, that, in a finished article, appeal to, and are judged solely, by the eye. Many products sold by retailers can be protected by industrial design protection, including shoes, smartphones, bottles, clothing, vehicles, fabrics, vehicle components, and toys. Design features that are functional in nature do not qualify for industrial design protection. An industrial design registration grants the owner the exclusive right to make, import, or sell any article in respect of which the design is registered and the design has been applied.

To obtain an industrial design registration, the industrial design must be original to the author, and the design is not identical or does not closely resemble any other design that has already been registered. A Canadian industrial design application can be filed within a year of the first publication of the industrial design anywhere in the world. The applicant for the industrial design registration has to make a declaration that, to the applicant's knowledge, the design was not in use by any other person at the time of adoption of the design.

The term of protection of a Canadian industrial design registration is 15 years from the filing date (or 10 years from registration). For companies selling products with a distinctive design, industrial design registration can provide the initial protection for the design, and, once the design has become distinctive, the company can apply to obtain a trademark registration for the design (which would provide indefinite protection if there is continued use of the design).

On November 5, 2018, the *Industrial Design Act* was amended as part of Canada's adoption of the Hague System. The Hague System allows an industrial design applicant to obtain registrations in multiple countries from a single international application filed with the World Intellectual Property Office (WIPO). An international application filed with WIPO is examined for formalities during the international stage; if compliant, the international application proceeds to international registration. The international registration then enters the Canadian national stage as a Hague application and is then examined substantively under the *Canadian Industrial Design Act*. If allowed, the Hague application becomes a Hague registration in Canada. The Hague System benefits international design applicants, as the cost for obtaining Canadian industrial design registration is lower (since a Hague application designating Canada automatically enters national stage in Canada without further action or payment of fees to the Canadian Industrial Design office). For domestic applicants, the Hague System makes it easier and cheaper to obtain industrial design protection outside of Canada.

Domain Names

The internet's domain name system and the internet-based practice of meta-tagging present the intellectual property system and especially trademark law with some interesting challenges. The conflict between the registered trademark system and a domain names registry is the result of domain name registrations following a "first-come, first-served" policy, without an initial, independent review of whether the name being registered is another person's registered trademark. At the same time, a domain name in some respects is more powerful than a trademark, as there can only be one company name registered for each top-level domain.

To obtain a Canadian ".ca" registration, a would-be registrant must meet certain Canadian-presence requirements. These present certain challenges for foreign entities that do not wish to incorporate in Canada.

While the ownership of a registered Canadian trademark suffices to meet the requirement, the owner may reserve only those domain names that consist of or include the exact word component of that registered trademark.

In Canada, some trademark owners have successfully used the doctrine of "passing off " in combating so-called "cybersquatters." In other cases, they have argued trademark infringement under the *Trademarks Act*.

To gain control of a domain name, it might also be possible to argue "depreciation of goodwill" under s. 22 of the *Trademarks Act* as well as misappropriation of personality rights.

The Canadian Internet Registration Authority (CIRA) Domain Name Dispute Resolution Policy (CDRP) is an online domain name dispute resolution process for the ".ca" domain name community. One- or three-member arbitration panels consider written arguments and render decisions on an expedited basis. Among other features, the CDRP permits a panel to award costs of up to C$5,000 against a complainant found guilty of reverse domain name hijacking.

Other Intellectual Property

Patents, copyrights, trademarks, industrial design, and domain names represent some of the most common types of intellectual property. However, in today's economy, intellectual property protection takes many additional forms. The common law protects against the misappropriation of trade secrets, personality rights and passing off, among other things. It also protects privacy and personality rights to some degree. A broad range of particular rights and obligations also arise under more specific statutes such as the *Integrated Circuit Topography Act*, the *Personal Information Protection and Electronic Documents Act*, the *Plant Breeders' Rights Act, the Competition Act*, the *Public Servants Inventions Act* and the *Status of the Artist Act*.

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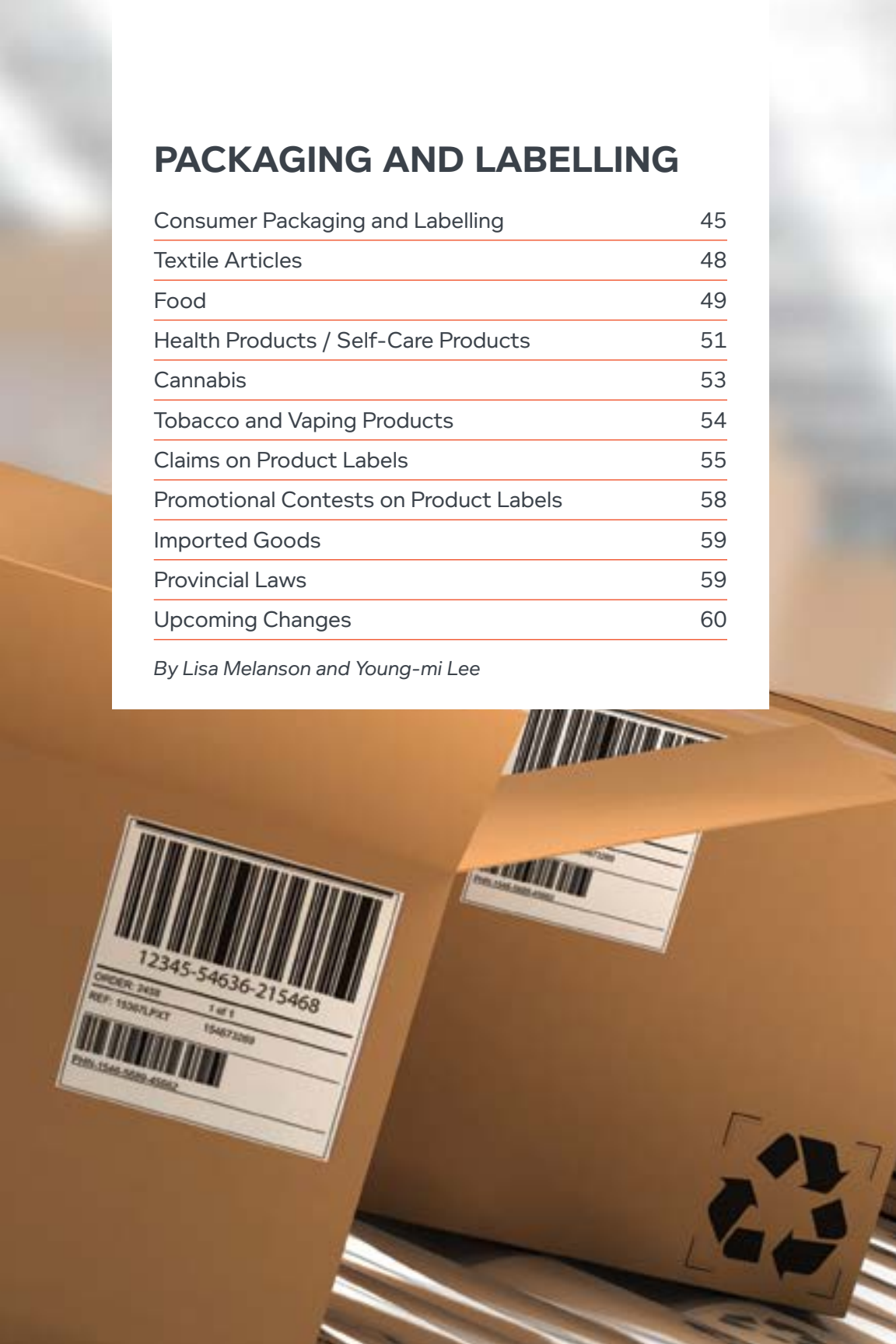
PACKAGING AND LABELLING

By Lisa Melanson and Young-mi Lee



PACKAGING AND LABELLING

Products sold in Canada are subject to a wide range of packaging and labelling requirements that serve both consumer-protection and product-transparency functions. Consistent labelling permits consumers quickly and easily to confirm product attributes and details that ultimately factor into purchasing decisions. Manufacturers and distributors must pay close attention to product labels and mandatory disclosures, as a non-compliant label creates a risk that a product will have to be pulled from the shelves and relabelled, or potentially even recalled – a time-consuming and expensive process. Of greater concern, an organization with defective product labelling could face the more serious risk of a fine or a product-liability lawsuit. For further details on post-marketing compliance issues, see Product Liability and Regulatory Compliance.

The present chapter provides a brief overview of the packaging and labelling requirements for a variety of prepackaged consumer products, and considers the popular types of claims and statements that are commonly included on product labels.

Consumer Packaging and Labelling

The *Competition Act* is the principal statute that governs advertising in Canada. This legislation creates a general prohibition against false or misleading language and statements on product packaging and labels. The *Canada Consumer Product Safety Act* (CCPSA), *Consumer Packaging and Labelling Act*, *Textile Labelling Act*, *Food and Drugs Act*, and *Safe Food for Canadians Act* all provide similar prohibitions against false or misleading statements on product packages and labels.

In general, the packaging and labelling requirements for prepackaged consumer products are regulated by the following:

- *Consumer Packaging and Labelling Act* (CPLA); and
- *Consumer Packaging and Labelling Regulations* (CPLR).

Health Canada and its food-safety branch, the Canadian Food Inspection Agency (CFIA), are responsible for administering and enforcing regulations relating to food[1] and health products. With respect to other consumer

1. In Canada's regulatory framework, food encompasses beverages, including alcoholic beverages.

products, the Canadian Competition Bureau has responsibility for administering and enforcing the CPLA and CPLR. Notably, food, drugs, medical devices, and textile products are exempt from the labelling requirements of the CPLA and CPLR. Where the CPLA and CPLR overlap with other product-specific regulations, as can frequently happen, the consumer product in question must comply with *all* of the applicable packaging and labelling requirements imposed under all governing legislation.

The CPLA and CPLR require products to include three basic labelling elements:

- The product's "identity," as represented by its common or generic name, must be stated on the principal display panel[2] in both English and French.
- The "net quantity" declaration must be expressed in metric units using metric symbols (g, kg, cm, etc.) on the principal display panel in both English and French. A valid metric symbol is deemed to be bilingual.
- The dealer identification, represented by the name and mailing address of the place of business of the person (individual, corporation, business, head office, distributor, importer) by or for whom the product was manufactured or produced, is required and must be shown in either English or French. If the address of a Canadian dealer is shown on the package of an imported product, it must be preceded by the words "imported by" ("*importé par*") or "imported for" ("*importé pour*") in both English and French or be immediately adjacent to the geographic origin of the product. This information can be included anywhere on the package except the bottom.[3]

The foregoing labelling elements are subject to minimum type-size requirements, which vary depending on the size of the principal display panel.

Certain regulated consumer products have additional labelling requirements under product-specific legislation. The following provides a brief review of the additional requirements for some common classes of products.

2. The principal display panel is the part of a label that is applied to all or part of a side or surface of a container that is displayed or visible under normal or customary conditions of sale or use. See s. 2 of the CPLR and s. B.01.001 of the *Food and Drug Regulations* for more details.
3. The bottom is considered to be that part of a container which may reasonably be expected to be the surface on which the container rests when displayed for purchase. If a container is labelled or printed in such a way that it may reasonably rest on any of the sides, then there is no bottom.

Toys and Baby Products

In accordance with the *Toys Regulations* under the CCPSA, certain safety warnings may be necessary for toys; where required, these must be shown in both English and French. For example, if a flexible film bag used to package a toy does not meet prescribed dimensional parameters, a suffocation hazard warning must be included on the bag. The *Toys Regulations* also include provisions specific to magnetic toys, with requirements for warnings on the containers and instructions of kits containing magnetic components. Toys that include chemicals may require specific labelling per the *Science Education Sets Regulations* of the CCPSA. With respect to electric toys, labelling must meet standards set by the Canadian Standards Association (CSA).

Many types of baby products are also governed by product-specific regulations under the CCPSA. Regulations with packaging and labelling requirements apply to carriages and strollers, playpens, cribs, cradles, and bassinets. Certain types of children's clothing may also be subject to additional regulations under the CCPSA (addressed in further detail below).

Electronics

Several legislative and regulatory standards apply to the labelling of electronics. Examples include the *Radiation Emitting Devices Act* (REDA) and *Radiation Emitting Devices Regulations* (REDR), the *Radiocommunication Act* (RA) and *Radiocommunication Regulations* (RR), the *Energy Efficiency Act* (EEA) and *Energy Efficiency Regulations* (EER), and the CSA codes and standards. These standards are often overseen by regulatory bodies involved in the administration and enforcement of mandatory certifications or labels that must be shown on product packaging.

For example, Natural Resources Canada requires, under the EEA and EER, that the EnerGuide label be present on appliances such as clothes dryers and washers, dishwashers, refrigerators, freezers, cooktops, ovens, and room air conditioners. Health Canada has the general responsibility for developing labelling rules, guidance, and safety codes under the REDA, REDR, and CCPSA with respect to radiation-emitting devices classed as consumer products (e.g., microwave ovens and laser pointers).

Radio apparatus, interference-causing equipment, and radio-sensitive equipment are regulated by the RA and RR. The RA and RR require labelling on radio products to show that government standards are

met, and provide for technical acceptance certificates in certain cases. The federal government's Spectrum Management program has overall responsibility for enforcing the RA and RR.

The federal radio standards include Radio Standards Procedure RSP-100, *Certification of Radio Apparatus*, which governs certification of radio and broadcasting equipment in Canada. RSP-100 covers two categories of devices that include consumer products:

- Category I equipment, which requires certification, includes, but is not limited to, the following consumer products: cellular phones, cordless phones, remote car garage door openers, and wireless routers.
- Category II equipment is certification-exempt and includes, but is not limited to, the following consumer products: alarm keypads, intelligent battery chargers, satellite TV receivers, VCRs, DVD players, and computers. Category II equipment must still comply with all RSP standards.

The packaging of electronic products may also be required to include certain notices to the user and/or statements in both English and French. Devices with integrated display screens may present the requisite label information electronically in an e-label rather than a physical label or nameplate.

Jewelry

If a dealer chooses to mark jewelry products with representations relating to the quality of precious metals, such as silver, gold, platinum, and palladium, the *Precious Metals Marking Act* and *Precious Metals Marking Regulations* will govern. The quality mark must be true and accurate and conform with the standards and tolerances provided in the regulations, and must be supported by a Canadian trademark application or registration. It is important to note that the permissible weight depictions and purity tolerances under the Canadian regulatory regime differ in some important respects from those in force in other jurisdictions, including the United States.

Textile Articles

Apparel and other textile articles are notably excluded from the general CPLA and CPLR requirements, and instead are governed by the following legislation:

- *Textile Labelling Act* (TLA); and
- *Textile Labelling and Advertising Regulations* (TLAR).

The Competition Bureau is responsible for administering and enforcing the regulations under the TLA. Footwear and certain accessories, such as handbags, are exempt from the TLA and TLAR.

Under the TLA and TLAR, consumer textile articles must be labelled with either the full name and address of the dealer or a CA Identification Number. The CA Identification Number is registered with the Competition Bureau for the Canadian dealer's exclusive use on product labels. The labels of textile articles must also disclose the fibre content of textiles. The generic name of each fibre present in an amount of 5% or more must be stated, typically listed in order of predominance, along with the percentage of the total fibre mass of the article. The information relating to fibre content must be provided in both English and French unless the product is sold in a geographic region where only one official language is used in consumer transactions.

Additional labelling requirements apply to children's sleepwear under the Children's Sleepwear Regulations of the CCPSA. For example, where a sleeping garment for children is treated with a flame retardant, the label must include the English words "flame retardant" and the French word "ignifugeant." Furthermore, the label must provide instructions in English and French for the care of the product, particularly cleaning procedures, to ensure that the product is not exposed to agents or treatments that could reduce the flame resistance of the product.

Food

The labelling of prepackaged food products for human consumption is governed by the *Food and Drugs Act* (FDA) and *Food and Drug Regulations* (FDR) and/or the *Safe Food for Canadians Act* (SFCA) and *Safe Food for Canadians Regulations* (SFCR). These products are now exempt from the CPLA and CPLR, as their food-labelling provisions have been consolidated under the new Safe Food for Canadians legislation.

Health Canada and the CFIA share responsibility for food labelling. Health Canada administers regulations and standards relating to the health, safety, and nutritional quality of food under the FDA (*e.g.*, nutrition facts table, claims about nutrients, presence of food allergens, safety-related expiration dates). The CFIA administers regulations under both the FDA and the SFCA relating to misrepresentation, labelling, advertising, and standards of identity of food products. The CFIA alone is responsible for enforcing all regulations governing food labelling.

In accordance with the FDR and SFCR, a prepackaged food product for human consumption[4] generally must include the following core elements in both English and French:[5] (i) the common name of the product prescribed under the FDR or other appropriate name; (ii) a net quantity declaration; (iii) the dealer's name and address; (iv) subject to limited exemptions, a list of ingredients including a declaration concerning the presence of food allergens or gluten; (v) a nutrition facts table; and (vi) a "best before" date and storage instructions. The requirement for an allergen declaration only applies to food allergens added to prepackaged food — not to allergens that result from cross-contamination. With respect to incidental allergen contamination, precautionary declarations, like the familiar "may contain peanuts" warning, are not mandated by any legislation and are considered voluntary. However, manufacturers and distributors should consider their common law "duty to warn" and the risk of liability when deciding whether or not to include voluntary warnings.

The SFCR also provides commodity-specific labelling requirements for many common food products (*e.g.*, dairy, fish, meat, fresh fruits and vegetables), prepackaged or otherwise. These requirements were consolidated into the SFCR from 14 discrete sets of food regulations that were repealed when the Safe Food for Canadians regime took effect.

Significant FDR amendments, imposing new requirements for nutrition labelling, ingredient lists, and food colouring, took effect on December 14, 2016. The food industry has been given a five-year transition period to meet most of these new requirements, other than those relating to food colour. When the five-year transition period ends on December 14, 2021, the CFIA will focus its efforts in the following year on educating the public and promoting compliance with the new requirements, in effect instituting a grace period for industry and holding enforcement activities in abeyance until December 2022.[6]

4. Food products intended for consumption by animals are not governed by the FDA and FDR. Labelling of feeds for livestock is regulated by the CFIA under the *Feeds Act* and *Feeds Regulations*, while labelling of foods for pet animals is regulated by the Competition Bureau under the CPLA and CPLR.
5. The dealer's name and address may be in either English or French.
6. Given the challenges imposed by COVID-19, the CFIA decided not to start enforcing the new regulations at the end of the five-year transition period. Starting December 15, 2022, though, the CFIA will begin verifying compliance with the new regulations. Even then, the CFIA may use its discretion not to enforce compliance in circumstances where a non-compliant company has a plan showing how it intends to meet the new requirements at the earliest possible opportunity, provided compliance will be achieved no later than December 14, 2023.

The amendments to the FDR are intended to introduce more uniform standards for food labelling by improving the requisite nutrition facts table and listing of ingredients. In the nutrition facts table, serving sizes must now be based on regulated reference amounts, the % (percentage) daily values have been updated to reflect new scientific data, and the list of nutrients now includes potassium but not vitamin A and vitamin C. With respect to the listing of ingredients, sugar-based ingredients are now grouped in brackets, food colours are identified by their individual common names, and bullets or commas are now used to separate ingredients.

Finally, it is noted that the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* were amended in April 2019 to impose penalties for non-compliance with food labelling requirements. These penalties serve to enhance CFIA's enforcement tool box in instances of labelling non-compliance.

Health Products / Self-Care Products

The labelling of prepackaged pharmaceutical products, medical devices, cosmetics, and natural health products is governed by the *Food and Drugs Act* and the following regulations thereunder:

- *Food and Drug Regulations*
- *Medical Devices Regulations*
- *Cosmetic Regulations*
- *Natural Health Products Regulations* (NHPR).

Health Canada is responsible for administering and enforcing these regulations.

Pursuant to the FDA, both therapeutic products (pharmaceutical products) and natural health products are regulated as drugs. These products are exempt from all requirements of the CPLA and CPLR, as are medical devices. Cosmetics remain subject to the CPLA and CPLR.

The specific labelling requirements applicable to pharmaceutical products and medical devices are complex and beyond the scope of this chapter. Cosmetics and natural health products are considered below.

Cosmetics

The FDA defines "cosmetic" to include "any substance or mixture of substances manufactured, sold or represented for use in cleansing,

improving or altering the complexion, skin, hair or teeth…[including] deodorants and perfumes." Labelling of cosmetics is governed by the FDA, *Cosmetic Regulations*, CPLA, and CPLR, as mentioned above, and also by the CCPSA and the *Consumer Chemicals and Containers Regulations* (CCCR). The Cosmetic Regulations prescribe the symbols and warning statements that are to be used on pressurized containers, as defined in the CCCR.

According to regulatory guidelines, some cosmetics require both an inner label and an outer label. For example, a bottle packaged in a box will have two labels: the box bears the outer label and the bottle bears the inner label. The outer label of a cosmetic must include the product identity, the net quantity, the dealer's name and address, any avoidable hazards/cautions (*e.g.*, "do not swallow"), and the ingredients.[7] All of this information, except the dealer information, must appear in both English and French. The inner label is only required to include the product identity, dealer information, and avoidable hazards/cautions.

Natural Health Products

Natural health products (NHPs) include vitamins and minerals, herbal remedies, homeopathic medicines, traditional medicines (such as traditional Chinese medicines), probiotics, and other products, like amino acids and essential fatty acids, intended for human use. The NHP product category is quite unique, and can present an unfamiliar and novel regulatory regime to organizations based in other jurisdictions. NHPs must be safe to use as over-the-counter products, since prescriptions are not required for their sale. The labelling requirements of NHPs are set out in the NHPR.[8]

Under the NHPR, a manufacturer or distributor must submit a product licence application to the Natural Health Products Directorate, and obtain a product licence, before selling a natural health product to retailers in Canada. The packaging and labelling proposed for the NHP is reviewed through this process.

NHPs require outer and inner labels. The principal display panel of both

7. Each ingredient of the cosmetic must be listed using the name assigned by the *International Cosmetic Ingredient Dictionary and Handbook*. This is commonly referred to as the "INCI name" of the ingredient.
8. Similar products intended for animal use, so-called veterinary health products (VHPs), are not subject to the NHPR and must follow the labelling rules of the FDR. VHP labels must also include the statement "Veterinary Health Product" and any additional mandatory statements specified in List C of the FDR.

the inner and the outer label must bear the following: (i) a brand name; (ii) the product identification number assigned by Health Canada; (iii) the dosage form; (iv) the words "sterile" and "*stérile*" (where applicable); and (v) the net amount in the immediate container, represented by weight, measure, or number. In addition, the outer label must list all non-medicinal ingredients by common name, under the heading "non-medicinal ingredients." Other information, such as the name and address of the product licence holder, the common name of each medicinal ingredient, the recommended use or purpose, the recommended dose, the recommended storage conditions, and the expiry date, can be listed on any panel.

Some NHP containers may be too small to comply with the inner label requirements, and may perhaps qualify under the NHPR as a "small package." Small packages are permitted to include less information as long as they meet the special requirements prescribed by the NHPR.

Cannabis

The *Cannabis Act* (CA) came into force on October 17, 2018, along with two sets of supporting regulations: the *Cannabis Regulations* and the *Industrial Hemp Regulations*. The cannabis legislation categorizes cannabis and related products according to use: (i) cannabis for non-medical purposes; (ii) cannabis for medical purposes; and (iii) health products containing cannabis or for use with cannabis.

In an effort to control the production, distribution, sale, and possession of cannabis across Canada, the CA, among other things, prohibits any promotion, packaging, and labelling of cannabis that could appeal to young people or encourage consumption, while ensuring that consumers have sufficient information to make informed decisions. To implement the CA, the *Cannabis Regulations* require plain packaging for cannabis products. In particular, the regulations set out strict requirements for logos, colours, and branding, and require that cannabis products be labelled with mandatory health warnings, a standardized cannabis symbol, THC and CBD content, and specific product information.

The packaging and labelling of prescription drugs containing cannabis are regulated under the existing requirements of the FDR, and are not subject to the corresponding standards in the *Cannabis Regulations*. However, the packaging and labelling requirements of the CA (*e.g.*, packages and

labels cannot be appealing to young persons, packaging must be child-resistant, etc.) still apply to cannabis-containing prescription drugs.

The sale of three new classes of cannabis products – cannabis edibles, cannabis extracts, and cannabis topicals – became legal in Canada on October 17, 2019 following amendments to the CA. Corresponding amendments to the *Cannabis Regulations* account for the new cannabis classes, which are subject to the core plain packaging and labelling requirements that were applicable to the previous classes of cannabis products. The 2019 amendments to the CA removed cannabis oil as a separate class of cannabis; cannabis oils can still be produced and sold, but are now regulated within the broader new class of cannabis extracts. With this change, the packaging and labelling requirements for cannabis oil, including the THC limit, became aligned with those for other extract products.

The amended *Cannabis Regulations* also include provisions specific to the new cannabis classes which are intended to address such risks as accidental consumption, overconsumption, and food-borne illnesses. Under the new provisions, product claims for health benefits (*e.g.*, "hemp fibre helps lower cholesterol"), energy value, nutrient content (*e.g.*, "high source of fibre"), and cosmetic benefits (*e.g.*, "reduces the appearance of wrinkles") are prohibited. Provisions governing cannabis edibles require the packaging and labelling to show a list of ingredients, the common name of the edible product, identification of certain allergens, a best-before date where applicable, and a cannabis-specific nutrition facts table.

Tobacco and Vaping Products

The *Tobacco and Vaping Products Act* (TVPA) regulates the manufacture, sale, labelling, and promotion of tobacco products and vaping products. The TVPA creates a new legal framework designed to protect youth from nicotine addiction and tobacco use, while permitting adults to access vaping products as less harmful alternatives to smoking.

The *Tobacco Products Regulations (Plain and Standardized Appearance)* came into force on November 9, 2019. These regulations include measures that standardize the appearance of, and information on, tobacco products and their packaging. Brand colours, logos, and other images are no longer permitted; rather, a plain brown colour must be used for product packaging.

Claims on Product Labels

Both the criminal and the civil regimes of the *Competition Act* prohibit any representations, in any form, that are false or misleading in a material respect. A representation is "material" if it could influence a consumer to buy or use the product or service advertised. To determine whether a representation is false or misleading, the courts consider the "general impression" it conveys, as well as its literal meaning. Even if a representation is technically accurate, it may give a general impression that is false or misleading in a material respect. The focus is on the message as received or perceived by a consumer.

All claims made on product labels must be truthful, non-misleading, and adequately substantiated. Because label claims are considered both at the time of sale and throughout the life of a product, they are often subject to greater scrutiny than claims made in other forms of media.

Claims on labels of non-food products are generally regulated by the Competition Bureau. For food products, label claims are subject to specific regulatory requirements overseen by the CFIA. Manufacturers and distributors should be highly critical when considering product claims, as even the most general statement may need to be substantiated in a very particular manner. For example, in order to use the seemingly general statement "high in fibre" on the label of a frozen vegetable product, there must be at least four grams of fibre per serving, according to the FDR. Similar restrictions exist for claims concerning the composition and quality of a product, the method of production, and the use of pictures on product labels.

Several popular claims for consumer products are considered in more detail below in light of the current policies of the Competition Bureau and the CFIA.

Environmentally Friendly and Green

According to the Competition Bureau's guidelines, environmental claims that are vague, non-specific, incomplete, or irrelevant, and cannot be supported through verifiable test methods, may be considered false or misleading and should be avoided. Exemplary vague claims include "environmentally friendly," "green," and "sustainable."

When an environmental claim is made on a product label, it must be

specific as to the environmental aspect or environmental improvement that is claimed, and must be substantiated and verified. By way of example, a statement that "this product uses 20% less electricity in normal use than our previous model" is recommended over a statement that "this new and improved product is better for the environment" or "this product uses green electricity." The Competition Bureau is generally skeptical toward claims of sustainability, taking the position that few products have been subject to environmental impact assessments of sufficient duration to permit an accurate determination of sustainability.

Free From

Another type of environmental claim is the "[certain substance] free" claim. This type of claim is only permissible when the amount of the specified substance is no more than that which would be found as an acknowledged trace contaminant or background level.

A claim of "… free" or "free from…" must not be made based on the absence of an ingredient that is never in a product category or which is only ever present at a background level. For instance, "pesticide free" on the label of an organic product is not permissible because, by definition, pesticides cannot be used in organic products. While such a claim may be literally true, the general impression that it conveys could be misleading by implying that other similar organic products do include pesticides.

Pure and 100% Pure

Consumers expect a food described as "pure" or "100% pure" to be uncontaminated and unadulterated, and to contain only substances or ingredients that are understood to be part of the food. Accordingly, the term "pure" should not be used on the label of a food product that is a compound, mixture, imitation, or substitute. Consumers do not expect corn oil to contain any substance other than corn oil, so a claim to "100% pure corn oil," for example, is considered misleading.

Natural

A "natural" claim can be included on the label of a food product if its ingredients are derived from natural sources. Foods cannot be considered natural unless they meet specific criteria relating to processing and addition/removal of ingredients. The CFIA's guidelines indicate that a food can only be represented as natural if it is still in its original form, was not processed significantly, and does not contain an added vitamin, nutrient, artificial flavour, or food additive.

Organic

Organic claims on any agricultural products (including food for human consumption, livestock feed, and seeds) are regulated by part 13 of the SFCR. An organic claim is not permitted on a food product label unless the product has been certified in accordance with the SFCR and the label complies with SFCR requirements.

Only products with organic content of 95% or more may be labelled or advertised as "organic" or bear the Canada Organic logo. Products with 70% or more organic content are eligible for the organic-ingredients claim by specifying the percentage of organic ingredients (*e.g.*, "x% organic ingredients"). However, such products cannot carry the Canada Organic logo or an organic claim unless their organic content is 95% or higher. Products with less than 70% organic content are ineligible for an organic-ingredients claim, and can only identify which ingredients are organic in the ingredients list.

Local

The CFIA has recognized the need to clarify the meaning of "local" or "locally grown" when used on food product labels. As part of its initiative to modernize food labelling, the CFIA has undertaken to review food labelling regulations, guidelines, and policies relating to claims that use the term "local" – although the timeline for this review is unclear. In the meantime, the CFIA has adopted an interim policy, which defines "local" as: (i) food produced in the province or territory in which it is sold; or (ii) food sold across provincial borders within 50 km of the originating province or territory. Since the term "local" on packaging and labelling is still subject to FDA and SFCA prohibitions relating to false and misleading claims, it is recommended to add a qualifier, such as the name of a city, to provide consumers with additional information.

Product of Canada and Made in Canada[9]

Both the Competition Bureau and the CFIA distinguish the claims "Product of Canada" and "Made in Canada" in a similar manner. The Competition Bureau's approach reflects the fact that the *Competition Act*, the CPLA, and the TLA all prohibit false or misleading representations. In accordance

9. The CFIA is currently in the process of amending its guidelines for "Product of Canada" and "Made in Canada" food labelling claims. It is expected that the Competition Bureau will amend its policy accordingly once the CFIA has finalized its guidelines.

with this approach, a "Product of Canada" representation will usually be appropriate if: (i) the last substantial transformation of the good occurred in Canada; and (ii) all or virtually all (at least 98%) of the total direct costs of producing or manufacturing the good were incurred in Canada. A "Made in Canada" representation will usually be appropriate if: (i) the last substantial transformation of the good occurred in Canada; (ii) at least 51% of the total direct costs of producing or manufacturing the good were incurred in Canada; and (iii) the "Made in Canada" representation is accompanied by an appropriate qualifying statement, such as "Made in Canada with imported parts" or "Made in Canada with domestic and imported parts." The qualifier can also include more specific information, such as "Made in Canada with 60% Canadian content and 40% imported content."

The CFIA's current guidelines state that a prepackaged food product can use the claim "Product of Canada" when all or virtually all major ingredients, processing, and labour used to make the food product are Canadian. This means that all of the significant ingredients in the food product are Canadian in origin and that non-Canadian material is negligible. The claim "Canadian" is considered to be the same as "Product of Canada" and must meet the same criteria. A "Made in Canada" claim can be used on a food product when the last substantial transformation of the product occurred in Canada, even if some ingredients are from other countries. If the "Made in Canada" claim is used, it must also include a qualifying statement indicating whether the food product is made in Canada from imported ingredients or a combination of imported and domestic ingredients.

Promotional Contests on Product Labels

It is common for promotional contests to be advertised on packages and labels of consumer-facing products. This practice is known as "on-pack" advertising. In many cases, the entry forms or game cards (scratch cards, peel backs, etc.) are actually packaged with the product.

Two pieces of legislation regulate on-pack contest advertising. Under the *Competition Act*, there are minimum disclosure requirements for contests; under the *Criminal Code*, it is an offence to conduct an "illegal lottery." In order to comply with the disclosure requirements and to avoid classification as an "illegal lottery," a contest's on-pack advertisement

must, at a minimum: (i) indicate "No purchase necessary;" and (ii) disclose the number and approximate value of prizes, the areas to which the prizes relate, and any important information relating to the chances or odds of winning. The information should be provided in a reasonably conspicuous manner before the potential entrant is inconvenienced in some way or becomes committed to the advertiser's product or to the contest.

Imported Goods

The Canada Border Services Agency administers the *Marking of Imported Goods Order*, the *Determination of Country of Origin for the Purposes of Marking Goods (non-CUSMA Countries) Regulations*, and the *Determination of Country of Origin for the Purposes of Marking Goods (CUSMA Countries) Regulations* (collectively, the "Origin Regulations"). The purpose of the Origin Regulations is to communicate to consumers that certain products are *not* made in Canada, and to identify according to established rules the country from which the products originated. This protectionist scheme, administered under the *Customs Act* and the *Customs Tariff*, requires a permanent "country of origin" statement to appear on 60 different categories of non-food goods that are imported into Canada. The categories are quite varied and include such items as bicycles, sink strainers, watch bracelets, and gift wrap. The "country of origin" statement must be legible and will normally take the form of "Made in X."

Pursuant to the Origin Regulations, there are different sets of regulations for the goods of CUSMA and non-CUSMA countries. In addition to mandating that goods be marked, these regulations dictate how the country of origin should be determined; they also describe the 21 classes of goods which are exempted from the country-of-origin marking requirements.

Provincial Laws

Product packaging and labelling are primarily regulated by federal legislation, but provinces also have related laws for specific industries. The potential existence of applicable provincial legislation must be determined on a province-by-province and product-by-product basis.

For example, Québec has extensive French language requirements for all packaging and labelling under the province's *Charter of the French*

Language (Charter de la Lange Français). Under this *Charter*, "[e]very inscription on a product, on its container or on its wrapping, or on a document or object supplied with it, including the directions for use and the warranty certificates, must be drafted in French." The French inscription may be accompanied by a translation, but no inscription in another language may be given greater prominence than that in French. In addition, Québec's *Act Respecting Lotteries, Alcohol, Publicity Contests and Amusement Machines* impacts how a contest can be run in that province.

Upcoming Changes

Ongoing changes to packaging and labelling requirements can be expected as Health Canada and the CFIA continue their modernization of Canada's regulatory frameworks.

Food Labelling Modernization

The CFIA launched its food labelling modernization initiative – now known as the "food product innovation" – in 2013. In connection with this initiative, Health Canada proposed food labelling changes to the FDR and the SFCR[10] that would impact: (i) date marking; (ii) company contact information; (iii) identification of the origin of imported products; (iv) legibility and location of label information; (v) percentage declaration of characterizing ingredients; (vi) test market foods; (vii) standard container sizes; (viii) class names; and (ix) commodity-specific labelling requirements. The CFIA subsequently adjusted the initiative, in light of the COVID-19 pandemic, by removing redundant requirements and focusing on legislative provisions that facilitate industry innovation, such as:

- repeal of some standard container sizes
- incorporation by reference of remaining standard container sizes
- incorporation by reference of class names
- updated definition of "test market food"
- harmonized and streamlined commodity-specific labelling requirements for food.

The CFIA intends to implement the amendments to the FDR and the

10. The proposed amendments to the FDR and SFCR were pre-published on June 22, 2019.

SFCR on a rolling timeline, starting at their registration and ending six years thereafter. Based on current projections, the final amendments will be registered in the Canada Gazette, Part II in the fall of 2021.

Front-of-Package Nutrition Labelling

As part of its healthy eating strategy, Health Canada has proposed amendments to the FDR relating to front-of-package nutrition labelling.[11] These amendments target prepackaged food products containing nutrients of public health concern (sodium, saturated fats, sugars) at or above certain thresholds, requiring warning symbols on their front packaging. Although it was originally anticipated that these legislative amendments would take effect in 2020, they have not yet come into force.

Key Date of December 14, 2022 – Enforcement of New Food Labelling Requirements

In general, Health Canada has been signalling that December 14, 2022 will be a key date for the streamlined implementation of various legislative amendments relating to food labelling requirements. As noted above, the transition period for compliance with the new requirements relating to nutrition facts tables and ingredient lists was not extended to December 2022, as previously proposed, so December 14, 2021 formally remains the deadline for compliance with these requirements. However, in practice, Health Canada only intends to enforce these new rules after December 14, 2022. Similarly, Health Canada had intended to align most labelling changes proposed within the food product innovation to require compliance by December 14, 2022. Due to the COVID-19 pandemic, though, the projected registration of these changes has been pushed to 2021; the same is true for the timeline of changes relating to front-of-package nutrition labelling. Therefore, it remains to be seen whether Health Canada will continue to target these changes for compliance by December 14, 2022.

Supplemented Foods Framework

Health Canada has recently proposed amendments to the FDR that would provide a regulatory framework for supplemented foods.[12] A supplemented food is generally considered to be a prepackaged product that is manufactured, sold, or represented as a food, and which contains

11. The proposed amendments to the FDR were pre-published on February 10, 2018.
12. The proposed amendments to the FDR were published on June 26, 2021

added nutrients (*e.g.*, vitamins, minerals, amino acids, etc.) or herbal or bioactive ingredients that may perform a physiological role beyond merely providing nutrition. Currently, there is no specific regulatory framework for supplemented foods in Canada. Since 2012, as an interim measure, Health Canada has been using temporary marketing authorizations (TMAs) to approve the sale of these products on a case-by-case basis and under specific conditions. Therefore, the proposed amendments are long overdue.

The proposed regulatory framework includes the creation of a "List of Permitted Supplemented Food Categories" and a "List of Permitted Supplemental Ingredients." The first list would identify the specific categories of food to which supplemental ingredients may be added. The second list would identify all of the substances that may be added to a specified food as a supplemental ingredient (e.g., vitamins, minerals, amino acids, caffeine), along with detailed conditions of use.

The proposed amendments set out new requirements for labelling and advertising of supplemented foods in addition to the general requirements for prepackaged foods currently found in the FDR. For example, a supplemented food facts table would be required to replace the nutrition facts table on the product label, in order to provide information on each supplemental ingredient. In addition, a cautionary statement may be required on the product label, depending on the amount of each supplemental ingredient added. Where such a cautionary statement is mandated, the supplemented food would have to display a supplemented food caution identifier on the principal display panel of its label, and any representations (e.g., health claims on the label or in an advertisement) concerning the supplemental ingredients in the product would be restricted or prohibited.

Supplemented foods already on the market via TMAs would be provided a transition period of three years to comply with the new regulations. Public consultation on the proposed amendments opened on June 26, 2021 and will close on August 25, 2021.

Food Labelling Claims: Product of Canada and Made in Canada

The CFIA is in the process of amending its guidelines for "Product of Canada" and "Made in Canada" food labelling claims. The public consultation ended on June 23, 2019. The proposed changes are

intended to help Canada's food industry better promote Canadian products domestically, with the revised guidelines appearing less restrictive than the current guidelines.

Current rules permit a "Product of Canada" claim in circumstances where "all or virtually all" of the total direct costs of producing or manufacturing the good were incurred in Canada. This "all or virtually all" requirement was interpreted to mean greater than 98%, but has been lowered to 85% under the proposed changes. As noted above, a qualifier is currently required for any "Made in Canada" claim (*e.g.*, to indicate that the food product is made from imported ingredients or a combination of imported and domestic ingredients); this qualifier is no longer necessary under the proposed guidelines.

Self-Care Framework

Health Canada is planning to update the regulation of so-called self-care products – NHPs, cosmetics, and non-prescription drugs – to bring their distinct regulatory regimes into alignment. Health Canada has been conducting public consultations in connection with the proposed updates. The proposed regulatory framework is intended to improve labelling for NHPs, among other things, and will roll out in three phases: (i) Phase I – improving the labelling of NHPs; (ii) Phase II – risk-based approach to regulatory oversight for non-prescription drugs; and (iii) Phase III – addressing evidence standards for similar health claims, extending risk-based regulatory oversight, and seeking additional powers for Health Canada to require a recall or label change for all self-care products.

With respect to Phase I, Health Canada has proposed amendments to the NHPR to introduce improved labelling requirements for NHPs intended to make information clear, consistent, and legible for consumers and aligned with rules that have already been established for non-prescription drugs.[13] The proposed labelling requirements include: (i) a product facts table presenting important information in the format of a standardized facts table; (ii) identification of food allergens, gluten, and aspartame, if any, along with a statement indicating their source; (iii) clear and prominent display of label text requiring improved legibility for regulatory text, such as a minimum type size, font types, and contrast; and (iv) modernized contact information, including acceptance of an

13. The proposed amendments to the NHPR were published on June 26, 2021.

email address, telephone number, or website address within the product facts table in place of the currently required postal address.

The new labelling requirements for NHPs would come into force three years after registration of the legislative amendments. NHPs licensed and labelled in Canada prior to the coming-into-force date of the proposed regulations would be provided with an additional transition period of three years to comply, for a total period of six years following registration.

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SUPPLY CHAIN, TRADE & CUSTOMS

By John Boscariol and Martha Harrison

SUPPLY CHAIN, TRADE & CUSTOMS

Our modern world is increasingly interconnected — products, both digital and physical, routinely flow across international borders. The Canadian retail and consumer products market is replete with products that are either made in foreign countries, or have significant portions of their content made abroad.

Understanding the rules that apply to the import and export of consumer products is critical to protecting the integrity of the retail supply chain — from sourcing goods, services and intellectual property through to the final sale to the consumer. For new entrants, some of whom may be importing for the first time, Canadian customs and and trade law can come nearly as an afterthought. Even experienced manufactures and distributors can have issues stemming from incorrect customs declarations, using the wrong methods for determining valuation of the products being imported, failing to properly account for special duties imposed as a result of Canada's trade-remedy process, or not addressing the risk of forced labour in their supply chain. Attending to these issues at the early stages of the design and implementation of the supply chain and monitoring ongoing compliance will ensure that goods, services and technology move smoothly across borders and establish a significant advantage over competitors who struggle with non-compliance and face undue enforcement attention, penalties and excessive border delays.

Canada is a member of the World Trade Organization (WTO) and a party to the *Canada-United States-Mexico Agreement* (CUSMA), formerly known as the *North American Free Trade Agreement* (NAFTA), the *Comprehensive Economic and Trade Agreement* (CETA) with the EU, the *Canada-United Kingdom Trade Continuity Agreement*, the *Comprehensive and Progressive Trans-Pacific Partnership* (CPTPP), the *Canada-Korea Free Trade Agreement* (CKFTA), and numerous other regional trade and investment protection agreements.

Duties and Taxes on the Importation of Goods

Because many retail and consumer products companies source inputs and final product from outside Canada, customs compliance and the minimization of duty exposure is critical to the success of their operations.

As importers, they are required to declare imported goods upon entry

into Canada and to pay customs duties and excise taxes, if applicable, to Canada's customs authority, the Canada Border Services Agency (CBSA). Goods are subject to varying rates of duties depending upon the type of commodity and its country of origin. As a member of CUSMA, Canada accords preferential tariff treatment to goods of U.S. and Mexican origin as determined under CUSMA Rules of Origin; in most cases, these goods may be imported duty-free.

The amount of customs duties payable is a function of the rate of duty (determined by the tariff classification and the origin of the goods, and as set out in the Schedule to Canada's *Customs Tariff*) and the value for duty. Canada has adopted the World Customs Organization's Harmonized System of tariff classification, as have all of Canada's major trading partners. Like taxes, this process is self-assessed but subject to later audit and verification by the CBSA.

Classification

An importer must first determine the Harmonized System tariffs classification for its goods. Goods in the *Customs Tariff* are separated into 97 chapters that are common to all participants in the Harmonized Tariff system. There are two additional chapters (Chapter 98 and Chapter 99) that are unique to Canada and cover situations in which Canada provides special duty relief (for example temporary imports).

The chapters are arranged in groupings from items with little processing (live animals, metal ore and plants), to items made from those items (such as food and beverages), then to more complex items (plastics, leather and textiles), with the most complex items (such as vehicles, medical and scientific instruments, electronics) appearing last. Goods are assigned a 10-digit "item code" with the first two digits being that of the chapter. These chapter designations, together with the next four digits (together forming a six-digit grouping) are shared among every WTO country. The final four digits are unique to Canada and usually serve the purpose of providing flexibility for Canada to sub-divide tariff items with more granularity.

To assist importers in determining the proper classification, the *Customs Tariff* also includes an introductory note, which provides general rules of interpretation. Canadian courts have recognized the value of these rules and their utility in interpreting the *Customs Tariff*.

Origin and Preferential Tariff Treatment

Once the proper 10-digit tariff item code has been identified, the importer must determine whether a preferential tariff treatment applies. For a preferential treatment to apply, the good must be determined to be "originating" under the rules of origin of the applicable trade agreement. Importers should obtain a "Certificate of Origin" from either the vendor or manufacturer of the goods they intend to import. The Certificate of Origin is confirmation from the manufacturer that the goods meet the technical rules of origin for a particular good. Without the Certificate of Origin, an importer cannot claim the preferential tariff rate.

Valuation

In accordance with Canada's obligations under the WTO's agreement regarding customs valuation, the value for duty of goods imported into Canada is, if possible, to be based on the price paid or payable for the imported goods, subject to certain statutory adjustments. This primary basis of valuation is called the "transaction value method." An example of an adjustment that would increase the value for duty of the goods is a royalty payment, if the royalty is required to be paid by the purchaser of the imported goods as a condition of the sale of the goods for export to Canada. An example of an adjustment that would allow for a deduction from the price paid or payable is the transportation cost incurred in shipping the goods to Canada from the place of direct shipment, if such costs are already included in the price paid or payable by the importer.

If for one reason or another (e.g., where there has been no sale of the goods) the transaction value of the goods may not be used as a basis for the declared customs value, Canadian legislation provides alternative methods for valuation. In addition to customs duties, Goods and Services Tax (GST) in the amount of 5% is also payable upon the importation of goods. This GST rate is applied to the duty-paid value of the goods. Provided that they have acquired the goods for use in commercial activity, importers registered under the *Excise Tax Act* will be able to recover GST paid upon importation by claiming an input tax credit.

Verification

As mentioned above, customs declarations are self-assessed in a manner similar to other taxes. However, as with other taxes the tax authority (in this case the CBSA) maintains the right to verify and audit importers

to ensure goods have been properly declared, customs duties properly assessed, and, if necessary, the proper permits have been obtained.

In the ordinary course, imports are subject to verification any time in the four years following their importation. Verification can be with regard to any aspect of the customs declaration, including classification, valuation, preferential tariff treatment, compliance with end-use restrictions (for example, if the items were imported temporarily, verification that the goods were exported promptly), proper permits were obtained, and any trade remedies requirements (*e.g.*, anti-dumping or countervail) were complied with.

Importers are required under Canadian law to correct any errors in classification, origin or valuation within 90 days of having reason to believe such declarations are incorrect if the correction of the error results in either duties being owed or if the change is revenue neutral. If correcting the error would result in a refund of duties, the importer is not under an obligation to correct.

Importers are required to keep customs and other records relevant to their importations for a period of at least six years. Failure to do so can have adverse consequences, including the assessment of administrative monetary penalties.

Other Requirements for Imported Goods

Certain imported goods are required to be marked with their country of origin — these include a number of retail and consumer products. Goods that must be marked generally fall within the following product categories: goods for personal or household use; hardware, novelties and sporting goods; paper products; wearing apparel; and horticultural products. Certain types of goods, or goods imported under specific conditions, are exempt from the country-of-origin-marking requirement.

Prepackaged products (i.e., products packaged in a container in such a manner that it is ordinarily sold to or used or purchased by a consumer without being re-packaged) imported into Canada are also subject to requirements under the federal *Consumers Packaging and Labelling Act*. Consumer textile articles are subject to the requirements of the federal *Textile Labelling Act*.

There are also significant legislative requirements relating to the

importation of foods, agricultural commodities, aquatic commodities, and agricultural inputs. They are all subject to the inspection procedures of the Canadian Food Inspection Agency (CFIA).

Counterfeit trademark or pirated copyright goods may be detained upon importation into Canada. In accordance with the *Copyright Act* and the *Trademarks Act*, the owner of a valid Canadian copyright or a Canadian trademark holder registered with the Canadian Intellectual Property Office (CIPO) is eligible to file a Request for Assistance (RFA) application with the CBSA. This RFA provides an important enforcement tool for intellectual property rights. Using the RFA, the CBSA can identify and detain commercial shipments suspected of containing counterfeit trademark or pirated copyright goods. When the CBSA detects such goods, the CBSA can use the information contained in the RFA to contact the rights-holder. The rights-holder may then pursue a court action if necessary. The Royal Canadian Mounted Police (RCMP) is responsible for undertaking any criminal investigations related to commercial scale counterfeiting and piracy.

Certain goods are prohibited from being imported into Canada. These include: materials deemed to be obscene under the *Criminal Code of Canada*; base or counterfeit coins; certain used or second-hand aircraft; goods produced wholly or in part by prison labour; used mattresses; any goods in association with which there is used any description that is false in a material respect as to their geographical origin; certain used motor vehicles; certain parts of wild birds; certain hazardous products; white phosphorus matches; certain animals and birds; materials that constitute hate propaganda; and certain prohibited weapons and firearms.

Prohibition on Importing and Selling Goods Made in Whole or in Part by Forced Labour

On July 1, 2020, Canada amended the *Customs Tariff Act* to bring it in line with *CUSMA*. Article 23.3 of *CUSMA* commits parties to eliminating all forms of forced or child labour. The *Customs Tariff* (under tariff item No. 9897.00.00) was thus accordingly amended to prohibit the importation of goods that are mined, manufactured or produced wholly or in part by forced labour (with the exception of those imported solely for personal use and not for sale for a business or occupational use). As a result, customs officers can detain and seize such goods pursuant to their enforcement powers under the *Customs Act*. The *Customs Act* imposes

additional prohibitions and reporting requirements regarding any such goods that have been imported into Canada in violation of this measure.

As global efforts mount to eliminate forced labour, Canada is seeking a more proactive approach to address these human rights issues arising in the supply chain. On October 29, 2020, Bill S-216, *An Act to enact the Modern Slavery Act and to amend the Customs Tariff* was introduced to the Senate. Bill S-216 imposed an obligation to publicly report on an annual basis the measures taken by a company to prevent and reduce the risk that forced labour or child labour is used in any step of the production of: (i) goods in Canada or elsewhere; or (ii) goods imported into Canada. In addition, it introduces a prohibition on importation of goods produced in whole or part by child or forced labour. Bill S-216 passed its second reading on March 30, 2021, and was undergoing review by the Standing Senate Committee on Banking, Trade and Commerce, when a federal election was called in August of 2021. Although Bill S-216 died on the Order Paper, these modern slavery measures are expected to be introduced in Parliament again – accordingly, companies should have policies and procedures in place to ensure the risk of forced labour in their supply chains is appropriately mitigated.

Trade Remedies

Canada maintains a trade remedy regime that provides for the application of additional duties and/or quotas to imported products, where such products have injured or threaten to injure the production of like goods in Canada. Retail and consumer products, especially those from China and other Asian countries, are often the targets of these trade actions.

The federal *Special Import Measures Act* provides for the levying of additional duties on "dumped" products (i.e., products imported into Canada at prices lower than the comparable selling price in the exporting country or at below their cost plus an amount for profit) if they have caused or threaten to cause injury to Canadian industry.

Duties may also be levied in instances of countervailable subsidies being provided by the government in the country of export, and if such subsidized products injure or threaten to injure Canadian industry. Further, Canada may apply safeguard surtaxes or quantitative restrictions on imports where it is determined that Canadian producers are being seriously injured or threatened by increased imports of goods

into Canada. These measures may be applied regardless of whether the goods have been dumped or subsidized.

The World Trade Organization

As a member of the WTO, Canada is subject to a broad range of obligations that impact all sectors of the Canadian economy, including manufactures and distributors of consumer product. These obligations govern Canadian measures concerning market access for foreign goods and services, foreign investment, the procurement of goods and services by government, the protection of intellectual property rights, the implementation of sanitary and phytosanitary measures and technical standards (including environmental measures), customs procedures, the use of trade remedies, such as anti-dumping and countervailing duties, and the subsidization of industry.

These WTO obligations apply to Canadian government policies, administrative and legislative measures, and even judicial action. They apply to the federal government and also in many cases to provincial and other sub-federal governments.

Canada is an active participant in the WTO's dispute settlement system, both as complainant and respondent. As a result of WTO cases brought against Canada by other countries, Canada has had to terminate or amend offending measures in numerous sectors, including automotive products, magazine publishing, pharmaceuticals, dairy products, green energy, and aircraft. On the other hand, Canadian successes under the WTO dispute settlement system have increased access for Canadian companies to markets around the world.

Canada-United States-Mexico Agreement

In November of 2018, Canada, the United States and Mexico concluded negotiations on the modernization of NAFTA and signed the *Agreement between Canada, the United States of America, and the United Mexican States* (CUSMA). On July 1, 2020, CUSMA came into force, replacing NAFTA after three years of negotiations, drafting, and revisions.

Similar to NAFTA, CUSMA eliminates tariff barriers among Canada, Mexico, and the United States, and each country continues to maintain its own tariff system for non-CUSMA countries. In this respect, CUSMA

differs from a customs union arrangement of the kind that exists in the European Union, whereby the participating countries maintain a common external tariff with the rest of the world.

A system of rules of origin has been implemented to define those goods entitled to preferential duty treatment under CUSMA. The principles and methods for determining country of origin under CUSMA are generally similar to those found in NAFTA. One of the most significant is the change in the "de minimis" requirement. There is an increase in allowable non-originating content (namely, content not produced in CUSMA countries) of a good to 10% from 7% previously available under NAFTA. Effectively, under CUSMA a good can have more "non-originating" content and still qualify for preferential tariff treatment. Provided CUSMA rules of origin are satisfied, investors from non-CUSMA countries may establish manufacturing plants in Canada through which non-CUSMA products and components may be further processed and exported duty-free to the United States or Mexico.

NAFTA was one of the first major trade deals to allow investors to sue governments for damages arising out of violations of investment protection obligations under Chapter 11 of the agreement. The investor-state dispute settlement mechanism (ISDS) is now available under CUSMA only as between Mexico and the United States, as Canada and Canadian investors have been removed. Even though under CUSMA there is no ISDS between Canada and the United States, Canadian investors may sue Mexico and Mexican investors may sue Canada under the investment protection provisions of the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*. CUSMA does, however, provide that ISDS under the original NAFTA may apply to Canada and Canadian investors with respect to legacy claims regarding existing investments. Such claims can be brought within three years after CUSMA came into force, i.e., by July 1, 2023.

While CUSMA contains many obligations similar to those found in WTO agreements, it is sometimes referred to as "WTO-plus," because of enhanced commitments in certain areas, including foreign investment, intellectual property protection, energy goods (such as oil and gas), financial services, telecommunications, and rules of origin. CUSMA also establishes special arrangements for automotive trade, trade in textile and apparel goods, and agriculture.

The *Canada-European Union Comprehensive Economic and Trade Agreement*

On October 30, 2016, Canada and the European Union signed the final legal text of the EU-Canada CETA. CETA provisionally came into force on September 21, 2017. As of that date, all provisions of CETA — with the exception of the investor-state dispute settlement mechanisms, certain provisions related to portfolio investing, and some specialized intellectual property provisions related to copyright enforcement — came into force.

As Canada's broadest and most significant trade agreement to date, CETA significantly liberalizes trade and investment rules applicable to economic relations between the two regions. CETA addresses trade in services (including financial services), movement of professionals, government procurement (including at the provincial and municipal levels), technical barriers to trade, investment protection and ISDS, and intellectual property protections (including for geographical indications and pharmaceuticals).

On the day CETA entered into force, 98% of all EU tariff lines became duty-free for Canada. Canadian exporters also benefit from clear rules of origin that take into consideration Canada's supply chains to determine which goods are considered "made in Canada" and eligible for preferential tariff treatment. Similar to CUSMA, CETA also aims to foster regulatory unification, co-operation, and information sharing between Canadian and EU authorities in order to put in place more compatible regulatory regimes. This includes co-operation on sanitary and phytosanitary measures for food safety, animal and plant life, and health. CETA also includes some sector-targeted provisions that recognize specific interests related to wines and spirits, biotechnology, forestry, raw materials, science, technology, and innovation. Underscoring the agreement's co-operative objectives, CETA also promises to implement greater transparency and information sharing with respect to subsidies and trade remedies provided by governments to their respective countries' industries.

Where a dispute arises under CETA, the parties have agreed to establish a permanent tribunal that utilizes the ISDS arbitration mechanism. The tribunal is to be comprised of 15 members: five nationals of Canada, five nationals of EU members states, and five nationals of third countries — each of which must be a jurist in their home jurisdiction. Cases will be heard by panels of three tribunal members (one for each party's state, and the

third selected from a list of neutral members). CETA also establishes an appellate tribunal that may uphold, reverse, or modify a tribunal's award based on errors of law, manifest errors of fact, or on the basis that it has exceeded its jurisdiction. Because of objections of the Wallonia region of Belgium, this portion of CETA is not yet in force. However, the recent opinion of the European Court of Justice that CETA's ISDS arbitration mechanism is not incompatible with EU law, is a major step towards full and final implementation.

Canada-United Kingdom Trade Continuity Agreement

January 31, 2020 marked the U.K.'s formal exit from the EU. As one of the many consequences associated with Brexit, CETA was scheduled to cease to apply to Canada-U.K. trade as of January 1, 2021. To ensure continuity of the preferential terms of trade that existed in connection with CETA, Canada solidified its trade relationship with the U.K. on April 1, 2021 by entering into the *Canada-United Kingdom Trade Continuity Agreement*. Over the short term, this agreement will ensure continuity for trade between Canada and the U.K., while ensuring Canadian exporters and businesses have continued preferential access to the U.K. market and that 98% of Canadian products continue to be exported to the U.K. tariff-free.

The *Comprehensive and Progressive Trans-Pacific Partnership Agreement*

The CPTPP is a trade agreement among 11 Pacific Rim countries, representing a major portion of the global economy. The agreement provides significantly enhanced access to Pacific markets for Canadian business.

The agreement has been finalized, and was signed by ministers of Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. It came into force in December 2018 and has been implemented by Mexico, Japan, Singapore, New Zealand, Canada, Australia, and Vietnam.

The CPTPP, is a broad and comprehensive agreement, in the mould of CETA. The CPTPP reduces trade barriers across a range of goods and services, which will, in turn, create new opportunities for businesses and consumers. The CPTPP addresses new trade issues and other contemporary challenges, such as labour and environmental issues. It

reflects both tariff and non-tariff barriers to trade and investment, with the goal of facilitating the movement of people, goods, services, capital, and data across borders. The agreement also includes ISDS provisions to resolve disputes between parties and investors.

Other Free Trade Agreements

In addition to CPTPP, CETA, CUSMA, and the agreements of the WTO, Canada has also negotiated free trade agreements with Colombia, Chile, Costa Rica, Honduras, Jordan, Korea, Israel, Panama, Peru, Ukraine and the European Free Trade Association (Iceland, Liechtenstein, Norway, and Switzerland).

Canada is currently in talks regarding free trade deals with China, India, Japan, Indonesia, Turkey, Morocco, the Association of Southeast Asian Nations (ASEAN), the Caribbean Community (CARICOM), the Dominican Republic, Singapore, the Andean Community (MERCOSUR), Philippines, Thailand, El Salvador, Guatemala and Nicaragua.

Canadian Free Trade Agreement

The federal government of Canada has negotiated the *Canadian Free Trade Agreement* (CFTA) with each of the governments of Canada's provinces and territories. The CFTA contains obligations pertaining to: restricting or preventing the movement of goods, services and investment across provincial boundaries; investors of a province; the government procurement of goods and services; consumer-related measures and standards; labour mobility; agricultural and food goods; alcoholic beverages; natural resources processing; communications; transportation; and environmental protection. The CFTA also provides for government-to-government and person-to-government dispute resolution.

The CFTA came into force on July 1, 2017, replacing the *Agreement on Internal Trade*.

Economic Sanctions

Because many retail and consumer product companies sell and source goods and technology to and from customers and suppliers around the world, they need to be cognizant of Canada's economic sanctions laws. A number of nations, entities and individuals are subject to Canadian

trade embargoes under the *United Nations Act*, the *Special Economic Measures Act*, the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*, the *Freezing Assets of Corrupt Foreign Officials Act*, and the *Criminal Code*.

Canadian sanctions of varying scope apply to activities involving the following countries or regions: Belarus, Myanmar (formerly Burma), Central African Republic, the Crimea Region of Ukraine, the Democratic Republic of Congo, Iran, Iraq, Lebanon, Libya, Mali, Nicaragua, North Korea, People's Republic of China, Russia, Somalia, South Sudan, Sudan, Syria, Tunisia, Ukraine, Venezuela, Yemen, and Zimbabwe. Canada also maintains very significant prohibitions on dealings with listed "designated persons," terrorist organizations and individuals associated with such groups, regardless of their country location, including the Proud Boys, the Taliban, ISIL (Daesh) and al-Qaida.

In a number of areas, these Canadian economic sanctions measures can be more onerous than those imposed by the United States and Europe.

Unlike the United States, Canada does not maintain a general trade embargo against Cuba. Indeed, an order issued under the *Foreign Extraterritorial Measures Act* makes it a criminal offence to comply with the U.S. trade embargo of Cuba, and requires that the Attorney General of Canada be notified of communications received in respect of these U.S. embargo measures.

Export, Import and Brokering Controls on Goods and Technology

Canada, for reasons of both domestic policy and international treaty commitments, maintains controls on imports, exports and transfers of certain goods and technology and, in the case of exports, their destination country. The federal *Export and Import Permits Act* (EIPA) controls these goods through the establishment of three lists: the *Import Control List* (ICL), the *Export Control List* (ECL) and the *Area Control List* (ACL).

Goods identified on the ICL require an import permit, subject to exemptions (including for goods from certain countries of origin). These include steel products, weapons and munitions, and agricultural and food products such as turkey, beef and veal products, wheat and barley products, dairy products, and eggs. Manufacturers and distributors must be careful that any goods they import that fall within this scheme are properly permitted for import.

The ECL identifies those goods and technology that may not be exported or transferred from Canada without obtaining an export permit, subject to exemptions for certain destination countries. Controlled goods and technology are categorized into the following groups: dual-use items (including information security, surveillance and network monitoring systems), munitions, nuclear non-proliferation items, nuclear-related dual-use goods, miscellaneous goods (including all U.S.-origin goods and technology, and certain medical products, forest items, agricultural and food products, prohibited weapons, nuclear-related and strategic items), missile equipment and technology, and chemical and biological weapons and related technology.

In addition to the EIPA, other Canadian legislation regulates import and export activity, including in respect of rough diamonds, nuclear-related goods and technology, cultural property, wildlife, food and drugs, hazardous products and environmentally sensitive items. Manufacturers and distributors should be particularly aware of restrictions on the import of common items that can also fall into these prohibited categories. For example, multi-tools and knives can often be easily modified to be opened in a manner that would classify them as a switchblade — which is considered a prohibited weapon in Canada.

In 2019, Canada became a State Party to the United Nations *Arms Trade Treaty* (ATT), a treaty establishing standards for international trade in a broad range of conventional arms that currently counts more than 100 State Parties. To meet its ATT obligations Canada amended the EIPA and adopted a package of brokering regulations, including a Brokering Control List. The newly established legislative scheme imposes controls over brokering activities. The EIPA defines brokering as an activity aimed "to arrange or negotiate a transaction that relates to the movement of goods or technology included in a Brokering Control List from a foreign country to another foreign country." This means that the import or export of goods or technology in or out of Canada or negotiations or arrangements solely in respect of such transfers are not covered by the new brokering regulations.

This is a significant development for Canadian industry as this is the first time such controls have been introduced in Canada. The industries and entities potentially affected by the ATT Package include Canadian defence, security, and aerospace industries, companies that manufacture,

export and/or broker military and dual-use goods and technologies, and those providing related technical and after-sale services.

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LABOUR AND EMPLOYMENT

By Trevor Lawson

LABOUR AND EMPLOYMENT

Employment in Canada is heavily regulated and is governed by both legislation and common law principles. The majority of employees in the consumer products sector are covered by provincial legislation.

To avoid attracting unnecessary workplace liability, consumer products employers operating in Canada should be familiar with the following types of legislation:

- 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.

Employment Standards

All Canadian jurisdictions have enacted legislation that governs minimum employment standards. Generally, employment standards acts (ESAs) are broad and apply to all employment contracts, whether oral or written. The standards defined in the ESAs are minimum standards only, and employers are prohibited from contracting out or otherwise circumventing the established minimum standards. These laws describe which classes of employees are covered by each minimum standard and which classes of employees are excluded. Although standards vary across jurisdictions, many topics covered are common to all ESAs, including minimum wages, maximum hours of work, overtime hours and wages, rest and meal periods, statutory holidays, vacation periods and vacation pay, layoff, termination and severance pay and job-protected leaves of absence. The leaves of absence protected by ESAs vary across provinces, but may include sick leave, bereavement leave, maternity/paternity/parental/adoption leave, reservist leave, compassionate care/family medical leave, organ donor leave, family responsibility leave, emergency leave, crime-related death and disappearance leave and domestic or sexual violence leave.

Important Minimum Standards Considerations for Consumer Products Businesses:

- overtime and hours of work;
- entitlements of temporary help agency or assignment employees; and
- entitlements upon termination of employment.

Overtime and Hours of Work

Generally speaking, the employer and employee cannot establish a policy or enter into a contract to determine whether overtime is payable. In Canada, unless the employee is employed in a supervisory/managerial capacity, or is in an exempted occupation (i.e. accountant or engineer), or other exempted category, the employer must pay overtime on all hours worked in excess of the statutory threshold. For example, in Ontario, the statutory threshold is 44 hours per week. In British Columbia, the statutory threshold is eight hours in a day and 40 hours in a week.

Whether the supervisory/managerial exemption is available to the employer will be determined on a case-by-case basis with regard to the nature of the employee's position, the scope of his or her responsibilities and the manner in which the applicable legislation has been interpreted in the past. It is not sufficient for the employee to have a job title indicating that he or she is a "manager" or "supervisor." Usually, the employer must be able to demonstrate that the true nature of the employee's position is supervisory or managerial. Some factors which contribute to a finding that a position is supervisory or managerial include that the employee is responsible for directing or scheduling others' work, has the ability to hire, discipline and/or terminate employees, exercises discretion in relation to the operation of the business and only performs non-managerial or non-supervisory duties on an irregular basis.

Temporary Help Agency or Assignment Employees

In general, minimum employment standards, including overtime, vacation, statutory holiday pay and termination pay, apply to temporary help agency (sometimes called "assignment") employees. In some jurisdictions, there are additional requirements under employment standards legislation applicable to assignment employees. For example, in Ontario there are specific record-keeping requirements for both the agency employing the individual and the client where the individual performs the work. Where

an agency fails to pay an assignment employee for work performed for a client, the client may be jointly and severally liable with the agency for some or all of the unpaid wages, including regular wages, overtime pay, statutory holiday pay and statutory holiday premium pay.

Termination of Employment

Notice of Termination of Employment

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 (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 Ontario, for example, employees with a minimum of three months of service are generally entitled to at least one week's notice of termination, with a maximum eight-week notice period for employees with eight or more years of service. Employers are required either to give "working notice" of an employee's termination from employment or to provide pay in lieu of working notice.

An employer is not required to give notice or pay in lieu of notice if the termination is for Cause. Cause is a high standard and includes, for example, willful misconduct or serious disobedience. Depending on the jurisdiction, certain classes of employees may be exempt from the termination notice provisions of the legislation. In most jurisdictions, special provisions apply where a significant number of employees are terminated within a specified period of time. These provisions may be triggered where a store is closing or going out of business. These provisions include, at the very least, advance written notice to the applicable Director of Employment Standards or an equivalent governmental authority.

Severance Pay

In the federal and Ontario jurisdictions, severance pay must be provided to employees as an additional benefit to notice of termination from employment. In Ontario, an employee with five or more years of service may be entitled to severance pay if the employer, as a result of the discontinuation of all or part of its business, terminates 50 or more employees in a six-month period or if the employer has a payroll of C$2.5 million or more. Severance pay is calculated on the basis of an employee's length of service and may reach a maximum of 26 weeks of

regular pay. As with pay in lieu of notice of termination, employees may not be eligible to receive severance pay if they have engaged in willful misconduct, serious disobedience or if they fall within other exceptions specified in the legislation.

Common (or Civil) Law Entitlement to Notice of Termination and Damages

In addition to minimum statutory termination and severance pay entitlements, a terminated non-unionized employee may be entitled by common law (or civil law, in Québec) 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 that wish to avoid or limit liability for common law pay in lieu of notice should therefore have clear terms in their written contracts. We especially recommend that consumer products businesses looking to hire seasonal, occasional or short-term employees consider limiting their liability upon termination in written contracts. The manner in which an employer treats an employee at the time of dismissal is also important, because an employer may be liable to compensate an employee for any actual damages caused by tortious conduct.

In Québec, an employee with at least two years of uninterrupted service to whom *An Act respecting Labour Standards* is applicable may make a complaint for dismissal without good and sufficient cause. Upon finding that the complaint is valid, the adjudicator can also order reinstatement, the payment of lost wages and any other order that he or she believes to be fair and reasonable, taking into account all circumstances of the matter.

Labour Relations

Legislation governs the formation and selection of unions and their collective bargaining procedures in each Canadian jurisdiction. In general, where a majority of workers in an appropriate bargaining unit is 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.

Remaining Union-Free

Proactive and progressive human resources practices remain the best option to stay union free in Canadian workplaces. Our experiences show that employees are less likely to unionize where the employer has established a responsive management style with mechanisms, whether formal or informal, for employees to submit input and feedback. The rate of unionization in the private sector varies by jurisdiction and industry.

An employer will likely see or hear about a union drive during its formative stages. It is important that an employer seek legal advice early in the process when it learns of the union's organizing efforts. Most jurisdictions permit "employer free speech" during a union drive; however, any actions or comments that can be perceived as coercive are likely to be challenged by the organizing union as an unfair labour practice. For example, targeting union supporters, staging captive audience meetings with employees and changing terms and conditions of employment during a union drive are all prohibited by labour legislation.

In Canada, the certification process is designed to move quickly. This reduces the time that either party could engage in prohibited activities. In most jurisdictions, there is a very brief window between an application for certification and a secret ballot representation vote. Thus, it is imperative that an employer: (i) adopt proactive and progressive human resources policies before any union organizing drive; and (ii) manage its "employer free speech" rights aggressively and appropriately during a union certification campaign.

Human Rights

All Canadian jurisdictions have enacted human rights codes or acts that specifically prohibit various kinds of discrimination in employment. Human rights legislation in Canada generally provides that persons have a right to equal treatment and a workplace free of discrimination and harassment on the basis of any of the prohibited grounds. The grounds may vary somewhat from one jurisdiction to another, but generally include:

- race, colour, ethnic origin, ancestry, place of origin;

- religion or creed;
- age;
- physical or mental disability (includes drug and alcohol dependence);
- sex or gender (includes pregnancy and childbirth);
- gender expression and/or identity;
- sexual orientation;
- marital status;
- family status;
- source of income;
- political belief; and
- record of criminal conviction.

Human rights law prohibits direct discrimination on the enumerated grounds and also constructive or systemic discrimination, whereby a policy that is neutral on its face has the effect of discriminating against a protected group. However, employers may maintain qualifications and requirements for jobs that are *bona fide* and reasonable in the circumstances.

Recruitment

Employers should try not to ask any questions during the hiring process that might generate information about a prohibited ground. While obtaining this information inadvertently (such as by the applicant volunteering the information without having been asked or prompted) is not necessarily improper, it is improper for the employer to make a hiring decision based on a prohibited ground, unless it is a *bona fide* (good faith) occupational requirement (BFOR).

Even if the decision is properly made, having information related to a prohibited ground of discrimination could lead to a costly and damaging human rights complaint. If challenged, employers should be prepared to establish the reason the applicant was not offered the job and that the prohibited ground did not contribute in any way to the decision.

Complaints of a Human Rights Violation

An employee who believes that he or she has been a victim of discrimination or harassment must first demonstrate that the alleged discrimination or harassment occurred or that he or she has been treated

differently in a term or condition of employment on the basis of one of the enumerated grounds. Once the employee or former employee has demonstrated that the discrimination occurred, the employer has the burden of proof to establish that the offending term or condition of employment is a BFOR.

Duty to Accommodate

An employer's duty to accommodate arises when an employee is unable to perform the duties of his or her position because of an individual characteristic protected by human rights legislation. The duty to accommodate rests on both the employer and the employee. The employee has a duty to inform the employer of the needs required. At the same time, the employer has a duty to actively consider and inquire when circumstances or behaviour are such that the employer should know there may be an issue with an employee.

The employer must provide a suitable accommodation unless the employer can demonstrate that the applicable workplace requirement or rule was adopted for a rational purpose and in a good faith belief that it was necessary, and that it is impossible to accommodate the individual without undue hardship.

Undue hardship is a high standard. It requires direct, objective evidence of quantifiable higher financial costs, the relative interchangeability of the workforce and facilities, interference with the rights of other employees or health and safety risks. The employer must assess each request for accommodation individually to determine whether it would be an undue hardship to accommodate the particular needs identified.

Accessibility Standards

In Ontario, the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA) places specific disability accommodation requirements on various categories of organizations in Ontario. The goal of the AODA is to provide accessibility for all those with disabilities. The obligations on employers and businesses have been rolled out slowly since 2012. In 2016 and 2017, the last significant block of employment obligations became effective on all employers.

The AODA imposes a number of employment related obligations on employers. Among the obligations imposed by the AODA are that employers must:

- Develop, adopt and maintain an accessible employment policy statement.
- Provide disability awareness training to be completed between three and five years from the time the standard comes into force.
- Develop, adopt and maintain procedures for accommodating employees in the recruitment, assessment, selection and hiring stages.
- Provide internal and external notification of disability accommodation and consult with job applicants requesting accommodation about possible accommodation.
- Develop and maintain individualized accommodation and return-to-work plans for employees.
- Maintain materials regarding policies and procedures, which support employees with disabilities and provide information on how to request accommodation.
- Provide AODA mandated policies and/or materials to inspectors as requested.

In addition to the obligations relating to employment, the AODA also imposes accessibility obligations on companies with respect to customer service, physical premises and information and communications.

Manitoba and Nova Scotia have passed similar accessibility legislation. The *Accessible Canada Act* was passed by the Canadian federal government. It came into force in July 2019 and applies to federally regulated entities, including private sector employers. It is reasonable to expect that other Canadian jurisdictions may develop similar legal requirements.

Occupational Health & Safety

The federal government and all provincial jurisdictions have enacted laws designed to ensure worker health and safety, as well as compensation in cases of industrial accident or disease. Employers must set up and monitor appropriate health and safety programs. The purpose of occupational health and safety legislation is to protect the safety, health and welfare of all workers (including employees and contractors), as well as the safety, health and welfare of non-workers entering work sites.

Occupational health and safety officers have the power to inspect workplaces. Should they find that work is being carried out in an unsafe

manner or that a workplace is unsafe, they have the power to order that the situation be rectified and to make "stop-work" orders if necessary. Contraventions of the acts, codes or regulations are treated very seriously, and may result in fines or imprisonment.

Where a worker believes that the work they have been asked to perform or the physical state of the workplace poses an immediate danger to him or her or to another worker, the legislation provides for an "on-the-spot" right to refuse to perform work. A protocol for work refusals and requirements for employer followup can be found in the applicable legislation.

Employers are prohibited from penalizing workers for complying with or seeking enforcement of occupational health and safety legislation. A worker who believes that he or she has been the subject of reprisal has remedial measures under the applicable legislation.

Workplace Violence and Harassment

As part of maintaining a safe workplace, most Canadian jurisdictions have legislation providing for employer obligations in respect of the prevention of workplace violence and harassment, including violence or harassment by customers or the public. In several jurisdictions, these obligations extend to the duty to prevent and to address incidents of sexual harassment. In the province of Québec, psychological harassment in the workplace is addressed in employment standards legislation. The requirements of workplace violence and harassment legislation vary by jurisdiction, but employers need to ensure that they are aware of their obligations and remain in full compliance. Some key features of the legislation require employers to:

- assess risk in the workplace, based on a number of prescribed factors;
- develop policies and procedures relating to workplace violence and harassment;
- train employees; and
- develop procedures for investigating incidents of workplace violence or harassment.

Privacy

Employers in Canada must be aware that Canada has privacy laws governing the collection, use, disclosure, storage and retention of personal employee information, as well as an employee's right of access

to such information. This is especially important in Québec, Alberta and British Columbia, which have enacted privacy legislation separate from the federal legislation.

Recruitment

While not all employers have statutory privacy obligations, we advise all employers take privacy laws into account in their human resources practices, including reference and background checking of prospective employees.

Privacy law usually requires employers to notify prospective employees of their intent to collect, use and disclose personal information, and to state the purpose for doing so. Personal information includes any information about an identifiable individual, or information that allows an individual to be identified, but does not generally include business contact information (i.e. name, title, business address, telephone, facsimile and email address).

The most important general principle of Canadian privacy law is that any collection, use or disclosure of personal information must be reasonable and necessary. In recruitment, this means that employers should only gather information necessary to make the hiring decision.

Employers may assume that an applicant who has provided a reference has consented to the employer collecting from the referee personal information that is reasonably related to the job requirements. In all other circumstances, employers should obtain express consent, or at least notify the applicant of the intention, to do further reference checks.

Video Surveillance of Employees

Some privacy commissions in Canada have considered whether the use of video and audio surveillance systems is a reasonable collection of data about employees.

Video surveillance of employees is generally only permitted under Canadian privacy law where there are reasonable grounds to justify the surveillance, where the surveillance is carried out in a reasonable and non-discriminatory manner, and where no other less intrusive alternatives are available to the employer to protect its legitimate business interests.

Employees should be informed and made aware of the surveillance

measures and of the reasons for the surveillance. The video surveillance should be used to monitor work or activities taking place in the location under surveillance, rather than the employees themselves.

Employee Bag Checks or Searches

An employer must have an extremely compelling business reason, such as a reasonable suspicion of theft, fraud or threat to safety or security, to request that an employee empty their bag in front of a representative of the employer or otherwise allow the employer to search his or her belongings. Furthermore, the employer should exhaust all other reasonable methods of investigation before resorting to a search of an employee's belongings.

See Cybersecurity, Privacy and Data Protection for more information.

Employment Benefits

Canada Pension Plan and the Québec Pension Plan

The Canada Pension Plan is a federally created plan that provides pensions for employees, as well as survivors' benefits for widows and widowers and for any dependent children of a deceased employee.

All employees and employers, other than those in the Province of Québec, must contribute to the Canada Pension Plan. The employer's contribution is deductible by the employer for income tax purposes. Québec has a similar pension plan that requires contributions by employers and employees within Québec.

Employment Insurance Plan

In addition to the Canada Pension Plan, both employees and employers must contribute to the federal Employment Insurance Plan, which provides benefits to insured employees when they cease to be employed, when they take a maternity or parental leave and in certain other circumstances. The employer's contribution is deductible for income tax purposes. Québec also has its own Parental Insurance Plan, which provides benefits to insured employees when they take maternity or parental leave and to which both employers and employees in Québec contribute.

Health Insurance and Taxes

All provinces provide comprehensive schemes for health insurance. These

plans provide for medically necessary treatment, including the cost of physicians and hospital stays. They do not replace private disability or life insurance coverage.

Funding of public health insurance varies from one provincial plan to another. In some provinces, employers are required to pay premiums or health insurance taxes.

In others, individuals pay premiums. In still others, the entire cost of health insurance is paid out of general tax revenues.

Employers commonly also provide supplemental health insurance benefits through private insurance plans to cover health benefits not covered by the public health insurance plan.

Workers' Compensation

Employers may be required to provide sick or injured worker benefits, in the form of workers' compensation, a liability and disability insurance system that protects employers and employees in Canada from the impact of work-related injuries. This benefit compensates injured workers for lost income, health care and other costs related to their injury. Workers' compensation also protects employers from being sued by their workers if they are injured on the job.

Pay Equity

There are requirements under employment standards or human rights legislation in all Canadian jurisdictions which prohibit gender-wage discrimination. There are a number of provinces which have specific statutes that require pay equity (equal pay for work of equal value), which apply only to public sector employers. The Canadian Federal government, Québec and Ontario have pay equity legislation applicable to both private and public sector employers. Pay equity legislation typically includes requirements relating to the preparation and maintenance of a pay equity plan, the payment of wage adjustments where required, as well as complaint and enforcement mechanisms.

Misclassification of Contractors

Businesses that regularly use contractors should consider whether there is any risk that a contractor has been misclassified and would be found at law to be an employee. A court or adjudicator will consider the

totality of the relationship between the business and the individual to determine whether the individual is self-employed or whether there is an employment relationship. The focus of the analysis is on the extent of the control that is exercised by the business over the performance of the contractor's work and also involves the consideration of factors such as which party provides the tools for the performance of the work, the individual's chance of profit and risk of loss and whether the individual can hire their own employees or contractors.

In the event that a contractor has been misclassified, there is risk that the business may be liable for minimum employment standards entitlements, such as overtime, vacation, statutory holiday pay and termination pay, payment of income taxes, Canada Pension Plan contributions, employment insurance remittances and workers' compensation premiums, as well as common law notice of termination.

Unique Aspects in Québec — French Language Requirements

Although Québec is a civil law jurisdiction rather than a common law jurisdiction, from a practical perspective, legal principles applicable to employment in the province of Québec are largely similar to legal principles in the rest of Canada.

An aspect of employment in Québec that is unique in Canada, however, is the issue of language. The majority of the population of Québec is French-speaking, and Québec law regulates certain aspects of the use of French in the workplace.

Québec's *Charter of the French Language* affirms French as the province's official language, and grants French-language rights to everyone in Québec, both as workers and as consumers. Anyone who does business in Québec — anyone with an address in Québec, and anyone who distributes, retails or otherwise makes a product available in Québec — is therefore subject to rules about how they interact with the public and how they operate internally inside the province.

In Québec, written communications with staff must be in French, including offers of employment and promotion and collective agreements. No one may be dismissed, laid off, demoted or transferred for not knowing a language other than French — but knowledge of English or another language may be made a condition of hiring if the nature of the position requires it.

Businesses that employ at least 50 people within Québec for at least six months, must obtain a francization certificate by demonstrating the generalized use of French at all levels of the business. Businesses where the use of French is not generalized at all levels may be subject to a francization program in order to achieve this goal. Businesses with at least 100 employees must establish an internal francization committee to report on progress.

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BUSINESS IMMIGRATION

By Stéphane Duval and Amélie Drouin

BUSINESS IMMIGRATION

NOTE TO READER: *The unprecedented outbreak of the coronavirus disease (COVID-19) forced many countries, including Canada, to impose severe restrictions on travel into the country and had significant impact on immigration procedures since March 2020. Therefore, readers are advised to consult with their immigration counsel on the restrictions currently in place that may affect the procedures described below.*

Please note that due to the above, we do not list all of Canada's travel restrictions as they are changing on a very frequent basis.

Introduction

Business immigration and global mobility have become important factors in the Canadian economy. More companies are using temporary foreign workers to address labour or skill shortages. In recent years, the number of temporary foreign workers in Canada has continued to grow. According to statistics published by Immigration, Refugees and Citizenship Canada (IRCC), this number has increased from about 100,000 in 1988 to around 550,000[1] in recent years and is still growing.

In its current state, Canadian immigration law (made up of both federal and provincial laws, associated regulations and ministerial instructions) governs the ability of individuals who are neither Canadian citizens nor permanent residents of Canada to lawfully be admitted temporarily or permanently in Canada, either to visit, study, work or settle permanently. More precisely, it also sets out the obligations of Canadian employers to both the foreign nationals working in Canada and to the associated regulatory schemes that monitor the relationship between employers and foreign nationals.

In addition, the *Immigration and Refugee Protection Act* (Act) imposes a rigorous compliance regime, which is designed to ensure that Canadian employers consistently respect the wage and working conditions of foreign nationals and impose serious penalties (including a period of ineligibility for hiring foreign nationals and penal charges) for non-compliance. Failure to respect any obligations could lead to serious consequences for a company, its directors and officers.

1. https://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00028-eng.htm;

Working in Canada

As a general principle, any foreign national who is neither a Canadian citizen nor a permanent resident of Canada cannot work in Canada unless authorized to do so. For Canadian immigration purposes, work is defined as an *activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market.*[2]

Determining whether there is a payment of a salary or commission in Canada is often a simple exercise; that being said, the absence of payment of a salary does not in itself void the requirement of a work permit. However, determining if there will be direct *competition with the activities of Canadian citizens or permanent residents in the Canadian labour market* is more difficult. In order to make this determination, immigration officers will analyze whether the foreign national will engage in an activity where Canadians are available or if the foreign national will compete with Canadian jobs. If so, the foreign national is considered to be seeking to work in Canada, the officer will then determine whether: (i) a work permit is required; or (ii) the work in question falls into one of the categories of work for which a work permit is not required (work permit exempt).

Work That is Work Permit Exempt

Generally, foreign nationals entering Canada on business visits do not require work permits. Under Canadian immigration legislation, "business visitor" is defined as a *foreign national who seeks to engage in international business activities in Canada without directly entering the Canadian labour market*.[3]

In order for foreign nationals to be admitted into Canada as business visitors and benefit from any applicable work permit exemptions, they must meet the following criteria:

- There must be no intent to enter the Canadian labour market; the foreign national is not directly entering the Canadian labour market if:
  - the primary source of remuneration for the business activities is outside Canada;
  - the principal place of business remains predominately outside Canada; and

2. *Immigration and Refugees Protection Regulations* (SOR /2002-227), s. 1(1);
3. *Immigration and Refugees Protection Regulations* (SOR /2002-227), s. 187;

- the actual place of accrual of profits remains predominately outside Canada.[4]

- The activity of the foreign worker must be international in scope.

In other words, and by way of example, IRCC offers the following extended definition to "Business Visitor:"[5]

A business visitor is someone who comes to Canada for international business activities without directly entering the Canadian labour market.

Examples of this include someone who comes to Canada to meet people from companies doing business with their country; to observe site visits; because a Canadian company invited them for training in product use, sales, or other business transaction functions.

They don't need a work permit to come to Canada. Business visitors must prove that their main source of income and their main place of business are outside Canada.

In addition, Canadian immigration authorities have outlined specific situations in which work completed in Canada will be work permit exempt. These situations include, among others, foreign nationals travelling to Canada to:

- **Provide after sales/lease service:** This includes repairing, servicing, supervising installers, and setting up and testing commercial or industrial equipment (including computer software). Setting up does not include hands-on installation. This includes repairing and servicing of specialized equipment, purchased or leased outside Canada, provided the service is being performed as part of the original or extended sales agreement, lease/rental agreement, warranty, or service contract.

- **Act under a warranty or service agreement:** Service contracts must have been negotiated as part of the original sales or lease/rental agreements or be an extension of the original agreement, and it must be for specialized commercial or industrial equipment purchased or leased outside Canada.

- **Act as installation supervisors:** Foreign nationals who enter Canada to supervise the installation of specialized machinery purchased or

4. *Immigration and Refugees Protection Regulations* (SOR /2002-227), s. 187(3);
5. https://www.cic.gc.ca/english/helpcentre/answer.asp?qnum=434&top=16;

leased outside Canada or to supervise the dismantling of equipment or machinery purchased in Canada for relocation outside Canada.

- **Act as trainers and trainees:** Foreign nationals entering Canada to provide familiarization or training services to prospective users or to maintenance staff of the establishment after installation of specialized equipment purchased or leased outside Canada has been completed.
- **Provide intra-company training and installation activities:** Foreign nationals coming to provide training or installation of equipment for a branch or subsidiary company of their foreign employer are considered to be business visitors. The same prohibition against hands-on building and construction work as for after-sales service applies.
- **Board of Directors' meetings:** Foreign nationals attending a meeting as a member of a board of directors may enter as a business visitor.
- **Short-term work visits for highly skilled workers:** Foreign nationals who are highly skilled and whose occupation falls within Canada's national occupation code levels 0 or A may undertake work in Canada for 15 days once every six months or 30 days once every 12 months without a work permit.
- **Researchers:** Foreign nationals coming to perform research at the invitation of a publicly funded degree granting Canadian post-secondary institution or affiliated research institution will be able to come to Canada to work on that project for 120 days, once a year, without a work permit.
- **Foreign students studying in Canada:** Foreign nationals with valid study permits who are full-time students at a designated learning institution, have started studying, are in a program of a duration of at least six months that leads to a degree, diploma or certificate, can work without a work permit for up to 20 hours per week during regular school sessions. They can work full-time during scheduled breaks, such as the winter and summer holidays or spring break.

Work That Requires a Work Permit

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

TFWP

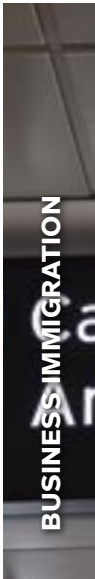
Regular Program

The TFWP allows Canadian employers to hire foreign workers to fill temporary labour and skill shortages when qualified Canadian citizens or permanent residents are unavailable. This program is managed jointly by Employment and Social Development Canada (ESDC) and IRCC. Under this program, employers must demonstrate that they have been unable to recruit Canadian citizens or permanent residents for the job, due to a labour or skill shortage.

Under the TFWP, employers must first obtain a positive Labour Market Impact Assessment (LMIA) in order for the foreign national to then be able to apply for a work permit. An LMIA is a document issued by ESDC following a thorough assessment of Canada's labour market in order to determine whether or not Canadian citizens or permanent residents are available to undertake the type of work in question. In most cases, this requires employers seeking to hire a foreign national to advertise the position publicly for at least four weeks via a variety of methods so as to prove whether or not:

- the employment of a foreign worker is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
- the employment of a foreign worker is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
- the employment of a foreign worker is likely to fill a labour shortage;
- the wages offered to a foreign worker are consistent with the prevailing wage rate for the occupation and region(s) where the worker will be employed and the working conditions offered to a foreign worker meet generally accepted Canadian standards;
- the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and
- the employment of the foreign worker is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.

If all the conditions are met, a positive LMIA would be issued and the foreign national will then be able to apply for a work permit either at the port of entry upon arrival, if he/she is a visa-exempt country, or at the



Canadian visa office in their country of citizenship or legal residence (see below, Applying For A Work Permit).

Global Talent Stream

As mentioned at the beginning, global mobility is important, and Canada realized the importance of attracting highly skilled individuals that can contribute to Canadian economy.

Part of the Canadian authorities' strategy was to launch the *Global Talent Stream* (GTS), which aims to help Canadian employers attract new talent and abilities with a faster and more efficient recruitment process for highly skilled workers. Under this program, employers will usually see their LMIA request processed within two weeks. To benefit from the GTS, the employer must work with ESDC to develop a Labour Market Benefits Plan that demonstrates its commitment to activities that will have lasting, positive impacts on the Canadian labour market (e.g. job creation, skills and training investments, growth of revenue, etc.). The GTS has no minimal recruitment requirement, but the employer will be asked to describe any efforts to recruit Canadians and permanent residents. The GTS is divided in two categories:

- **Category A:** Meant for employers who will be referred by a designated referral partner and who seek to hire unique and specialized talent in an area of specialization, which is of interest to the employer;
- **Category B:** Meant for employers who seek to hire highly skilled workers with specific work experience at positions above a varying minimum wage in one of the listed occupations, most of which are in the information technology industry.

Simplified Process for Certain Occupations in Québec

Certain occupations that require work permits are subject to a facilitated LMIA process that exempts employers from demonstrating recruitment efforts for certain occupations. The lists of occupations are established by region and are updated yearly. This simplified process allows employers to receive LMIAs on a somewhat more accelerated basis, provided that the potential employees meet a range of requirements associated with the occupations in question.

IMP

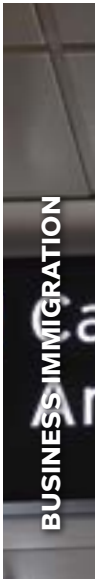
The IMP allows employers to hire a foreign worker without an LMIA. It is divided in various categories. Some of them are based on the

Regulations, on international agreements (e.g. CUSMA (formerly known as NAFTA), CETA, Canada-U.K. TCA, GATS, etc.), on Canadian interests, humanitarian reasons, etc.

Some of the categories of work permit under the IMP include:

- **Intra-company transferees:** This category was created to permit multinational companies with operations in Canada to temporarily transfer qualified employees to Canada for the purpose of improving management effectiveness, expanding Canadian activities, and enhancing the competitiveness of Canadian entities. Eligible foreign nationals must be currently employed outside of Canada (by a related enterprise), have been employed with them for at least 12 months in the past three years and be seeking entry to work at a Canadian *parent, subsidiary, branch, or affiliate of that enterprise in an executive, senior managerial, or specialized knowledge capacity*.[6]
- **Professionals:** This category facilitates the issuance of a work permit for certain occupations specifically provided for under various International Free Trade Agreements, such as CUSMA, which applies to citizens of Canada, the United States, and Mexico. It provides a specific list of occupations for which applicants can seek a Canadian work permit as long as they can prove their membership in the occupation in question along with the existence of a Canadian job offer in that occupation. Similar international agreements exist between Canada and Europe, the United Kingdom, Chile, Columbia, Peru, South Korea, to name a few.
- **Spouses of skilled work permit holders:** Spouses/common-law partners of individuals who hold Canadian work permits that were issued for more than six months in a high-skilled occupation can obtain open work permits with concurrent validity to their spouse's permit.
- **Emergency repairs or repair personnel for out-of-warranty equipment:** In situations where a repair, for which specialized knowledge is required and for which there is no Canadian commercial presence by the company that manufactured the equipment being serviced, must be completed urgently, absence of which Canadian jobs would be greatly affected, a short-term work permit can be obtained (usually 30 days or less).

6. https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/exemption-codes/intra-company-transferees/canadian-interests-significant-benefit-general-requirements-r205-exemption-code-c12.html;



- **Francophone mobility:** French-speaking foreign nationals that have been recruited for a high-skilled position outside of Québec can obtain work permits.
- **Bridging open work permit:** Foreign nationals currently in Canada (but outside of Québec) with a valid status as a worker set to expire within four months and who have submitted permanent resident applications may be eligible for bridging open work permits.
- **Québec selection certificate holders currently in Québec:** Foreign nationals who are currently in Québec with a valid status as a worker may obtain a work permit for up to two years with a Québec-based employer, on the basis of their Québec selection certificate obtained through a permanent skilled worker program.
- **Post-doctoral PhD fellows and award recipients:** Foreign nationals appointed to a time-limited position granting a stipend or a salary to compensate for periods of teaching, advanced study and/or research may be issued temporary work permits. Applicants must have completed, or be expecting to complete shortly, their doctorate and be working in a field related to that in which they earned, or are earning, their Ph.D. Academic research award recipients who are supported by their own country or institution and invited by Canadian institutions to conduct research activities in Canada may also be eligible for this exemption.
- **Post-graduation work permit:** Foreign nationals in Canada who have continuously studied full-time in Canada with a valid study permit and have completed a program of study that is at least eight months in duration at a designated learning institution are eligible to obtain an open work permit, under certain conditions.
- **Reciprocal employment:** This exemption allows foreign nationals to take up employment in Canada when Canadian citizens and permanent residents of Canada working for the Canadian company have had similar reciprocal opportunities abroad.
- **International Experience Canada:** The Canadian government and foreign governments have signed bilateral agreements on youth mobility. These agreements allow foreign nationals between 18 and 30 or 35 years old (depending on the country), to obtain a work permit for a limited period of time in order to travel or work anywhere in Canada or for a specific employer.

Applying For A Work Permit

The work permit can be applied for once an LMIA is issued (if applicable), or when the foreign worker is exempted from the obligation of obtaining an LMIA. The foreign worker can apply for their work permit upon entry into Canada or at a visa office abroad, depending on their country of citizenship.

Foreign Nationals Who do not Require Visas

A foreign national can apply for their work permit at the port of entry (Canadian land border or airport) if they are a citizen of a visa-exempt country. All visa-free applicants (except certain people, including U.S. citizens) will still require an Electronic Travel Authorization (eTA) in order to travel to Canada by air.

Foreign Nationals Who Require Visas

A foreign national who requires a visa to enter Canada must apply for their work permit at a visa office abroad. This can be done electronically or on paper. While there is a general list of documents to be provided in support of an application for a work permit, each local visa office has its own specific requirements and it is important to review them before submitting the application. A personal interview might also be required. The application must be submitted at the visa office responsible for the foreign national's country of citizenship or their country of current legal residence.

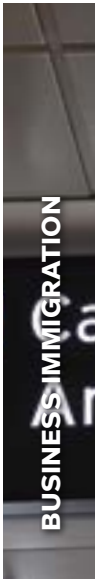
In addition, citizens of certain countries will require a medical examination prior to their admission into Canada if they are seeking to enter for six months or more.

International Mobility Workers Unit

Employers seeking to hire visa-exempt foreign nationals under one of the IMP categories, might have their application pre-approved by the International Mobility Workers Unit, an in-country service available to visa-exempt nationals not currently in Canada.

Employer Obligations Toward Foreign Nationals

Canadian employers of foreign nationals are expected to meet rigorous compliance requirements regarding the foreign workers in their employ. It is essential that Canadian employers:



- **Ensure ongoing compliance with the foreign national's original terms of employment:** When hiring a foreign worker, Canadian employers set out the terms of employment both to the foreign worker and to the government of Canada. These must be respected in precisely the same way as they would for a Canadian employee. However, in cases of foreign workers, any changes to the terms of employment — including minor changes such as an increase in salary or a change in the number of hours worked — may need to be reported to Canadian authorities prior to this change taking place (depending upon the work permit category). Audits of employers that currently have or have had (audits can be retroactive six years) foreign workers in their employ are routine occurrences.
- **Hire a foreign worker with the requisite authorization:** The law prohibits any employer from hiring a foreign national who does not possess the requisite work authorization. It also places the onus on the employer to verify the status of every foreign national that it employs. In other words, should the employer fail to exercise due diligence in determining whether employment is authorized, the employer will be deemed to have known that it is not authorized. It is critical to verify the status of any foreign worker before making an offer of employment.
- **Avoid any form of misrepresentation:** Canadian law prohibits any person, including an employer, from communicating either directly or indirectly, information that is false or misleading, or making any erroneous representation that could lead to Canadian immigration law or regulations being administered incorrectly. Therefore, it is important that any statement, form, or document produced by an employer is accurate and true, including but not limited to the offer of employment, any forms, or communications exchanged with officers.

The consequences of non-compliance in any form on the part of the Canadian employer could be significant. Employers found non-compliant are subject to:

- warnings;
- administrative monetary penalties ranging from C$500 to C$100,000 per violation, up to a maximum of C$1 million over one year, per employer;
- a ban of one, two, five or 10 years, or permanent bans for the most serious violations from all forms of foreign worker programs;

- the publication of the employer's name and address on a public website with details of the violation(s) and/or consequence(s); and/or
- the suspension or revocation of previously issued LMIAs.

Furthermore, depending on the nature of the breach, companies, directors, and officers can also be sentenced to a fine of up to C$50,000 or C$100,000 and imprisonment for a term of up to two or five years.

Permanent Residents

Many programs currently exist in order for foreign workers to settle permanently in Canada. Some of these are point-based systems that factor in personal, professional, and other qualities in addition to any time spent in Canada as a foreign worker. Other programs are based on family reunification, and additional options exist on the provincial level tailored to the needs of each province.

Permanent residents can, like any Canadian citizen, work and live in Canada, subject to certain obligations imposed upon them, including a residency obligation. Under the current legislation, the residency obligation requires any permanent resident to be physically present in Canada for at least 730 days in any five-year period, failing which they may lose their permanent resident status. Certain exceptions to this obligation exist.

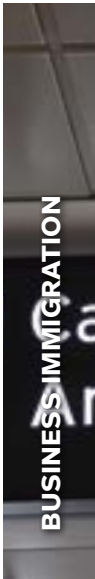
Inadmissibility

Foreign nationals can be considered criminally inadmissible to Canada for having been convicted of an offence inside or outside of Canada that constitutes an offence under Canadian law. Individuals who are inadmissible to Canada may be denied entry to the country regardless of their purpose for entering Canada. In certain cases, this inadmissibility can be overcome via an application for a temporary resident permit, granted on a temporary basis in the case of an established and urgent need to travel to Canada.

In some circumstances, individuals who are inadmissible to Canada may be eligible for criminal rehabilitation, which overcomes criminal inadmissibility permanently.

Conclusion

Prior to hiring a foreign national, whether temporarily or permanently,



employers should ensure that they are well informed of their rights and obligations. These are in effect during the recruitment process, and remain in effect throughout the hiring process and after its completion. The consequences of any breach could drastically affect both the employer and its business.

The rules and regulations governing both permanent and temporary entry to Canada are complex and ever changing. It is therefore prudent for any company having or wishing to establish a commercial presence in Canada to become familiar with Canadian immigration laws.

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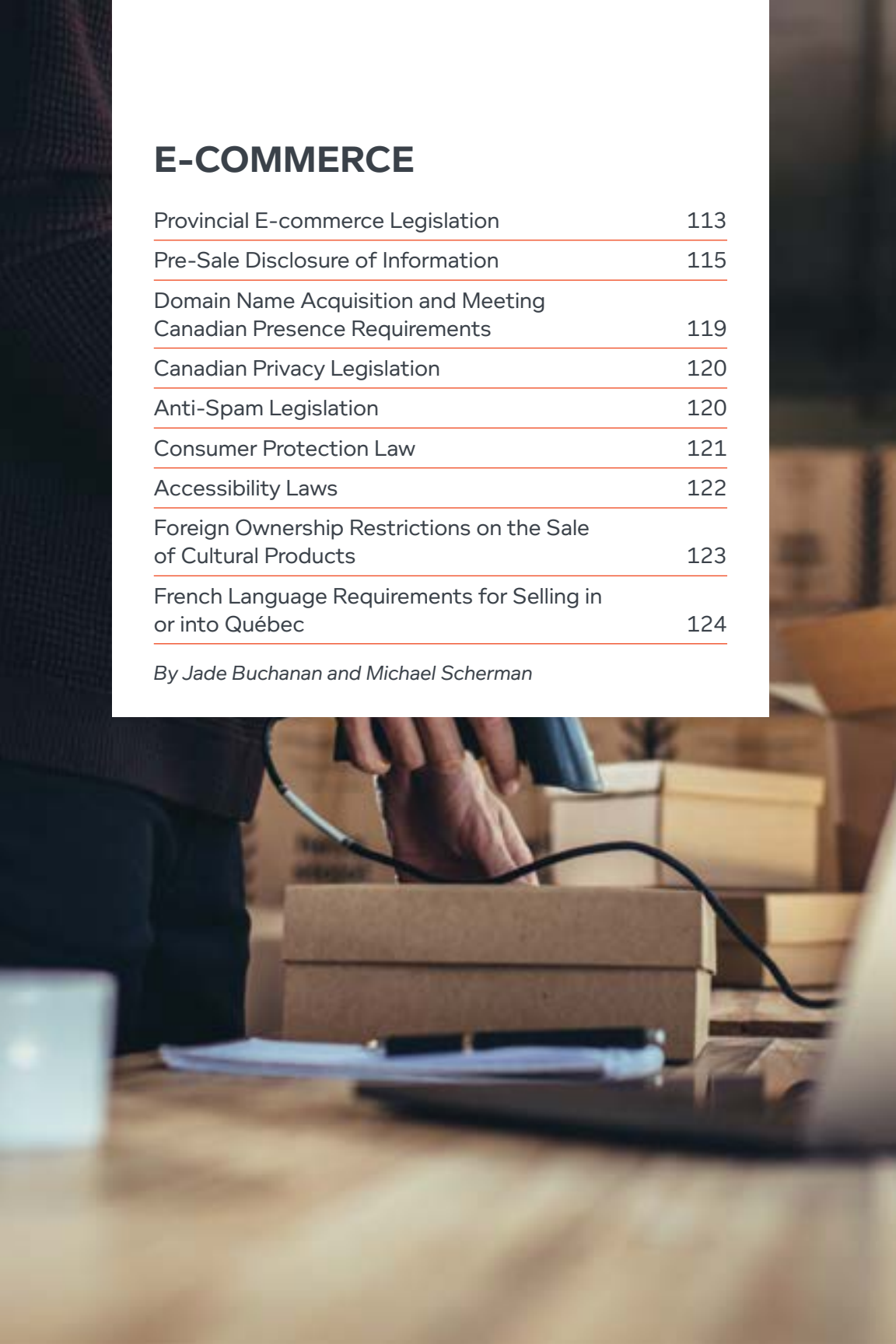
E-COMMERCE

By Jade Buchanan and Michael Scherman



E-COMMERCE

This chapter addresses the special issues manufacturers and distributors of consumer products face when they promote their products online or sell their products directly to consumer online in Canada.

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 merchants.

This chapter is divided into eight aspects of e-commerce regulation: provincial e-commerce legislation; domain name acquisition and meeting Canadian presence requirements; Canadian privacy law; anti-spam law; consumer protection law; accessibility law; foreign ownerships restrictions on the sale of "cultural products;" and French language requirements for selling in or into Québec.

Provincial E-commerce Legislation

Every Canadian province, except New Brunswick and Prince Edward Island, has adopted consumer protection legislation that is modelled on the Internet Sales Contract Harmonization Template.[1] The relevant statutes and regulations for each province are as follows:

- In British Columbia, ss. 46 – 52 of the *Business Practices and Consumer Protection Act*;[2]
- In Alberta, the *Internet Sales Contract Regulation* enacted under the *Consumer Protection Act*; [3]
- In Manitoba, Part XVI of the *Consumer Protection Act* and the *Internet Agreements Regulation* enacted thereunder;[4]
- In Saskatchewan, Part III, Division 1 of the *Consumer Protection and Business Practices Regulations* enacted under the *Consumer Protection and Business Practices Act*;[5]

1. Office of Consumer Affairs, "Internet Sales Contract Harmonization Template" (25 May 2001), online: <https://ic.gc.ca/eic/site/oca-bc.nsf/eng/ca01642.html>.
2. SBC 2004, c 2.
3. *Internet Sales Contract Regulation*, Alta Reg 81/2001; *Consumer Protection Act*, RSA 200, c C-26.3.
4. *Consumer Protection Act*, CCSM c C200; *Internet Agreements Regulation*, Man Reg 176/2000.
5. *The Consumer Protection and Business Practices Regulations*, RRS c C-30.2 Reg 1; *Consumer Protection and Business Practices Act*, SS 2014, c C-30.2.

- In Ontario, ss. 37 – 40 of the *Consumer Protection Act* and ss. 31 – 33 of the *General Regulations* enacted thereunder;[6]
- In Québec, Title I, Chapter III, Division I.3 of the *Consumer Protection Act*;[7]
- In Nova Scotia, ss. 21V – 21AF of the *Consumer Protection Act* and the *Internet Sales Contract Regulation* enacted thereunder;[8]
- In Newfoundland, Part V, Division 2 of the *Consumer Protection and Business Practices Act*.[9]

Provincial e-commerce laws impose obligations on e-commerce merchants before and after the sale of goods and services to consumers. In general, these laws require: (i) pre-sale disclosure of information; and (ii) delivery of a copy of the agreement to the consumer.

The thresholds for when these rules apply vary. In British Columbia, Manitoba, Québec, and Newfoundland, the rules apply to all online sales. By contrast, in Alberta, Ontario, Saskatchewan, and Nova Scotia, the rules apply only to sales over C$50. The rules in Nova Scotia do not apply to goods and services that are immediately downloaded or accessed using the internet.

The main challenge in ensuring compliance with provincial e-commerce legislation will come from a website architecture and content perspective — not simply from compliant terms of use of the website. In other words, it is relatively straightforward to revise terms of use and to draft or revise a website privacy policy; however, compliance with provincial e-commerce legislation requires foresight and may require at least some structural and content changes to an e-commerce website. The considerations below must be built into the design process.

Compliance with provincial e-commerce laws likely also requires attention to a number of standard clauses in online sales contracts, including: (i) choice of law; (ii) arbitration; (iii) unilateral amendment; and (iv) exclusions of certain warranties. See **Consumer Protection Laws**.

6. *Consumer Protection Act*, SO 2002, c 30; General, O Reg 17/05.
7. *Consumer Protection Act*, CQLR c P-40.1.
8. *Consumer Protection Act*, RSNS 1989, c 92; *Internet Sales Contract Regulation*, NS Reg 91/2002.
9. *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1.

Pre-Sale Disclosure of Information

E-commerce merchants must provide certain information to consumers prior to the consumer entering into an agreement online. This information includes the seller's contact information, a description of the goods or services, delivery arrangements, payment details, and shipping and return information.

These disclosures must be prominent, clear, comprehensible, and available in a manner that: (i) requires the consumer to access the information; and (ii) allows the consumer to retain and print the information. Further, the consumer must have an express opportunity to accept or decline the agreement, and to correct errors immediately before entering into the agreement.

Québec rules regarding form are more stringent than those above. Merchants in Québec must expressly bring the disclosed information to the consumer's attention in a form that allows it to be easily printed and retained.

Contact Information

E-commerce legislation requires pre-sale disclosure of merchants' contact information.

The merchant's name and, if different, the name under which the merchant carries on business must be disclosed prior to the sale. The only exception is Newfoundland, where disclosure of the merchant's name alone is required.

Typically, a merchant's business address and, if different, the merchant's mailing address must be disclosed. In Newfoundland and Québec, disclosure of only the merchant's business address is required. Alternatively, in Ontario and Saskatchewan, the address of the premises from which the merchant conducts business with the consumer must be disclosed.

The merchant's telephone and facsimile numbers are universally required as a pre-sale disclosure. All provinces except Québec also require the merchant's email address, if available. Additionally, Ontario, Saskatchewan, and Québec require disclosure of the merchant's technological addresses (such as Facebook, Twitter or Instagram feeds),

if available. Newfoundland requires disclosure of the salesperson's name, where applicable, and other items including the consumer's name and address, the date and place of the contract, and both parties' signatures.

Merchants can satisfy these requirements by placing: (i) their name or names of other required parties on checkout pages; (ii) their legal names at the bottom of each webpage that will be part of their e-commerce platform; and (iii) their other contact information at the bottom of the main page of their websites. In some cases, such as the requirement in Newfoundland to disclose consumer-specific information and signatures of both parties, the information can be provided during the online checkout process.

Description of Goods and Services

Merchants are required to disclose, at least, a fair and accurate description of the goods and services they will provide to consumers through their e-commerce platform. In British Columbia, Québec, and Newfoundland, this requirement is heightened — merchants are required to disclose a detailed description of the goods and services to be supplied under the contract. Further, all provinces require disclosure of any relevant technical or system specifications.

Merchants often satisfy these requirements by having a section of their website dedicated to all relevant descriptions, specifications, and other materials related to their products. For operators of online marketplaces who rely on third-party merchants to provide product descriptions, consideration of indemnification and auditing mechanisms is a means of limiting exposure related to the requirement to provide fair and accurate descriptions of goods and services.

Delivery Arrangements

Key dates related to sales are required as pre-sale disclosures. These may include, as applicable:

- the date when the goods are to be delivered;
- the date when the supply of goods or services will begin; and
- the date when the supply of goods or services will be complete.

Disclosure of the merchant's delivery arrangements, including the identity of the shipper, mode of transportation, and place of delivery, is universally required by provincial laws.

Per Ontario and Saskatchewan law, in the case of service provision, e-commerce platforms must disclose information on the place where the services will be provided, the person to whom they will be provided, and the merchant's method of providing them (including the name of any person who is to provide the services on the merchant's behalf). In Saskatchewan, if the supply is ongoing and over an indefinite period, disclosure of the frequency of supply is also required.

Note that, as discussed further in the section discussing price below, consumer protection laws also generally require that any costs associated with shipping or delivery of goods be disclosed to consumers prior to entering into the purchase transaction.

Warranties, Guarantees, Returns and Other Policies

Merchants' cancellation, return, exchange, and refund policies, if any, are universally required to be disclosed under provincial e-commerce legislation. In addition, Manitoba requires the details of any applicable warranties or guarantees. Newfoundland requires a statement of cancellation rights.

Certain other policies, such as trade-in arrangements or arrangements for the protection of the buyer's financial and personal information (such as privacy policies), may also be required for disclosure, depending on the province.

Price

All provincial e-commerce laws require pre-sale disclosure of the following items:

- an itemized purchase price for the goods or services to be supplied to online consumers;
- the total price under the contract, including the cost of credit;
- a detailed statement of the terms, conditions, and methods of payment; and
- the currency in which amounts owing under the contract are payable.

Except in Newfoundland, provincial e-commerce legislation requires disclosure of other costs, including tax and shipping charges, as well as descriptions of other charges that may apply to the contract but cannot be reasonably determined by the merchant (such as brokerage fees or customs duties). If periodic payments are to be made under the

contract, most provinces also require disclosure of the amount of each periodic payment.

Other disclosure requirements related to price that are specific to particular provinces include:

- in Manitoba, any delivery, handling or insurance costs payable by the buyer in addition to the purchase price;
- in Québec, the rate applicable to the use of an incidental good or service; and
- in Manitoba and Newfoundland, if credit is extended by the seller, a description of any security taken by the seller and information regarding the cost of credit.

Other Pre-Sale Disclosures

In addition to the requirements above, all provinces except Newfoundland have blanket pre-sale disclosure requirements that aim to cover key elements of e-commerce transactions. These provisions mandate disclosure of all restrictions, limitations or other terms or conditions that may apply to the supply of goods and services.

Also of note, though not a pre-sale disclosure, is a requirement regarding distance contracts in Québec. Per s. 54.3 of Québec's *Consumer Protection Act*, a merchant cannot enter into (or make an offer to enter into) a distance contract that collects full or partial payment from the consumer before performing the merchant's principal obligation unless the consumer may request a chargeback of the payment. This is important because the use of PayPal as a payment option would contravene this restriction.

Delivery of a Copy of the Contract

All provincial e-commerce laws, except those in Manitoba, require a merchant to deliver a copy of the agreement to the consumer within 15 days after the consumer enters the agreement. The mandatory pre-sale disclosure information discussed above must be included in the copy of the agreement delivered to the consumer. The copy must also include the consumer's name and the effective date of the contract.

Generally, delivery must occur in a manner that ensures that the consumer is able to retain, print, and access the copy for future reference. Most

provinces specify that delivery via email, fax, or postal mail to the contact information provided by the consumer is sufficient. In Québec, delivery must occur in a way that the consumer can easily retain and print a copy of the contract.

Domain Name Acquisition and Meeting Canadian Presence Requirements

In Canada, the .ca domain name is administered by the Canadian Internet Registration Authority (CIRA). CIRA certifies domain name registrars. These registrars receive applications for domain name registrations directly from registrants and then funnel them up to CIRA, which ultimately approves and registers them.

CIRA requires registrants to meet Canadian presence requirements, which are designed to ensure that the .ca domain remains a "key public resource for the social and economic development of all Canadians."[10] Manufacturers typically meet the Canadian presence requirements by creating a Canadian corporation or registering a trademark in Canada that corresponds to the desired domain name, both of which will satisfy the requirements.

Manufacturers should be wary of cybersquatters (and typosquatters), who register domain names broadly for the purposes of making it difficult (and costly) for companies to acquire domain names with their company names (or names close to their company names) in them. Many tools are at the disposal of manufacturers to fight back against cybersquatters, including a variety of "carrot-and-stick" strategies, such as filing a cybersquatting complaint under the CIRA domain name dispute resolution policy, initiating a trademark infringement action, and approaching the current registrant with an offer to acquire the domain name at cost (namely the cost of acquiring and maintaining the registration).

Forcing a cybersquatter to relinquish a coveted domain name can be time-consuming if the cybersquatter is not motivated for a quick transfer. Accordingly, an "all-fronts," "carrot-and-stick" approach using all available levers at once may be the most effective strategy.

10. Canadian Internet Registration Authority, "Canadian Presence Requirements", online: <https://cira.ca/canadian-presence-requirements-registrants>.

Canadian Privacy Legislation

Canada has strict private sector privacy legislation, both at the federal level and, in some provinces, the provincial level. Compliance with Canadian privacy legislation requires much more than simply drafting or revising a website privacy policy. It requires conducting a privacy audit to assess data flow, the purposes of collection, the means of collection, and the technological, administrative, and contractual protections that have been put in place to ensure compliance. Additional privacy measures may be required for organizations handling sensitive personal information, such as financial or transaction data.

Compliance with Canadian privacy legislation is discussed in Cybersecurity, Privacy and Data Protection.

Finally, while not strictly privacy related, organizations 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.

Anti-Spam Legislation

Canada's Anti-Spam Legislation (CASL) applies to the sending of commercial electronic messages (defined broadly to include text, sound, voice, or image messages) and includes provisions related to the installation of computer programs and alteration of data transmission.[11]

CASL is much stricter than the U.S.'s CAN-SPAM Act of 2003. Online marketers should carefully structure their email and direct mail campaigns to comply with the Canadian regime, which includes an "opt in" consent requirement (as opposed to CAN-SPAM's "opt out" requirement), disclosure requirements, an "unsubscribe" mechanism requirement, and a prohibition against false or misleading advertising. The regime imposes severe penalties for non-compliance. CASL also sets out certain exceptions to the consent requirement, as well as exceptions to the consent, form, and content requirements. In addition, there are specific

11. *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, SC 2010, c 23.

requirements for obtaining consent on behalf of third parties (such as brands and marketing partners).

Many aspects of CASL will be familiar to those who run a CAN-SPAM compliant e-marketing program. However, CASL has several unique features. As such, marketing departments may have to rework their compliance approach.

To combat spyware, malware, and other malicious software, CASL prohibits the installation of computer programs without the consent of the computer's user or owner.

For an in-depth explanation of CASL, see our Anti-Spam Toolkit available on our website at www.mccarthy.ca.

Consumer Protection Law

Manufacturers that engage in e-commerce or advertise online should also be aware of general consumer protection rules under both the federal Competition Act and provincial consumer protection statutes.

The *Competition Act* prohibits businesses from engaging in deceptive marketing practices for the purpose of promoting a product or a business interest.[12] This prohibition applies to all representations, in any form, that are false or misleading in a material respect. A representation that could influence a consumer to buy or use the product or service advertised will be deemed material. In determining whether a representation is false or misleading, courts will consider the "general impression" it conveys to the public, as well as its literal meaning.

The *Competition Act* provides two adjudicative regimes to address deceptive marketing practices: a criminal regime and a civil regime.

The criminal regime prohibits representations made knowingly or recklessly, and specifically forbids deceptive marketing, deceptive notices of winning a prize, double ticketing, and schemes of pyramid selling.

The civil regime prohibits: (i) performance representations that are not based on adequate and proper tests; (ii) misleading warranties and

12. *Competition Act*, RSC 1985, c C-34, Parts VI–VII.

guarantees; (iii) false or misleading ordinary selling price representations; (iv) untrue, misleading, or unauthorized uses of tests and testimonials; (v) bait and switch selling; (vi) the sale of a product above its advertised price; (vii) unfair promotional contests; and (viii) false or misleading representations in electronic messages. Businesses that engage in deceptive marketing practices prohibited by the civil regime may be ordered to pay a fine, the bureau's costs, and restitution to customers, as well as to cease such practices.

The provincial consumer protection statutes also prohibit unfair selling practices,[13] which include the making of false or misleading statements. Where a buyer has entered into a contract after or while the seller has engaged in an unfair practice, consumer protection laws provide that the buyer will be able to draw on the usual contractual remedies of rescission, specific performance, and compensatory damages. Buyers need not demonstrate reliance on the unfair practice in order to avail themselves of these remedies; they must merely demonstrate that their accession to the contract followed the unfair practice.

The *Competition Act* is discussed thoroughly in Competition Law. Canadian consumer protection laws are discussed in Consumer Protection Laws.

Accessibility Laws

Web Content Accessibility Guidelines (WCAG) 2.0 is an internationally accepted standard for web accessibility developed by the World Wide Web Consortium, an international team of experts. WCAG 2.0 explains how to make web content more accessible to people with disabilities, which include visual, auditory, physical, speech, cognitive, language, learning, and neurological disabilities.[14]

E-commerce merchants need to take notice of WCAG 2.0. The Ontario *Integrated Accessibility Standards* require private sector organizations with 50 or more employees as well as designated public sector organizations to conform to WCAG 2.0 Level AA.[15] As of January 1, 2021, all public websites and web content posted after January 1,

13. For example, see ss. 14(1),(2), 17(1) of the Ontario *Consumer Protection Act*, supra note vi.
14. World Wide Web Consortium, "Web Content Accessibility Guidelines (WCAG) 2.0" (11 December 2008), online: <https://www.w3.org/TR/WCAG20/>.
15. *Integrated Accessibility Standards*, O Reg 191/11, s 14(2).

2012 must meet WCAG 2.0 Level AA, other than live captions and pre-recorded audio descriptions.

The Ontario government has provided a useful guide for companies to follow to ensure compliance with WCAG 2.0 standards.[16] This guide includes recommendations for: (i) testing compliance of current websites; and (ii) working with web developers to ensure future websites satisfy WCAG criteria.

In the coming years, other jurisdictions may adopt similar legal requirements (including in British Columbia, where a bill was proposed for the *Accessible British Columbia Act* in 2021). Manitoba and Nova Scotia have passed accessibility legislation that contemplates the development of website accessibility standards.[17] The federal *Accessible Canada Act*, was proclaimed into force in 2019, also contemplates such standards.[18] While website accessibility standards have not yet been enacted under these laws, it is expected that they will adopt WCAG criteria.

On June 5, 2018, WCAG 2.1 was published.[19] WCAG 2.1 adds criteria to WCAG 2.0, such that compliance with WCAG 2.1 necessarily means compliance with WCAG 2.0. Though both versions are existing standards, e-commerce merchants should be mindful of WCAG 2.1, especially considering several jurisdictions are expected to pass website accessibility regulations that may conform to this higher standard in the near future.

Foreign Ownership Restrictions on the Sale of Cultural Products

The Canadian federal government has imposed foreign ownership restrictions on companies that sell "cultural products" to Canadians. Such products include books, magazines, songs, films, new media, and radio and television programs.

In recent years, the implementation of this policy has been relaxed (for example, Amazon.ca sells books from a U.S. location and Netflix.ca

16. Ontario, "How to make websites accessible" (7 November 2014), online: <https://www.ontario.ca/page/how-make-websites-accessible>.
17. *Accessibility for Manitobans Act*, CCSM c A1.7, ss 3(2)(c), 5(1)(c); *Accessibility Act*, SNS 2017, c 2, ss 2(a)(ii), 7(1)(c).
18. SC 2019, c 10, ss 5(c), 18(a).
19. World Wide Web Consortium, "Web Content Accessibility Guidelines (WCAG) 2.1" (5 June 2018), online: <https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21/>.

streams television and films from the U.S.), but compliance still requires some attention. Any organization seeking to sell cultural products will need to undertake a specific program for compliance.

French Language Requirements for Selling in or into Québec

To the extent that manufacturers that sell by way of e-commerce have 50 or more employees in Québec, they must comply with certain French language requirements under Québec's *Charter of the French Language*.[20] These requirements give effect to two fundamental principles of Québec law:

- consumers of goods and services have a right to be informed and served in French; and
- workers have a right to carry on their activities in French.

These general principles are reflected in a series of legal requirements applicable to companies that carry on business in Québec, including requirements affecting commercial advertising, public signs, the language of work, the language of information technology, and the language of contracts and invoices. Many U.S. companies that choose to carry on business in Canada are initially unprepared to comply with these provisions.

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20. CQLR c C-11.

CYBERSECURITY, PRIVACY AND DATA PROTECTION

By Jade Buchanan and Michael Scherman

CYBERSECURITY, PRIVACY AND DATA PROTECTION

With limited exceptions, all businesses engaged in commercial, for-profit activity in Canada are subject to privacy legislation that regulates the collection, use and disclosure of personal information. Data will constitute "personal information" when it can be used to identify an individual, whether on its own or in combination with other pieces of data. Personal information can include "indirect" or "inferred" information, such as a customer's spending patterns or information about their usage of a product, and can be in any format, including voice recordings and video surveillance records. Manufacturers of consumer products (which we will call "brands") will need a robust privacy program, particularly if they collect information about consumers. Brands may handle personal information as part of their marketing efforts, loyalty programs and may even make products that collect personal information, such as internet-of-things devices.

A Patchwork of Legislation

There are several laws in Canada that relate to privacy rights and the collection, use, and disclosure of personal information. By default the handling of personal information by brands is governed by the *Personal Information Protection and Electronic Documents Act*[1] (PIPEDA), a federal act 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, in which case the province's legislation will apply instead of PIPEDA for actions that take place entirely within its borders (with some exceptions). This is the case in British Columbia, Alberta, and Québec.

PIPEDA compliance will likely be a cross-border brand's first step in adapting their privacy framework to Canada, but provincial laws may apply, particularly for brick and mortar stores in British Columbia, Alberta, and Québec.

Privacy Principles

PIPEDA includes 10 principles that establish obligations for organizations and more broadly drive interpretation of privacy law and policy in Canada.

1. *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5

Brands operating or selling products in Canada should consider their business activities and privacy procedures from the perspective of these 10 principles:

- **Accountability**: Brands are responsible for personal information under their custody or control. In certain circumstances or jurisdictions, they are also responsible for the privacy compliance of a business with which they share personal information. An important consequence of accountability is that organizations remain responsible for personal information in their control, even when their service providers process it.
- **Identifying Purposes**: Brands must explain to customers why they are collecting their personal information and how they will use it or disclose it to other organizations (unless the purpose of collection, use or disclosure would be obvious to a "reasonable" person and the customer voluntarily provides the information for that purpose). Brands cannot collect personal information for one purpose and then use it for another without obtaining new consent for the secondary use (unless an exception applies). For instance, brands cannot tell customers they are collecting personal information to "track purchases" and then use it to market products to them.
- **Consent**: Consent should be obtained before or during the collection. Brands should be aware that they cannot require a customer to provide personal information as a condition of sale, unless it is essential to conduct the sale.
- **Limiting Collection**: The collection of personal information is limited to what is necessary for the identified purposes and must be collected by fair and lawful means. This means brands may only collect the personal information needed to complete the purchase. For instance, if a customer joins a loyalty program, providing their demographic information should be optional.
- **Limiting Use, Disclosure and Retention**: Personal information must be used and disclosed only for the purpose(s) intended, except where consent of the individual is obtained or as required by law. This may pose a challenge for brands who engage in data analytics or use artificial intelligence applications, where large data sets collected over time are important to the generation of accurate insights.
- **Accuracy**: Brands must make a reasonable effort to ensure that a customer's personal information is accurate and complete.

- **Security Safeguards**: Brands must protect all personal information in their custody or under their control by making reasonable security arrangements to prevent unauthorized access, collection, use, copying, modification or disposal or similar risks. The nature of the safeguards will vary depending on the sensitivity of the information, the amount, distribution, and format of the information, and the method of storage. Sensitive information needs a higher level of protection.
- **Openness**: Brands must be open about their policies and practices with respect to personal information. Customers must be able to acquire information about an organization's policies and practices without unreasonable effort (typically in a public-facing privacy policy, with the contact information of the privacy officer).
- **Individual Access**: If a customer requests, brands must provide him or her with information about the existence, use, and disclosure of his or her personal information and must provide access to that information (with certain narrow exceptions). An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.
- **Challenging Compliance**: Brands must have procedures in place to receive and respond to complaints or inquiries about their policies and practices regarding the handling of personal information.

Validity of Consent

Before an organization can collect, use or disclose an individual's personal information, the organization needs the individual's consent or a statutory exception to the consent requirement. Consent can be express or implied. Express consent involves a positive affirmation or acceptance and may be required for sensitive personal information (such as medical or financial information or large volumes of non-sensitive information). Implied consent may be sufficient for non-sensitive personal information (such as a mailing address). Consent of an individual is only valid if it is reasonable to expect that an individual to whom the organization's activities are directed would understand the nature, purpose and consequences of the collection, use or disclosure of the personal information to which they are consenting. Further, the OPC and Privacy Commissioners of British Columbia and Alberta have issued joint Guidelines for obtaining meaningful consent (as explained in the next section). Exceptions to the consent requirement include disclosures of

personal information in the context of certain business transactions and disclosed compelled by law.

Guidelines for Obtaining Meaningful Consent

In determining what constitutes meaningful consent, brands can consult the "Guidelines for obtaining meaningful consent" (the Guidelines[2]) jointly issued by the OPC and the Privacy Commissioners of British Columbia and Alberta.

The Guidelines contain seven guiding principles for privacy notices and policies: (i) emphasize key elements about the company's collection, use and disclosure of individuals' personal information to help individuals understand the nature, purpose and consequences of what they are consenting to; (ii) allow individuals to control the level of detail they want to receive in order to make a consent decision, and the timing of receiving that information; (iii) provide individuals with clear options to say 'yes' or 'no' to the collection, use or disclosure of their personal information; (iv) be innovative and creative with the manner in which privacy practices are communicated; (v) consider the consumer's perspective; (vi) make consent a dynamic and ongoing process; and (vii) be accountable, standing ready to demonstrate compliance.

The seven guiding principles emphasize accessibility and comprehensibility of consent processes, while providing businesses with flexibility on design and form. The Guidelines also give additional guidance with respect to consent and children and a checklist of "must-do" legal requirements and "should-do" best practices.

The practical implications of the Guidelines include notifying individuals of a particular risk associated with the processing of their personal information and weaving privacy notices throughout the user experience.

Breach Notification

When an organization experiences a breach of security safeguards involving personal information, PIPEDA requires organizations to take specific actions. All breaches will trigger the requirement to retain records of the breach for a period of 24 months. Breaches that create a

2. Office of the Privacy Commissioner of Canada, "Guidelines for obtaining meaningful consent" (May 2018), online: <https://www.priv.gc.ca/en/privacy-topics/collecting-personal-information/consent/gl_omc_201805/>.

real risk of significant harm will trigger obligations to report the breach to the Privacy Commissioner and notify the affected individual(s) and any organizations that "may be able to reduce the risk of harm that could result from [the breach] or mitigate that harm," which could include law enforcement. The definition of significant harm is broad and includes "bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property."

Organizations determine whether there is a real risk of significant harm based on what is reasonable in the circumstances. Factors that are relevant to the determination are the sensitivity of the personal information involved in the breach and the probability of misuse. The number of affected persons is not a factor — a breach affecting one person will create a real risk of significant harm under the same conditions of a breach affecting one million people.

Alberta's *Personal Information Protection Act*[3] (PIPA), also has mandatory breach notification requirements, so brands need to consider PIPA's applicability when preparing for and responding to data breaches.

Breach notification obligations can make breaches even more costly for the affected organization. An incident response plan and regular testing of that plan are critical. If a breach does occur, an incident response plan can minimize the damage the brand experiences.

Transfers

Storing or accessing the personal information of Canadian residents from outside of Canada is not prohibited, but presents some compliance challenges. Alberta's PIPA requires that organizations notify individuals if they transfer personal information to a service provider located outside Canada. Québec's privacy legislation requires organizations to take all reasonable steps to ensure that personal information that is transferred cross-border for processing will not be used for new purposes or communicated to third parties without the consent of the individuals concerned.

Federally, under PIPEDA the OPC's current position is that a transfer of

3. *Personal Information Protection Act*, SA 2003, c P-6.5

personal information to service providers located outside Canada is a use of personal information, not a disclosure of personal information. This means that separate consent for the transfer is not required, though the OPC has stated that under PIPEDA's "openness" principles, notice of such transfers should be provided to affected individuals.

Employee Privacy

Brands who hire employees in Canada may need to comply with privacy laws as they apply to employees (depending on the situation). For example, in British Columbia and Alberta, employee personal information is subject to the same privacy legislation as consumer information, but there are special exceptions for employees. For example, employers may collect, use and disclose employee information without consent where: (i) it is reasonable to establish, manage or terminate an employment relation; and (ii) the employee has notice of the purpose of that collection, use and disclose before collection.

To comply, organizations who hire individuals in Canada should develop a set of policies and processes for collecting, using and disclosing employee personal information. For simplicity, organizations can include notices in employee handbooks or include them with other employee privacy training or policies.

Components of a Privacy Program

Components of a brand's privacy program include:

- an assessment of which laws apply and when;
- the adoption of a privacy policy, and personal information management practices, to ensure compliance with applicable privacy laws;
- the appointment of an individual (a "privacy officer") who will be responsible for the administration and oversight of the organization's personal information management practices and who will be prepared to implement any changes required by applicable legislation;
- a review of the current personal information practices of the organization outside Canada in order to align with how current personal information practices of the organization may need to be changed for the collection, use and disclosure of personal information in Canada. This will include:

  - determining what personal information is collected and from where;
  - assessing what consents are obtained and what purposes are identified when collecting personal information;
  - tracking where personal information is stored and how it is used, transferred and disclosed.
  - a review of the organization's data management infrastructure to ensure that the infrastructure is adequately flexible and robust to facilitate implementation of the organization's privacy policies and data management practices;
- the implementation of consent language in contracts, forms (including web forms) and other documents utilized when collecting personal information from individuals (including customers and employees);
- the development and testing of an incident response plan (or update of the existing response plan to comply with Canadian requirements) to comply with mandatory breach notification; and
- a standard approach to dealing with third parties who may have access to the personal information for which the organization is responsible. This may include appropriate contractual terms, such as:
  - specifying the ownership of the data, ensuring that the third party will provide adequate security safeguards for the information;
  - ensuring that the personal information will be used only for the purposes for which it was provided to the third party;
  - ensuring that the third party will cease using (and return or destroy) the personal information if requested; and
  - that the third party will assist the organization in complying with privacy legislation, including the breach notification obligations (discussed above).

Brands should also consider risk allocation, such as requiring indemnification by the third party for any breach of such terms.

Corporate Transactions

Brands that acquire or invest in other businesses, or that may be acquired or are seeking investments, have heightened need to consider privacy compliance. Prospective buyers and investors may scrutinize the privacy compliance policies and practices of the target organization, which increases the need for a robust compliance program. As a prospective

buyer, an organization needs to ensure it is not acquiring an organization that has poor practices, an unknown data breach, or personal information that is unusable due to lack of consent.

The transaction itself may involve the disclosure of personal information from buyer to seller, including in the due diligence phase. While disclosure generally requires consent, there are statutory exemptions from the consent requirement for disclosure for due diligence and the consummation of the transaction. However, the exceptions are conditional on meeting certain requirements, which can include notifying the individuals post-closing and including certain provisions in the transaction documents.

Personal Health Information

Owing to its sensitive nature, personal health information may have different or additional standards or laws applied to it. Certain provinces (namely Ontario, New Brunswick, Nova Scotia, and Newfoundland and Labrador) have legislation dealing with health information that supplant (and apply instead of) the general privacy law applicable in the province with respect to personal health information. Certain other provinces have also passed health privacy laws except that they apply alongside the general privacy law applicable in the province (and in those provinces both laws may apply to personal health information in the province). The landscape for personal health information in Canada is more complex than in other areas so brands should check whether the information they handle constitutes personal health information and if determine which laws apply to their specific situation.

Penalties

Failure to comply with privacy laws can result in orders and fines issued by the relevant provincial or federal Privacy Commissioner. Privacy Commissioners may choose to investigate a matter on their own accord or due to a submitted complaint. Depending on the industry, other regulators may become involved with privacy matters including securities, financial institutions, and public health regulators.

In addition to regulatory enforcement, those affected by privacy breaches may be able to bring a lawsuit as individuals or as members of class actions. The cause of action available to aggrieved individuals

will depend on the laws of the relevant province. British Columbia, for instance, has a statutory tort for invasion of privacy that requires willful intent but does not require proof of damage, while Ontario has a common-law tort of breach of privacy that applies to general personal information.

Several consumer class actions have been commenced in Canada in the wake of a data incident, including specific claims against consumer products manufacturers in relation to over-collection by their internet-connected devices and by employees who had their personal information lost or stolen. These actions have not yet been fully considered by Canadian courts and as a result, questions regarding the legal validity of the causes of action that were advanced, and the scope of possible damage awards, remain largely open. There is also the possibility that a data breach of an organization could lead to legal action from its shareholders with an allegation that the organization's continuous public disclosure as to the state of its cybersecurity systems was misleading. Such a shareholder class action has not yet been brought in Canada.

Both consumer and shareholder class actions will almost always be brought in provincial (as opposed to federal) courts, and it is possible the data incident of a brand could lead to multiple Canadian class actions that span different provinces where people were affected. In light of the complexity of privacy laws and the differences between the various laws that may apply to an organization or to a particular business unit, ensuring privacy compliance across an organization's departments may be challenging, particularly for organizations that operate globally. Organizations must also keep in mind that in addition to fines, orders, and private actions, a data incident due to deficient privacy practices may risk reputational harm that leads to further financial loss.

Canada's Anti-Spam Law[4]

Canada has legislation that specifically addresses the sending of commercial electronic messages. It also applies to the installation of computer programs, which can be a trap for unwary device manufacturers.

4. *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, SC 2010, c 23.

See E-commerce. For an in-depth explanation of CASL, see our Anti-Spam Toolkit available on our website.

Privacy Law Reform Initiatives in Canada

There are a number of very significant legislative efforts underway in Canada to amend or replace key privacy laws, including:

- federal Bill C-11, introduced in November 2020, which would replace PIPEDA with a new "*Consumer Privacy Protection Act*" and "*Personal Information and Data Protection Tribunal Act*"; and
- Québec's Bill 64, introduced in June 2020, which would overhaul Québec's current private sector privacy law.

There are also other reform initiatives that are being discussed by various governments in Canada. The ultimate fate of these bills and initiatives remains to be seen, but it does seem likely that the legislative framework for privacy in Canada will change significantly over the coming months and years.

Brands operating or selling or considering operating or selling in Canada can check out McCarthy Tétrault's blog on cybersecurity, privacy, and data protection law to stay updated on new developments and policy advancements: www.mccarthy.ca/en/insights/blogs/cyberlex.

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LOYALTY PROGRAMS

By Ana Badour, Hilary Smith, Mathieu Dubord and EveTessier

LOYALTY PROGRAMS

With the exception of certain provisions in Ontario's and Québec's respective consumer protection legislation, loyalty programs are not specifically regulated in Canada, although aspects of such programs may be subject to certain protections in provincial consumer protection legislation.

Ontario

The Ontario legislation prohibits the expiry of rewards points due to the passage of time. Any provision to the contrary is void, with retroactive effect to October 1, 2016, such that all points purporting to expire after October 1, 2016, will need to be reinstated. However, a rewards program may still be terminated and accumulated rewards may expire in some cases, including where the agreement so provides.

Québec

In Québec, consumer protection legislation requires, among other things, that consumers be notified in writing of certain information before entering into a contract and prohibits any provision under which the exchange units (defined below) received by a consumer under a loyalty program may expire on a set date or by the lapse of time.

In the province, a loyalty program is defined as "a program under which consumers, on entering into contracts, receive exchange units in consideration of which they may obtain goods or services free of charge or at a reduced price from one or more merchants." "Exchange units" are defined as "any form of benefit granted to a consumer that has an exchange value within the meaning of a loyalty program."

The legislation further provide that the expiry of exchange units on a set date or by the lapse of time is prohibited, unless the provision providing for the expiry of exchange units meets all of the following conditions: (i) the provision provides for the expiry of exchange units based on the inactivity of the consumer (i.e. no exchange unit has been received or exchanged for a given period); (ii) the "inactivity period" is not less than a year; (iii) the loyalty program merchant must send a notice of inactivity to the consumer; and (iv) the notice of inactivity must be sent to the consumer at least 30 days, but not more than 60 days, prior to the date of expiry of the exchange units.

In addition, any provision that allows a loyalty program merchant to unilaterally increase the exchange units required to obtain goods or a service in a disproportionate manner with respect to the increase of the retail value of the goods or service is also prohibited.

Merchants are also required to provide the following information in writing to consumers before entering into a contract relating to a loyalty program: (i) the conditions that allow receiving exchange units; (ii) the terms applicable to the exchange of exchange units; (iii) the terms applicable to the expiry of exchange units, where applicable; and (iv) the conversion factor used to convert exchange units into another form of exchange units, where applicable.

Lastly, the unilateral amendment of loyalty programs is prohibited, unless the contract: (i) specifies which elements of the contract may be unilaterally amended; and (ii) provides that the merchant must send to the consumer a written notice setting out the amendments to the contract and the date of the coming into force of such amendments at least 60 days, but no more than 90 days, prior to the coming into force of the amendment.

However, any provision that allows the loyalty program merchant to unilaterally modify to the detriment of the consumer the following element of a loyalty program is prohibited: (i) the number of exchange units received by the consumer; and (ii) the conversion factor used to convert exchange units into another form of exchange units, where applicable.

No other provinces or territories have announced intentions to enact similar legislation. Prince Edward Island proposed adopting similar legislation as Ontario, but the process is now dormant.

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PROPERTY DEVELOPMENT AND LEASING

By Annie Gagnon-Larocque

PROPERTY DEVELOPMENT AND LEASING

The following aspects of property development and leasing will likely be of interest to manufacturers and distributors considering a manufacturing facility or distribution centre.

Land Registration Systems

Each Canadian province has its own systems for registering interests in real property, as property legislation is constitutionally a provincial responsibility in Canada. In Ontario, for example, there are two land registration systems: registry and land titles.

Most provinces have legislation granting power to municipalities to regulate the subdivision and servicing of lands.

Most Ontario properties, however, are in the land titles system, which is operated by the province pursuant to the *Land Titles Act*. Title to land within this system is guaranteed by the province. In other provinces, registration systems vary. In the western provinces, for example, land falls exclusively within the provincial land titles systems. These systems are similar to the land titles system in Ontario, creating an "indefeasible title" that is good against the world, subject only to certain limited exceptions. In the Atlantic provinces, on the other hand, registry systems dominate land registration, except in New Brunswick, where its land titles system encompasses most of the land in the province. Québec has its own unique system for registering interests in land, which in its effect is more similar to a registry system than to a land titles system.

Planning Legislation

All Canadian provinces regulate property development to some degree, and often this regulation occurs at the municipal level. Official plans, zoning bylaws, development permits, subdivision bylaws and servicing bylaws are the primary means by which municipalities control land use and development.

At the provincial level, the subdivision of land is restricted by statute in a number of Canadian provinces. In Ontario, the *Planning Act* is the main statute that controls subdivision. In British Columbia and many other provinces, the *Land Title Act* of that province is the main statute that

controls subdivision. In addition, most provinces have legislation granting power to municipalities to regulate the subdivision and servicing of lands. In most cases, instruments such as transfers, subdivision plans or separation of title, which result in the issuance of separate titles, and instruments, such as leases, mortgages or discharges, which deal with part of a parcel, require subdivision approval.

Subject to certain exceptions, the *Planning Act* in Ontario prohibits any transfer or mortgage of land or any other agreement granting rights in land for a period of 21 years or more (this includes leases and easements) unless the land is already described in accordance with a plan of subdivision or the transaction has previously received the consent of the appropriate governmental body. If the proposed transaction does not fall within one of the exceptions outlined in the *Planning Act*, then it may be necessary to obtain a severance consent for the transaction to proceed. The process to obtain a consent typically takes at least 90 to 120 days to complete. This can be important in the retail and consumer product leasing context for longer-term paid leases and in cases where a landlord owns adjoining lands. Note that it does not apply to leases of part of a building, as there is an exemption under the *Planning Act* for this. In the consumer products context, where a distributor or manufacturer is often likely to be leasing the entirety of an industrial premises, this consent requirement for leases greater than 21 years less a day would be applicable and time should be built in to allow for the requisite approvals to be obtained when a lease is being negotiated. It is usually the property owner (i.e. the landlord) that would obtain the *Planning Act* consent as a condition to the lease. Note that this does not prevent a lease from being entered into until such time as the consent is obtained, but the lease must make it clear that if the consent is not obtained, then the lease can be for a term no greater than 21 years less one day.

Many provincial statutes (including Ontario's) provide that no interest in land is created or conveyed by an improper transaction carried out contrary to the governing legislation and careful consideration has to be given with respect to the possible application of subdivision control regulations both at the provincial and municipal level when contemplating subdivision, development and, in certain cases, leasing of land.

Title Opinions and Title Insurance

Rights in land are not required to be registered. That said, registration

in the appropriate land registry office is essential to protect an owner's priority over subsequent registered interests and to protect an owner against loss from a bona fide third party. On an acquisition, in addition to registering a deed in the appropriate land registry office, a lawyer's opinion on title is typically issued to the purchaser of real property following closing. In Québec, law firms or notarial firms customarily issue title opinions.

However, the use of commercial title insurance as an alternative to the traditional lawyer's opinion on title continues to gain popularity, particularly for lenders (since the available protections are broader for lenders). Unlike a traditional lawyer's title opinion, title insurance provides protection against hidden risks, such as fraud, forgery and errors in information provided by third parties (e.g., a government ministry). Also, unlike a traditional lawyer's title opinion, title insurance is a strict liability contract — the policy holder is not required to prove that the title insurer has been negligent in order to receive compensation for a covered loss (up to the amount insured, which is typically the purchase price for an owner's policy and the mortgage amount for a lender's policy).

If the tenant has a separate leasehold interest, this interest may be separately financed and a lender may require that a lender's title insurance be obtained in connection therewith. If a company is purchasing a leasehold interest, an owner's title insurance policy may be purchased and/or a full title and off-titles search may be conducted by a lawyer prior to the company taking ownership of such leasehold parcel.

Environmental Assessments

In Canada, there is a legislative framework at both the provincial and federal level that governs the duties of landowners with respect to the storage, discharge and disposal of contaminants and other hazardous materials connected with real property. The liability for improper environmental practices runs with the land and can be inherited by future owners of the property, which is important in all types of real property transactions. In certain circumstances, any "guardian" of a property, such

The liability for improper environmental practices runs with the land and can be inherited by future owners of the property.

as a tenant pursuant to a retail lease, may face liability for contamination. Commercial lenders in Canada will customarily require the completion of an environmental assessment of a property before the advance of funds. This will also be an important due diligence consideration for those operating in the consumer products space who may be leasing or purchasing industrial buildings in support of their manufacturing and distribution processes, where the likelihood of prior contamination may be higher.

Non-Resident Ownership

Non-residents may purchase, hold and dispose of real property in Canada as though they are residents of Canada, pursuant to the federal *Citizenship Act*. However, each province has the right to restrict the acquisition of land by individuals who are not citizens or permanent residents, in addition to corporations and associations controlled by such individuals.

Each province has different legislation as regards to the particularities of foreign ownership of Canadian real property. In Ontario, for example, non-citizens have the same rights as Canadians to acquire, hold and dispose of real property, though corporations incorporated in jurisdictions other than Ontario must obtain a licence to acquire, hold or convey real property. Non-residents who dispose of real property situated in Canada are subject to withholding tax requirements.

Some Taxes on the Transfer of Real Property in Canada

Withholding Obligations

The ITA contains provisions that protect Canada's ability to collect taxes when a non-resident disposes of "taxable Canadian property" (which includes, among other types of property, real property situated in Canada).

Unless: (i) the purchaser has no reason to believe, after making reasonable inquiries, that the vendor is not a non-resident of Canada; (ii) the purchaser concludes after reasonable inquiry that the non-resident person is resident in a country with which Canada has a tax treaty, the property disposed of would be "treaty-protected property" if the non-resident were resident in such country, and the purchaser provides the Canada Revenue Agency with a required notice; or (iii) the purchaser is

provided with an appropriate certificate in respect of the disposition issued by the Canada Revenue Agency, the purchaser will be liable to pay as tax on behalf of the non-resident up to 25% of the purchase price of land situate in Canada that is capital property and up to 50% of the purchase price of land inventory situate in Canada, buildings and other depreciable fixed-capital assets. If the non-resident vendor does not provide the purchaser with an appropriate certificate (or the purchaser is not satisfied that the conditions of either (i) or (ii) have been met), the purchaser will generally deduct from the purchase price the amount for which the purchaser would otherwise be liable. Québec tax legislation imposes similar requirements in respect of the disposition of immovable property situate in the Province of Québec. It should be noted that gains realized by a non-resident on the disposition of Canadian real estate are generally not, subject to certain exceptions, exempt from tax under Canada's treaties, and therefore real estate in most cases will not qualify as "treaty-protected property" for purposes of the ITA. Accordingly, absent an appropriate certificate, most purchasers acquiring real estate from non-residents will withhold from the purchase price and remit the withheld amount to the applicable taxing authority.

Land Transfer Tax

In all Canadian provinces, land transfer taxes (or in Alberta, "registration fees," and in Québec, "duties") are generally imposed on purchasers when they acquire an interest in land (typically including a lease in excess of 40 or 50 years, though the threshold is 30 years in British Columbia) by registered conveyance and, in some cases, by unregistered disposition. For properties located in Toronto, there is also municipal land transfer tax payable in addition to provincial land transfer tax.

Federal Goods and Services Tax, Provincial Sales Tax, and Harmonized Sales Tax

In Canada, the Goods and Services Tax (GST), currently at a rate of 5%, is generally payable upon a supply of real property (this includes a sale). The vendor is responsible for collecting GST from the purchaser in respect of a sale of real property unless the purchaser is registered for GST purposes and required to self-assess the applicable GST. The conveyance of previously owned residential property is not subject to GST (except where such residential property has been "substantially renovated").

In provinces that have "harmonized" their provincial sales tax with the GST, the rate of the harmonized sales tax (HST) is generally payable on the sale of any non-residential real property and any new or substantially renovated residential property, on the same basis as the GST. The same self-assessment rules that apply for GST purposes apply for HST purposes.

QST

The province of Québec harmonized the Québec sales tax (QST) and the same rules apply to real property (immovable) in Québec as for GST/HST purposes.

Common Investment Vehicles for Real Property

There are various avenues for investment in real property in Canada, including corporations, partnerships, limited partnerships, trusts, co-ownerships and condominiums. Each of these vehicles has its own nuances and with careful planning and legal advice, investors in the Canadian real property market can structure their investments so as to take maximal advantage, for tax purposes or otherwise, of the available alternatives.

Financing

Real estate financing for manufacturing and distribution centres and mixed-use real property can be structured in a variety of ways, including:

- conventional mortgage lending;
- public and private capital market financing;
- portfolio loans;
- acquisition financing;
- permanent financing;
- public and private bond financings;
- syndications;
- restructurings; and
- securitization.

There are various instruments used to take primary security over real property in Canada, such as a mortgage or charge (hypothecs in Québec),

a debenture containing a fixed charge on real property and trust deeds securing mortgage bonds (where more than one lender is involved). Additional security usually includes assignments of rents, leases and other contracts, guarantees and general security agreements.

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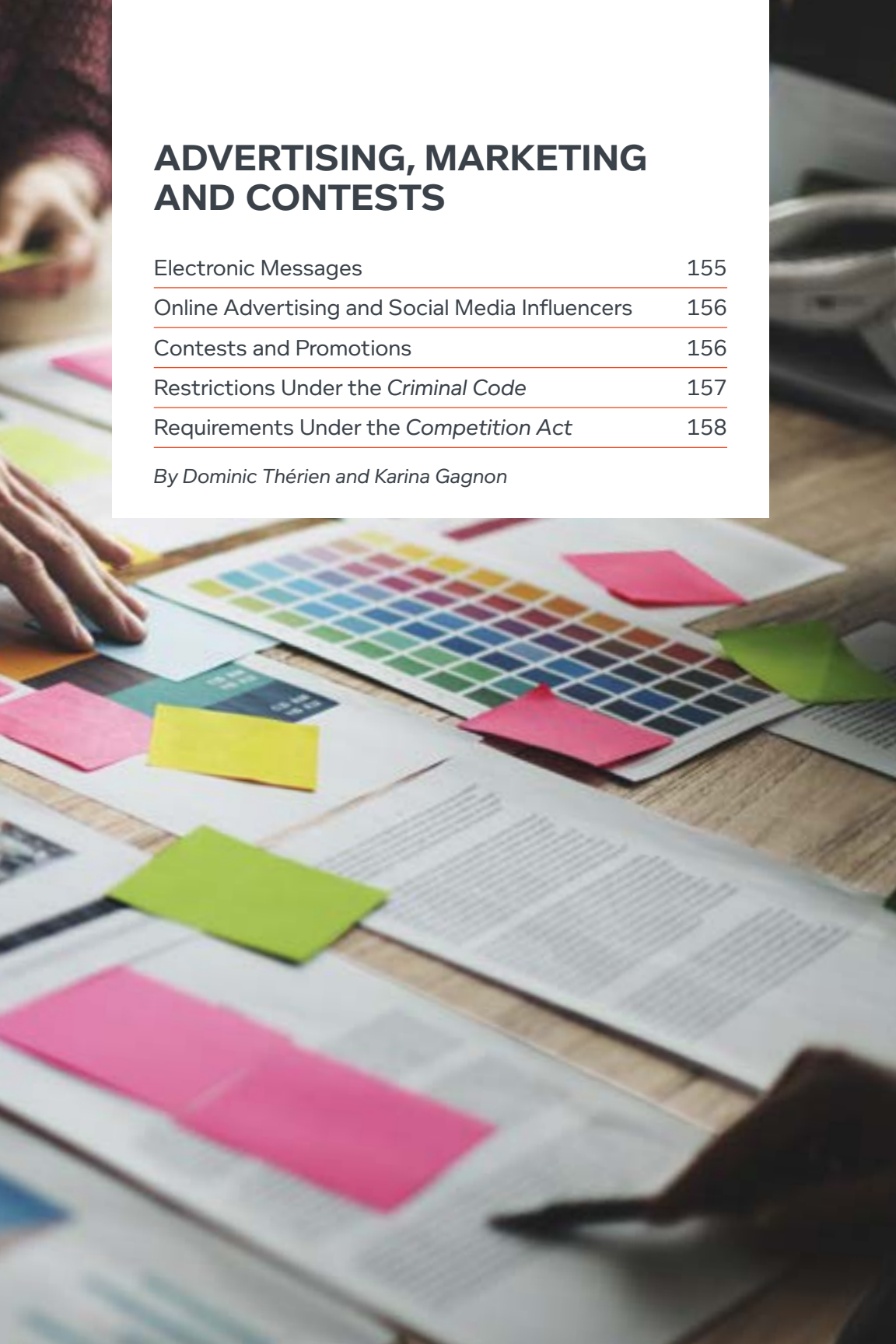

ADVERTISING, MARKETING AND CONTESTS

By Dominic Thérien and Karina Gagnon

ADVERTISING, MARKETING AND CONTESTS

The legislation central to advertising and marketing in Canada is the federal *Competition Act* (the Act).

Of core concern to consumer products manufacturers is the general prohibition in the Act against making any representation to the public for the purpose of promoting any business interest that is "false or misleading in a material respect." The general impression conveyed by a representation, as well as its literal meaning, will be taken into account in determining whether a representation is false or misleading in a material respect. The test for materiality is whether the impression created by the representation would constitute a material influence on the consumer's decision to purchase the product. There is no requirement for the Competition Bureau (or for any complainant) to show that any person has actually been deceived or misled by any materially false or misleading representation.

There are also prohibitions in the Act on more specific types of representations that promote any business interest, including representations:

- concerning the price at which a product is ordinarily supplied in support of a discount claim: (i) where a substantial volume of the product has not been sold at the advertised regular price (or a higher price) within a reasonable period of time; or (ii) where that product has not been offered in good faith at the advertised regular price (or a higher price) for a substantial period of time (these provisions are relevant to consumer products manufacturers that are involved with the promotions offered by their retailers);
- as to the performance, efficiency or length of product life that are not based on adequate and proper testing;
- that purport to be a warranty or a guarantee of a product or a promise to replace, maintain or repair an article or to repeat or continue a service until a specific result is achieved, if such representation is materially misleading or if there is no reasonable prospect that it will be carried out;
- in electronic messages that are false or misleading (and as discussed in more detail later in this chapter);
- respecting testimonials with respect to a product;

- that advertise a product at a bargain price when there are not reasonable quantities of that product ("bait and switch"); and
- that advertise a price that is below the price that the product is actually sold for.

Breaches of the restrictions imposed on all of these types of representations are reviewable conduct under the Act that expose the persons engaged in such conduct to a review by the Competition Bureau, and prohibition orders, including significant administrative penalties of up to C$10 million in the case of a first offence by a corporation. Criminal remedies are also available if the representations are made knowingly or recklessly.

Promotional contests conducted for the purpose of promoting any business interest also constitute reviewable conduct if specific requirements are not complied with, as discussed in more detail later in this chapter.

In addition to the Act, there are provincial consumer protection and business practice laws that apply to deceptive business practices, as well as to gift cards, coupons, rebates and warranties. For example, Québec's, *Consumer Protection Act*, subject to certain exceptions, prohibits commercial advertising directed at children under 13 years of age, regardless of the advertising medium or formats used by consumer products manufacturers (radio, television, website, mobile phone, etc.). The scope of this prohibition is broad, and applies to any person who requests the advertisement's design, distribution, publication or broadcast. Accordingly, producers of consumer products should be cognizant of the operation of the prohibition when considering how to market and promote their products. In its assessment of advertisements, the *Office de la protection du consommateur* takes into account: "(i) the nature and intended purpose of the goods advertised (For whom are the advertised goods and services intended? Do they appeal to children?); (ii) the manner of presenting such advertisement (Is the advertisement designed to attract the attention of children?); and (iii) the time and place it is shown (Are children targeted by the advertisement or exposed to it? Are they present at the time and place it appears or broadcast?)." All these criteria are interconnected and considered as a whole. In case of infringement by a corporation, administrative penalties range from C$2,000 to C$100,000 for a first offence.

There are also some market sectors in which advertising and marketing activities are more highly regulated, for example, alcohol, tobacco, cannabis, food, drugs, and automobiles, both at the federal and provincial level. Consumer products manufacturers should obtain specific advice on these and other regulated sectors.

While it is outside of the scope of this overview, consumer products manufacturers should also be aware of Advertising Standards Canada, which is an industry self-regulating organization that administers the *Canadian Code of Advertising Standards*. This Code applies to most forms of advertising in Canada and includes a consumer complaint procedure and the administration of complaints between advertisers. So, for example, if Advertising Standards Canada determines that there has been a price claim breach of the Code, it will ask the advertiser to amend or withdraw the advertisement in question, as applicable, and may require that a corrective notice be made.

Electronic Messages

Other examples of the types of representations that constitute reviewable conduct under the Act are misrepresentations made in electronic messages (e.g., promotional emails from a consumer products manufacturer to its customers). The types of misrepresentations in electronic messages that can constitute reviewable conduct are:

- a materially false or misleading representation in an electronic message (e.g., a misleading statement in the body of an email);
- a false or misleading representation in the sender information or subject matter information (e.g., a false "from" name or a misleading statement in the "subject" line of an email); and
- a false or misleading representation in a locator (e.g., the URL contained in an email).

The scope of potential liability for sending these misrepresentations (or causing or permitting them to be sent) is very broad because there is no materiality threshold on the second and third types of misrepresentations listed above. This means that any misrepresentation in sender, subject matter or locator information attracts potential enforcement action. Significant civil administrative penalties may also be imposed upon a corporation for such conduct, up to C$10 million for a first offence and up to C$15 million for subsequent offences.

These electronic message provisions also are significant as they may become enforceable by way of a private right of action under CASL (i.e. Canada's anti-spam law — see E-commerce, for details). While the federal government has suspended the implementation of the private right of action indefinitely, its introduction is not completely off the table.

Online Advertising and Social Media Influencers

While the same principles apply online as for traditional advertising, the digital economy is of primary importance to the Competition Bureau. In fact, in its *Strategic Vision for 2020-2024*, the Competition Bureau indicates that it will "focus [its] enforcement action on sectors of the economy that matter most to Canadians, so that they can have confidence in the marketplace," and specifically identifies online marketing as a key enforcement sector. Further, the Competition Bureau recently created the position of chief digital enforcement officer. Accordingly, it is crucial to consider the general impression of advertisements when viewed online, including on mobile devices. This can create unique challenges, such as ensuring the proper placement and layout of online disclaimers.

Additionally, the Competition Bureau, as part of its focus on price advertising, takes issue with "drip pricing," which is the practice of introducing additional costs to the customer over the course of the checkout process rather than disclosing the all-in cost upfront. The Competition Bureau has recently settled a number of inquiries involving drip pricing in the online context through consent agreements, with administrative monetary penalties of up to C$4 million.

The proliferation of advertising by social media influencers has also led to the issuance of guidelines by the Competition Bureau and Advertising Standards Canada that provide practical direction. The core principle is that any material connection between a brand and an influencer be disclosed. A material connection need not be in the form of monetary compensation, but can also result from the provision of free products or other benefits to the influencer. Disclosure of this connection must be conspicuously made for each social media post.

Contests and Promotions

Contests and promotions are highly valued marketing tools for consumer products manufacturers in Canada, but they should pay close attention

to how their contests and promotions are structured in order to comply with the restrictions under the *Criminal Code* and the requirements of the Act. A consumer products manufacturer that runs a contest or promotion that contravenes these restrictions and requirements risks both criminal and civil liability.

A typical contest involves offering customers the opportunity to win a prize on a "no purchase necessary" basis. Prizes include discounts, cash, products and trips. The winner of the prize can be selected through many different modes, such as a random draw, a "scratch and win" ticket or a trivia game. The permutations are endless, which gives businesses the latitude to structure contests and promotions in innovative and compliant ways.

Restrictions Under the *Criminal Code*

The *Criminal Code* prohibits a wide range of gaming and betting activities, which include any contest that involves either:

- the distribution of any prize by chance alone; or
- the distribution of a prize that is goods, wares or merchandise by a game of chance or a game of mixed chance and skill where the entrant pays consideration for the chance to win.

The first category set out above is particularly broad. As a result, most promotional contests will require that a customer whose name has been chosen by a random draw also correctly answer a skill-testing question in order to win a prize. In light of the relevant case law, contest sponsors typically use a four-step, two-to-three number mathematical question. Thus, the prize is not won by chance alone. Contest and promotion holders rely on a number of other features to ensure that any given contest or promotion falls outside the second category above, such as including a "no purchase necessary" entry option. This usually manifests as an "alternative mode of entry" where an entrant does not need to purchase a product, but can simply mail in an entry instead.

Contests and promotions that fall within either of the above two categories have been found to be unlawful. Such activities constitute lottery schemes, which can only be conducted by, or with the authorization of, the provincial regulators.

Requirements Under the *Competition Act*

In addition to the *Criminal Code* restrictions, the Act imposes three additional requirements on a contest or promotion that promotes any business interest. Accordingly, when running a promotion or contest, a consumer products manufacturer must also:

- provide adequate and fair disclosure of the number and value of the prizes and any other information within the knowledge of the consumer products manufacturer that would affect materially the chances of winning a prize;
- distribute prizes without undue delay; and
- select winners on the basis of either skill or random chance.

It is the position of the Competition Bureau that disclosure of the required information must be made in a reasonably conspicuous manner and in any advertising aimed at inducing individuals to participate in a promotion. As such, consumer products manufacturers offering a contest or promotion typically prepare "short-form rules" that contain the required information and other key contest conditions, and display them on all advertising for a promotional contest. Short-form rules also state where individuals can view the full set of contest rules (typically available on a website or in store).

Consumer products manufacturers should also be aware that Québec law and regulations impose additional requirements on businesses and manufacturers that conduct contests open to Québec residents. For example, the provider of the contest must file a notice of contest, as well as the contest rules and contest advertisements, with the *Régie des alcools, des courses et de jeux* (the "Régie") within a certain time frame before the contest launch and pay to the Régie a contest fee based on the aggregate value of the contest prize(s). The contest rules and contest advertisements must also include specific information (value of the prize(s), how the prize(s) will be awarded and other details). The Régie may also require security from the company for which a publicity contest is carried on under certain circumstances, such as where it has no declared head office or establishment in Québec, where value of a prize offered to Québec residents is more than C$5,000 or where the aggregate value of prizes offered to Québec residents is C$20,000 or more.

Depending on the structure of a contest or promotion, there are a number of other contest conditions and disclosures that could be appropriate to manage risk and ensure compliance. One of our contests lawyers in the Retail and Consumer Products Practice Group would be happy to provide tailored recommendations based on the proposed structure of any contest or other promotion.

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PRODUCT LIABILITY AND REGULATORY COMPLIANCE

By Christopher Hubbard, Martha Harrison and Katherine Booth

PRODUCT LIABILITY AND REGULATORY COMPLIANCE

The manufacture, importation, distribution, and sale of food and consumer products are the subject of heavy regulation in Canada. Various federal statutes often impose stringent obligations on consumer product companies and grant regulators broad powers to enforce compliance, including through compliance audits, and to impose fines and penalties. The regulatory regime can directly affect companies' operations 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. Consumer product companies are also potential defendants in individual and class action product liability litigation relating to allegedly defective products.

Consumer product companies operating in Canada should be familiar with the legal and regulatory regimes applicable to their products and operations, which are addressed in this chapter:

- Product Liability;
- Regulatory Compliance:
- *Canada Consumer Product Safety Act* obligations applicable to the sale of consumer products;
- *Food and Drugs Act and Safe Food for Canadians Act* obligations applicable to the sale of food;
- Recalls of consumer products and food;
- Additional regulation applicable to particular food and consumer products, including packaging and labelling requirements; and
- Legislation and regulations applicable to other product categories.

This chapter will focus primarily on the regulatory regime applicable to consumer products and food. A comprehensive review of the legislation and regulations applicable to all categories of products is beyond the scope of this Guide, so companies whose businesses include other products should familiarize themselves with the statutes and regulations applicable to the particular products they manufacture, distribute or sell.

Product Liability

The sale of products alleged to be defective or that have caused injury or damage are often the subject of individual or class action product

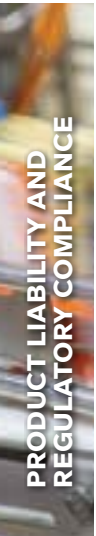
liability litigation against manufacturers, importers, distributors and retailers. Product liability litigation can include claims to be compensated for the cost of the defective product, as well as damages for any injury or damage arising therefrom. Claims may be based on breach of a contract, negligence or both.

All provinces and territories have a *Sale of Goods Act* that implies warranties or conditions into contracts of sale between buyers and sellers. Generally, the statutes imply warranties or conditions that the goods sold are fit for their intended purpose, where the purpose for which the goods are required by the buyer is known, and the goods are of merchantable quality, where the goods are purchased by description. Similar provisions are contained in the Québec Civil Code. Contracts also exist between sellers and purchasers of goods, and may contain warranties or other terms that could give rise to liability in the event of a defective product.

Contract claims are strict liability claims, and the absence of negligence is not a defence. If a consumer product company that did not manufacture a product faces liability to a purchaser for breach of contract or pursuant to sale of goods legislation, the fact it was not the manufacturer will not absolve it of liability vis-à-vis the purchaser. In these circumstances, the company may need to pursue indemnity from the manufacturer for any damages it is required to pay as a result of any product defect.

Consumer product companies can also be subject to common law obligations regarding the sale of products. In some circumstances, there may be a common law duty to warn customers about a product defect or to initiate remedial action such as a recall. The duty to warn is a continuing duty and can be triggered by information that becomes known after the product is in use. The existence and content of any duty on a company to warn or take remedial action are fact specific inquiries and depend on the circumstances of the case.

Consumer product companies that also manufacture a product may be exposed to common law claims for negligent design or manufacture if a product allegedly contains a defect. Generally, a manufacturer's duty is to take reasonable care to avoid causing either personal injury or damage to property, although liability can sometimes be found and damages awarded even where there is no actual personal injury or damage to property caused, for example if a manufacturer's negligence resulted in



defects that pose a real and substantial risk of actual physical injury or property damage. As noted, even where the company is the retailer or distributor and not the manufacturer, it can still be exposed to a claim in breach of contract or based on sale of goods legislation in relation to a product defect, or claims based on consumer protection laws (see Consumer Protection Laws).

Whether there is a "defect" in a product is a fact-specific inquiry, and includes reference to the reasonably expected and foreseeable uses of the product. The mere presence of a defect in a product can justify an inference of negligence in the design or manufacturing process. Often, a product recall is used as a basis for alleging a defect and commencing litigation.

When defining the standard of care applicable to a consumer product company as manufacturer, importer, distributor or retailer, Canadian courts will assess the reasonableness of the defendant's conduct with regard to industry and regulatory standards. However, if the industry standard is inadequate, a defendant may be found negligent despite conforming to it. Conformity with regulatory standards can be highly relevant to the assessment of reasonable conduct in a particular case, and falling below regulatory standards can be strong evidence of a breach of the standard of care. However, regulatory standards are different from the common law standard of care, and meeting regulatory standards alone will not necessarily absolve a defendant of liability.

Canada is a jurisdiction that allows class action proceedings. Each province has its own class action legislation, and some important differences exist between the provincial regimes. Consumer product companies that are named as defendants in a class action should seek counsel who have specialized product liability and class actions expertise.

Consumer Products: Obligations under the *Canada Consumer Product Safety Act*

The *Canada Consumer Product Safety Act* (CCPSA) came into force in 2011. This federal legislation applies to consumer products and prohibits the manufacture, importation or sale of consumer products that pose a danger to human health or safety. It also 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 within short time frames.

Consumer products are defined in the CCPSA as all products that may reasonably be expected to be obtained by an individual to be used for non-commercial purposes, with the exception of the products listed in Schedule 1 of the CCPSA. Generally, the excluded products are those covered by other specific legislation, such as food, cosmetics, drugs, medical devices, pest control products, firearms, vehicles and natural health products. A discussion of the legislation applicable to food products is provided below, as well as a brief overview of some of the legislation applicable to other categories of products.

Prohibited Products

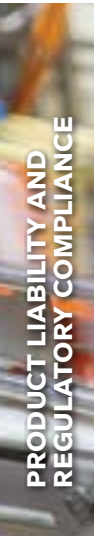
Under the CCPSA, parties are prohibited from manufacturing, advertising or selling the following consumer products:

- products listed at Schedule 2 of the CCPSA, which are prohibited primarily for safety reasons;
- products that do not comply with the requirements in regulations implemented under the CCPSA for specific products, such as the safety and performance specifications in the regulations relating to cribs, kettles, lighters, children's sleepwear, toys, children's jewelry, mattresses, textiles and the other products in relation to which there is a specific regulation;
- products that are known to be a danger to human health or safety; and
- products that have been recalled.

Duty to Report Incidents

Section 14 of the CCPSA imposes a broad obligation on manufacturers, importers, and retailers to report all incidents related to products directly to Health Canada.

Consumer product companies in the supply chain may learn of events regarding products they sell from a variety of sources. One common source is complaints received from end consumers. Other sources include product returns, information received from others in the supply chain (such as the manufacturer or retailer), or information received from a regulator.



Not all events that occur in relation to a product will constitute a reportable incident. However, the definition of an incident is broad. Generally, it captures all events that did or can reasonably be expected to result in death or serious adverse health effects or injury, and includes product incidents that occur outside of Canada. Reporting obligations will also automatically be triggered when a recall is initiated in another jurisdiction. The CCPSA defines an incident as:

- any occurrence in Canada or elsewhere that resulted or may reasonably have been expected to result in an individual's death or in serious adverse effects on their health, including a serious injury;
- a defect that may reasonably be expected to result in an individual's death or in serious adverse effects on their health, including a serious injury;
- insufficient or incorrect information on a label that may reasonably be expected to result in an individual's death or in serious adverse effects on their health, including a serious injury; and
- a recall or measure initiated for human health and safety reasons, including by a foreign entity or the provincial government.

Under the CCPSA, the onus is on the retailer, manufacturer, importer and distributor who learns of an event related to a product to assess the event and determine whether it constitutes a reportable incident. An event can be a reportable incident even if it did not in result in actual injury or damage: if it did or "may reasonably be expected" to cause a serious health effect or injury, the duty to report is triggered. Actual and possible injuries that Health Canada considers could meet the threshold of serious health impact include: threats to breathing (choking, strangulation, suffocation, asphyxiation, aspiration, respiratory problems, etc.), serious cuts or burns, internal bleeding or injury to internal organs, broken bones, poisoning, allergic reactions, loss of consciousness, convulsions, and loss of sight or hearing.

The timelines for reporting incidents are short. Consumer product companies must submit a report to Health Canada and to the person from whom they obtained the product within two days of becoming aware of an incident. The report must provide "all the information in [the company's] control regarding the incident." Health Canada's has stated it expects companies to assess incidents using the best information

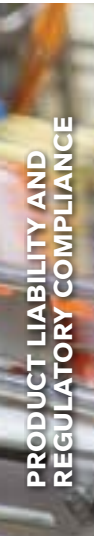
available at the time, and not to wait to complete an investigation or for absolute certainty about an event before reporting an incident. The fact that a manufacturer, distributor or other party may have already submitted a report to Health Canada about an incident does not absolve the retailer of its obligation; it must also submit its own report to Health Canada. If the company is also the manufacturer or importer of the product, it is also required to submit a second follow up report within 10 days of becoming aware of the incident. Incident report forms are available online at Health Canada's website, and can be submitted through an online portal directly to Health Canada.

The CCPSA does not have any specific provision requiring a company to implement a particular process to receive consumer complaints and assess product events to determine whether they constitute reportable incidents. However, Health Canada encourages companies to establish such processes and procedures to ensure compliance with reporting obligations. For many companies, a formal process to receive product information and consumer complaints, assess events, and track the decision and outcome is often necessary in order to keep track of events and appropriately report incidents. As discussed below, Health Canada has broad powers to audit or inspect a retailer to assess its compliance with reporting obligations.

Record-Keeping Obligations

The CCPSA requires manufacturers, importers, retailers, and testers to maintain distribution records for their products. The records must identify the name of the supplier, the location where the product was sold, and the period during which the product was sold. Companies must maintain the required records at their place of business in Canada (subject to exemption from the Minister), and they must be retained for six years. There is no requirement under the CCPSA for companies to keep documentation of every consumer transaction or every consumer's personal information, although Health Canada has stated that such information may be beneficial if corrective action, such as a recall or warning, is required.

In addition to the CCPSA, various regulations under that legislation may impose additional record-keeping requirements specific to particular products. Regulations should be reviewed to determine whether they apply.



Enforcement and Health Canada Audits

The CCPSA grants Health Canada sweeping powers to audit businesses to assess compliance with their obligations under the Act. Compliance inspections may be conducted to verify that suppliers of consumer products are familiar and complying with their responsibilities under the CCPSA and the regulations, including incident reporting obligations, and to verify that records are prepared and maintained as required under the CCPSA. Inspectors have the power to inspect a company's place of business and documents for these purposes.

With respect to audits dealing with reporting obligations, Health Canada may ask a company to provide information about its procedures for receiving product information, assessing events and reporting incidents, to explain its decisions not to report a particular product event, or to address other compliance points. As noted above, the CCPSA does not mandate any particular process for assessing events and reporting incidents. However, for many companies, documentation of the events that come to the company's attention, the company's assessment of the events, and reasons for deciding whether there was or was not a reportable incident can be helpful to establish compliance and increase the likelihood of successfully completing any inspection or audit undertaken by Health Canada.

Health Canada also conducts its own product testing. Health Canada engages in cyclic enforcement to test various product categories for compliance with the CCPSA regulations, and the results are published on the Health Canada website. Health Canada may also require a manufacturer or importer of a product to conduct testing on the product to confirm compliance with the CCPSA and regulations.

Food: Obligations under the *Food and Drugs Act* and *Safe Food for Canadians Act*

The *Food and Drugs Act* (FDA) and the *Safe Food for Canadians Act* (SFCA) together regulate the sale of food, drugs, cosmetics and medical devices in Canada. Food includes any article sold for use as food or drink for humans, and includes chewing gum and any ingredient that may be mixed with food for any purpose. As noted above, a full review of the obligations in respect of all categories of products, including drugs, natural health products, cosmetics and medical devices, is beyond the

scope of this chapter. Consumer products manufacturers and distributors should consult the specific legislation and regulations in respect of other product categories as applicable.

Prohibited Products

The FDA prohibits the sale of the following foods:

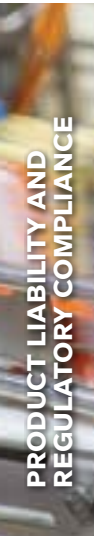
- foods that contain poisonous or harmful substances;
- foods that are unfit for human consumption;
- foods that contain any "filthy, putrid, disgusting, rotten, decomposed or diseased animal or vegetable substance;"
- foods that are adulterated;
- foods that are manufactured, prepared, preserved, packaged or stored under unsanitary conditions; and,
- foods that do not comply with any specifically prescribed standards.

Enforcement and CFIA Inspections

Guidance documents from the Canadian Food Inspection Agency (CFIA) state that it expects to be notified promptly when a company suspects that it has sold, distributed or imported a product that may pose a serious risk to consumers or violates the provisions of the FDA.

The FDA grants the Minister of Health broad powers to inspect businesses in order to enforce the Act and assess compliance. The CFIA is responsible for enforcing the FDA and the SFCA with respect to food. Under both regimes, inspectors have the power to enter the company's place of business, take samples of products to which the FDA and SFCA apply, inspect records, seize and detain products for an indefinite amount of time if the inspector believes there is a contravention, and order destruction of seized products if they are perishable or if the inspector is of the opinion that the article poses a risk of injury to health or safety and that disposal is necessary to respond to the risk. The company is required to provide reasonable assistance to furnish any information that the inspector may require.

With respect to imported foods, if on inspection they are found not to comply with the FDA, the SFCA or any applicable regulations, the inspector may permit the company an opportunity to remedy the breach



or may order the company to remove the product from Canada or destroy it at the company's expense if removal is unavailable.

CFIA Food Safety Investigations

The CFIA can initiate a food safety investigation if it has reason to believe that food is contaminated or does not comply with the federal regulations, in order to assess the issue and determine if a recall is necessary. Food safety investigations may be triggered by a consumer complaint, public health outbreaks, food test results obtained by the CFIA or others that identify a possible risk (such as contamination), information learned through a CFIA inspection of a retailer or other party, or a recall in another jurisdiction.

In the course of the investigation, the CFIA will collect information to assess the nature and scope of the potential health issue, including by conducting tests on the food product, inspecting facilities, and/or obtaining information to trace the distribution of the food product. If a potential health risk is identified, the CFIA may ask that Health Canada complete a formal Health Risk Assessment to assess what level of risk the food presents, based on the likelihood the food will cause illness and the potential duration and severity of the illness. The CFIA will use the results of the Health Risk Assessment to determine the most appropriate course of action, including whether or not a recall is necessary.

Recalls of Consumer Products and Food

Consumer Products

Under the CCPSA, the Minister of Health may order a company that manufactures, imports or sells a consumer product for commercial purposes to recall the product if the Minister believes on reasonable grounds that it poses a danger to human health or safety. Typically, if Health Canada determines that a recall is necessary, it will ask the company to initiate a voluntary recall. If the voluntary recall does not occur, Health Canada may issue a recall order. Health Canada also has the authority to carry out a recall order itself if the company fails to do so, at the company's expense.

Food

Pursuant to both the FDA and the SFCA, the Minister of Health has the power to order a recall of a food product where the Minister believes

on reasonable grounds that the product poses a risk to public, animal or plant health. If the CFIA determines that a recall is necessary, it will typically ask the company to initiate a voluntary recall. If no voluntary recall occurs, the CFIA can escalate the matter to the Minister to request that a recall order be made.

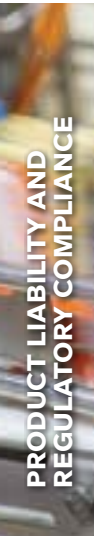
The CFIA expects companies to be capable of implementing product recalls. The agency has recommended guidelines for developing a prepared recall plan that can be implemented when required to remove from the market, quickly and efficiently, unsafe products that a retailer has sold.

Additional Regulations Applicable to Specific Products

Additional regulations under the CCPSA, FDA or SFCA may apply to specific products. For example:

- Regulations made under the CCPSA may impose additional compliance requirements in respect of a wide variety of products before they can be sold in Canada, including: candles; carbonated beverage glass containers; carriages and strollers; cellulose and fibre insulation; charcoal; children's jewelry; children's sleepwear; consumer products containing lead; consumer chemicals and containers; cribs, cradles and bassinets; corded window coverings; face protectors for ice hockey and box lacrosse players; glass doors and enclosures; glazed ceramics; ice hockey helmets; infant feeding bottle nipples; kettles; lighters; matches; mattresses; pacifiers; phthalates; playpens; residential detectors; restraint systems and booster seats for motor vehicles; tents; textiles (flammability); and toys.
- Regulations made under the FDA may impose additional compliance requirements for cosmetics (*Cosmetics Regulations*), natural health products (*Natural Health Products Regulations*), and various food additives.

Labelling, advertising and marketing requirements for food and consumer products are prescribed under the *Consumer Product Labelling Act* and *Consumer Product Labelling Regulations*, the FDA, and *Food and Drug Regulations*, the SFCA, the *Safe Food for Canadians Regulations*, the *Competition Act*, and other legislation such as the *Textile Labelling Act*, the *Precious Metals Marking Act*, the CCPSA, regulations related to the foregoing, and provincial consumer protection legislation. The CFIA has



published guidance documents to provide additional information on the requirements applicable to various advertising claims, such as claims of "no added sugar," "local" food claims, composition and quality claims, allergen- and gluten-free statements, health claims, "organic" claims, origin claims, and nutrient content claims. Consumer product companies should be aware of the legislation applicable to the products they intend to produce or sell.

The Packaging and Labelling chapter of this Guide provides further details on packaging and labelling requirements for food and consumer products.

Compliance Requirements Under the SFCA

The *Safe Food for Canadians Regulations* (SFCR) finally came into force on January 15, 2019, years after its enabling statute, the SFCA, was enacted on November 22, 2012. The SFCR generally applies to foods for human consumption (including ingredients) that are imported, exported, or interprovincially traded for commercial purposes. It also applies to the slaughter of food animals from which meat products destined for export or interprovincial trade may be derived.

The SFCA and SFCR have established a new regulatory regime with three fundamental elements of particular interest to food businesses: (i) licensing; (ii) preventive controls; and (iii) traceability. Under the SFCR, food businesses must obtain a licence based on their activities by submitting an application to the CFIA. In addition, they must develop and implement a written preventive control plan that documents how they comply with the requirements for food safety, humane treatment, and consumer protection. Further, they must maintain traceability documents to ensure that food products can be traced, and they must provide traceability information to the CFIA within 24 hours after receipt of a request (or within a shorter or longer period under certain conditions).

The SFCR has direct implications for how food manufacturers, retailers, distributors, and importers conduct business in Canada. In view of CFIA's broad discretion and the serious consequences for non-compliance with the SFCR, it is critical for companies to ensure that compliance tools and programs are in place that satisfy the existing SFCR requirements, and to prepare the requisite mechanisms to ensure compliance with upcoming compliance deadlines and obligations.

Statutes and Regulations Applicable to Specialized Product Categories

Separate legislative requirements apply to products other than food and consumer products that are sold in Canada. Examples include:

- drugs, cosmetics, and medical devices (regulated under the *Food and Drugs Act*);
- pest control products (regulated under the *Pest Control Products Act*);
- fertilizers (regulated under the *Fertilizers Act*);
- explosives (regulated under the *Explosives Act*);
- tobacco (regulated under the *Tobacco and Vaping Products Act*); and
- cannabis and industrial hemp (regulated under the *Cannabis Act*, *Cannabis Regulations*, and *Industrial Hemp Regulations*). Note also that other cannabis products, including edible and topical products, are expected to become legalized and regulated as of October 17, 2019.

Consumer product companies should consult the legislation applicable to the products they intend to make or sell in Canada to ensure compliance with all regulations and requirements.

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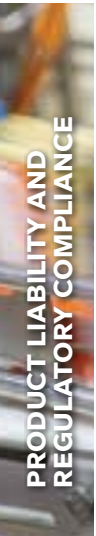

CONSUMER PROTECTION LAWS

By Miranda Lam, Olivia Martin and Diana Wang

CONSUMER PROTECTION LAWS

In Canada, protections for consumers are found in both federal and provincial legislation. Accordingly, protections for consumers vary from province to province. The purpose of this chapter is to provide an overview of consumer protection laws in Canada that all manufacturers should be aware of, even if they do not have a direct relationship with individual consumer customers, while highlighting some differences among the provinces.

Unfair Practices

Provincial consumer protection legislation prohibits businesses from engaging in unfair practices, which include making representations that may deceive or mislead consumers. This legislation contains specific examples of prohibited misrepresentations, which include representations that:

- goods or services have sponsorship, approval, performance, characteristics, accessories, ingredients, quantities, components, uses, benefits or other attributes which they do not have;
- a company has a sponsorship, approval, status, qualification, affiliation or connection which they do not have;
- goods or services are of a particular standard, quality, grade, style or model if they are not; and
- goods are new if they are used, deteriorated, altered or reconditioned.

Where a consumer has entered into a contract during or after the company has engaged in an unfair practice, provincial consumer protection legislation provides various remedies for the consumer, including cancellation of the contract. Consumers need not demonstrate reliance on the unfair practice or misrepresentation in order to avail themselves of these remedies; rather, they must merely show that their entry into the contract followed the unfair practices.

In addition to remedies available to individual consumers, companies may be prosecuted by provincial governments for offences under the consumer protection acts, including for misrepresenting products.

Misrepresentation of Products and Misleading Advertising

With the exception of Québec, where the Civil Code governs, consumers in Canadian provinces are generally protected from misleading advertising under the provincial sale of goods acts, consumer protection legislation and by common law. See Advertising, Marketing and Contests.

Sale of Goods Acts

Under the provincial sale of goods acts, there are implied warranties that apply to goods. These warranties require that goods are:

- reasonably fit for their intended purpose;
- of merchantable quality; and
- free from defects.

The implied warranties contain limiting provisions that restrict their application. However, courts have generally interpreted these limitations narrowly in favour of protecting the consumer.

Generally, there is no requirement for companies to formalize these statutorily implied warranties by way of express warranties. In practice, many companies do so in order to delineate the parameters of the warranties; however, implied warranties continue to apply and cannot be excluded or limited by way of express warranties.

In addition to warranties, the provincial sale of goods acts contain further requirements. For instance, where goods are sold based on description, there is an implied condition that the goods must correspond with that description.

Tort Liability

Apart from their own negligent acts, those who sell, distribute or deal in products have a duty to inspect and a duty to warn.

Distributors have a duty to warn buyers of known risks or hazards posed by the ordinary use of a good. In some Canadian provinces, it has also been found that retailers, having the expertise and opportunity required to inspect the goods they sell, may have a duty to inspect those goods.

If consumers are injured using goods sold to them by retailers, then the sellers, distributors or dealers may be liable for a breach of their duty to

inspect, and their duty to warn. In most cases, consumers cannot sue in tort when goods are not dangerous, but are simply of bad quality and cause purely economic losses.

Depending on the nature of the harm or risk, sellers, distributors or dealers may also be subject to regulatory scrutiny from regulators like the Canadian Food Inspection Agency and Health Canada. See Product Liability and Regulatory Compliance and Packaging and Labelling.

Québec

In Québec, consumers are protected from misleading advertising under the *Consumer Protection Act* and pursuant to the general principles of civil law provided under the *Civil Code of Québec*.

Under the general principles of civil law, a consumer may demand that any contract be nullified if their consent was based on an error induced by a supplier's misrepresentation. In addition to the nullity of the contract and receiving reimbursement of the price paid, a consumer may, in some cases, claim damages.

Under the *Consumer Protection Act*, no retailer, manufacturer or advertiser may, by any means, make false or misleading representations to a consumer, whether it is in the form of a positive statement, an act or an omission.

With respect to the accuracy of the representations, the *Consumer Protection Act* provides that the goods and services must conform to the description, statements and advertisements made by the retailer. Goods sold must be durable in normal use for a reasonable length of time, having regard to their price, the terms of the contract and the conditions of their use. A consumer's expectations as to the durability of a good are based on the representations made by the retailer.

A misrepresentation made by a manufacturer or a supplier about the goods they manufacture or supply is binding on a retailer, as a consumer may take action directly against the retailer under the *Consumer Protection Act*.

As to the price of a good, a retailer must indicate the sale price clearly and legibly. No retailer can charge a higher price than advertised. In some cases, a retailer acting in good faith can be excused for an error on the price advertised.

As to the warranties respecting goods or services offered by a retailer, exclusions are prohibited unless they are clearly indicated. The duration of a warranty mentioned in a contract or in an advertisement must be determined precisely. No retailer may make false representations concerning the existence, the scope or the duration of a warranty.

Where a good or service has been improperly presented, a retailer may face a wide range of civil recourses offered under the *Consumer Protection Act*, including that the consumer may demand the nullity of the sale, seek a price reduction or claim compensatory and punitive damages.

The Federal Competition Act

In all provinces, there are general prohibitions on misleading advertising under the federal *Competition Act* and the *Textile Labelling Act*. A company should ensure the products it advertises on its websites or over email communications, and any representations made in respect of the product, are not misleading to consumers in any way.

The making of false or misleading representations is both a criminal offence and conduct reviewable by the Competition Bureau under the *Competition Act*. While the *Competition Act* prohibits representations that are false or misleading "in a material respect," it imposes no general duty of disclosure. Under the *Competition Act*, the Commissioner of Competition may choose to prosecute individuals or corporations criminally, and, if convicted, courts may impose fines and order imprisonment. Alternatively, the Commissioner may conduct an inquiry and apply for an order that the conduct be brought to an end, or that the company publish a corrective notice, as well for administrative monetary penalties and restitution. Criminal and administrative penalties are in the discretion of the court, but can range from C$200,000 to C$10 million. See Competition Law.

Internet Contracts

Online orders are generally considered "future performance agreements" or "distance sales contracts" under provincial consumer protection legislation, imposing certain obligations on those who sell items online. See E-commerce.

Online Sales Terms

Various provinces have enacted legislation that require suppliers to disclose certain information and to memorialize the sale in writing.

In certain provinces, distance sales contracts are not binding unless a copy of the contract is provided to the consumer within 15 days of 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 seller 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 B.C. 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 organizations is whether to include a clause selecting the governing law or forum for any dispute. With the exception of Québec, 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 Québec, it is expressly prohibited to include any stipulation that a contract be governed by law other than Québec'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.

Delivery of Online Orders

Consumers may cancel internet contracts if a seller fails to comply with timelines for delivery of online orders. Under provincial consumer protection laws, a consumer can cancel a "future performance agreement" or "distance sales contract" at any time before delivery is made, if delivery is not made within 30 days after the delivery date specified in the agreement (or 30 days after the date of the order, if no delivery date is specified) or a later day agreed to in writing by the consumer. The foregoing is the Ontario requirement. Most provinces have similar rules related to future performance agreements and distance sales contracts.

As a result, while there is no requirement that products must be shipped within an amount of time specified in the legislation, the practical result of the legislation is that a seller must ship within a specified time period or the consumer may cancel the order/agreement at any time before the goods are delivered.

If, after the period described above has expired, the consumer agrees to accept delivery, the consumer may not cancel the order. In addition, a seller is considered to have delivered under a future performance agreement if delivery was attempted within the required time, but was refused by the consumer. Delivery is also considered to have occurred if it was attempted but was not successful because no person was available to accept delivery after the consumer was given reasonable notice that delivery would be occurring on that day.

Cancellation and Returns of Online Orders

While there is no general obligation to accept returns, most provinces require that the policy regarding cancellation, refunds, returns or exchanges be clear to the consumer before the consumer enters into the contract. Further, consumers may cancel contracts for a number of reasons, including failure to comply with the requirements of the provincial consumer protection legislation or the provincial sale of goods acts, as described above. Where a contract is cancelled for a failure to comply with the governing legislation, sellers must accept returns.

In certain provinces (in particular, British Columbia and Alberta), upon receipt of a request to cancel an online order, the seller must, within 15 days from the date of cancellation, refund to the customer all consideration paid under the sales contract.

A customer is obliged to return the unused goods within 15 days of receipt or within 15 days after giving notice of cancellation, whichever is later. Where cancellation occurs as a result of the retailer's non-compliance with the legislation, the seller will be responsible for the reasonable costs associated with returning the goods.

In most provinces, the sale of goods acts contain additional requirements for delivery, including that the delivery must be made within a reasonable time and must be delivered at a reasonable time of day. Further, unless otherwise agreed, a consumer is not bound to accept delivery by instalments.

Gift Cards

Each Canadian province has enacted legislation that governs prepaid purchase cards, or gift cards. While there are differences in how each province defines a gift card, in general, these definitions are expansive and include any card, written certificate, voucher, device or other medium of exchange that a person receives in exchange for the future supply of goods or services. These include reloadable gift cards and cards purchased for personal use.

Each province prohibits gift cards purchased by consumers from expiring, although certain exceptions exist. In some provinces, for example, cards for specific services, cards issued for charitable purposes, cards issued to a person who pays nothing or less than the monetary value of the card, and cards issued for promotional or marketing purposes may expire. In general, however, the retailer has ongoing liability for unredeemed gift cards.

Provincial consumer protection legislation also governs restrictions on the cards and what information must be provided to customers:

- In Ontario, contracts for gift cards must be in writing and must be delivered to the customer.
- In British Columbia, the legislation limits the restrictions that may be placed on gift cards and prescribes certain requirements for those restrictions. At the time the gift card is purchased, the retailer must inform the customer (in a clear manner) of the nature of the permitted restriction or limitation, the terms or conditions imposed in respect of use, redemption or replacement of the card, and other information, including a description of how a customer can check the balance of the card.

- In Alberta, any terms and conditions attached to the use of the gift card must be disclosed on the gift card itself and any packaging or promotional material. The required disclosure includes contact information for the purpose of obtaining information about the gift card and any restrictions or limitations on the gift card (for instance, if the gift card cannot be exchanged for cash, if the gift card cannot be used to make payment on a credit account, and the return policy for items purchased with a gift card).
- In Québec, before entering into a contract for the sale of a gift card, the retailer must inform the consumer of the conditions applicable to the use of the card and explain how to check the balance on the card. If this information does not appear on the card, the retailer must provide it to the consumer in writing.

The provincial consumer protection legislation in Ontario, Alberta and British Columbia prohibits retailers from charging fees to customers for anything in relation to gift cards. There are limited exceptions that vary from province to province, which permit retailers to charge fees to replace a lost or stolen card, for customization or for activation. In Québec, gift cards must be replaced free of charge and without depriving the consumer of the balance remaining on the card.

In British Columbia and Ontario, a retailer may also charge a small fee (only C$1.50) at the time of purchase, for a card that a customer can apply to goods or services from multiple unaffiliated sellers. The retailer may also deduct up to C$2.50 per month from the balance of this type of card, starting 15 to 18 months after the end of the month in which the card was purchased, provided this information is displayed prominently on the card. In Québec, the only charge allowed for the issue or use of the gift card is where the gift card allows the consumer to purchase goods or services from several independent retailers who do not use the same name. In such case, a fee may be charged, subject to certain conditions. Apart from activation fees, Alberta does not have exceptions for similar cards.

A breach of the foregoing provisions may entitle a consumer to a full refund within one year of purchase. In Québec, a retailer must, at the consumer's request, refund the balance of the gift card if it is less than five dollars.

Consumer Protection Agencies and Legislation

Federal

The federal Office of Consumer Affairs (OCA) promotes the interests and protection of Canadian consumers. It aims to ensure that consumers have a voice in the development of government policies and are effective marketplace participants.

The OCA provides research and analysis on marketplace issues in support of both policy development and intergovernmental harmonization of consumer protection rules and measures. It also identifies important consumer issues and develops and disseminates consumer information and awareness tools.

Finally, the OCA provides financial support to not-for-profit consumer and voluntary organizations, in the form of a Contributions Program, to encourage them to reach financial self-sufficiency and assist them in providing meaningful, evidence-based input to public policy in the consumer interest.

The Competition Bureau is not a consumer protection agency, but can investigate and bring proceedings — if criminal, through the public prosecution service, and if civil, on application to the Competition Tribunal — against companies that engage in deceptive marketing practices in contravention of s. 52 or s. 74.01 of the *Competition Act*.

Ontario

Consumer protection in Ontario (www.ontario.ca/page/consumer-protection-ontario) is governed by the Ontario Consumer Protection Act and corresponding regulations.

Consumer Protection Ontario is an awareness program from Ontario's Ministry of Government and Consumer Services and other public organizations or "administrative authorities" that promote consumer rights and public safety. The Ministry and these administrative authorities enforce a number of Ontario's consumer and public safety laws, investigate alleged violations and handle complaints.

British Columbia

In British Columbia, consumer protection is governed by the *Business Practices and Consumer Protection Act* and the associated regulations.

Consumer Protection BC (www.consumerprotectionbc.ca) is a not-for-profit corporation that, among other things, provides information and education about consumer protection in British Columbia, licenses certain industries, investigates violations of consumer protection legislation, and enforces consumer protection laws.

Alberta

In Alberta, consumer protection laws are legislated under the *Consumer Protection Act* and its regulations, including the *Cost of Credit Disclosure Regulation*, *Gift Card Regulation*, and *Internet Sales Contract Regulation*.

The Government of Alberta allows consumers to make complaints respecting consumer transactions via https://www.servicealberta.ca/file-a-complaint.cfm. A valid complaint will be investigated by the Consumer Investigations Unit. The Consumer Investigations Unit has the ability to warn businesses of unfair trading practices or to recommend penalties.

Québec

In Québec, the Office de protection du consommateur is the government body responsible for protecting consumers and monitoring the application of the *Consumer Protection Act* and the regulations enacted under this Act.

The Office receives complaints from consumers and makes retailers, merchants, manufacturers and advertisers aware of consumer needs and demands. It has wide powers of investigation provided by the *Consumer Protection Act*.

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DISPUTE RESOLUTION AND CONFLICT MANAGEMENT

By Miranda Lam, Olivia Martin and Diana Wang

DISPUTE RESOLUTION AND CONFLICT MANAGEMENT

This chapter provides an overview of formal and informal dispute resolution procedures in Canada, and addresses situations of conflict that manufacturers of consumer goods and distributors may face.

Dispute Resolution

This section provides a broad overview of Canada's court system and alternative dispute resolution mechanisms, while highlighting some specific features of the regimes in Ontario, Québec and British Columbia.

Canada's Court System

Under the *Constitution Act*, 1867, the judiciary is separate from and independent of the executive and legislative branches of government. Judicial independence is a cornerstone of the Canadian judicial system. Judges make decisions free of influence and based solely on fact and law. Canada has provincial trial courts, provincial superior courts, provincial appellate courts, federal courts and a Supreme Court. Judges are appointed by the federal or provincial and territorial governments, depending on the level of the court.

Each province and territory (with the exception of Nunavut) has a provincial court. These courts deal primarily with criminal offences, family law matters (except divorce), traffic violations and provincial or territorial regulatory offences. Private disputes involving limited sums of money are resolved in the small claims divisions of the provincial courts. The monetary ceiling for the small claims division in Ontario is currently C$35,000, while the ceiling in British Columbia is C$35,000. The ceiling in Alberta is currently C$50,000 and in Québec is C$15,000.

The superior courts of each province and territory try the most serious criminal cases, as well as private disputes exceeding the monetary ceiling of the provincial courts' small claims divisions. Although superior courts are administered by the provinces and territories, the federal government appoints and pays the judges of these courts.

Each province and territory has an appellate court that hears appeals from decisions of the superior courts and the provincial and territorial courts.

The Federal Court of Canada has limited jurisdiction. Its jurisdiction

includes inter-provincial and federal provincial disputes, intellectual property proceedings, citizenship appeals, *Competition Act* cases, and cases involving Crown corporations or departments or the government of Canada. The Trial Division hears decisions at first instance. Appeals are heard by the Federal Court of Appeal.

The Supreme Court of Canada is the final court of appeal from all other Canadian courts. It hears appeals from the appellate courts in each province and from the Federal Court of Appeal. The Supreme Court of Canada has jurisdiction over disputes in all areas of the law, including constitutional law, administrative law, criminal law and civil law. There is a right of appeal in certain criminal proceedings, but in most cases leave must first be obtained. Leave to the Supreme Court of Canada may be granted in cases involving an issue of public importance or an important issue of law.

Special Adjudication Processes in Ontario and British Columbia

In the Toronto Region of the Province of Ontario, the Superior Court of Justice maintains a Commercial List, which hears certain applications and motions in the Toronto Region involving a wide range of business disputes. It operates as a specialized commercial court that hears matters involving shareholder disputes, securities litigation, corporate restructuring, receiverships and other commercial disputes. Matters on the Commercial List are subject to special case management and other procedures designed to expedite the hearing and determination of complex commercial proceedings. Judges on the Commercial List are experienced in commercial and insolvency matters.

Ontario also has a Divisional Court that serves as a court of first instance for the review of administrative actions. It also hears appeals from provincial administrative tribunals, interlocutory decisions of judges of the Superior Court and appeals from the Superior Court involving limited sums of money (currently C$50,000).

In 2015, British Columbia introduced the Civil Resolution Tribunal, Canada's first online administrative tribunal. The Civil Resolution Tribunal hears all small claims disputes under C$5,000, except certain types of claims, such as libel, slander or constitutional questions. It also hears motor vehicle accident claims (up to C$50,000), some housing-related disputes (with no monetary cap), and disputes related to societies and co-operative associations. This tribunal provides a three-stage

process in which parties first negotiate amongst themselves, and then are assisted by a tribunal member who facilitates the negotiation. If no resolution can be reached during the first two negotiation stages, an independent tribunal member will decide the dispute. Decisions of the Civil Resolution Tribunal that fall under small claims jurisdiction can be appealed in provincial court. The tribunal's other decisions are reviewable by the superior court, the British Columbia Supreme Court.

Class Actions

Class proceedings are procedural mechanisms designed to facilitate and regulate the assertion of group claims. Eight of 10 Canadian common law provinces have class proceedings legislation, as does the civil law jurisdiction of Québec. In provinces without such legislation, representative actions may be brought at common law. Unlike ordinary actions, a proceeding commenced on behalf of a class may be litigated as a class action only if it is judicially approved or "certified." The Province of Québec has a unique process where a class action must be "authorized" by a judge of the Superior Court of Québec instead of "certified" in order to go forward.

In Canada, retailers and consumer-facing companies, including product manufacturers are common targets of class actions. Class actions may involve allegations of product liability, misrepresentation, breaches of consumer and employment laws, competition law (e.g. antitrust) breaches, securities fraud, and breaches of public law.

Class actions are becoming an increasingly prominent aspect of business litigation in Canada. Businesses may benefit from the fact that individual damage awards tend to be lower in Canada than in the United States. In addition, the availability of punitive damages is limited in Canada.

Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) refers to the various methods by which disputes are resolved outside the courtroom. Such methods include mediation (an independent third party is brought in to mediate a dispute) and arbitration (the dispute is referred to a third party for a binding decision).

Mediation

In Ontario, the Rules of Civil Procedure mandate and regulate mediation

in civil cases commenced in Toronto, Windsor and Ottawa. Mediation remains common in other parts of Ontario, and parties to a dispute will often agree to non-binding mediation by mutually selecting a mediator.

In British Columbia, mediations are generally arranged by counsel. However, parties in most types of Supreme Court cases can also serve a Notice to Mediate, which compels other parties to attend mediation. Parties must agree upon a mediator within a specified timeframe and costs are generally shared between parties. In Small Claims court, most cases involve a mandatory settlement conference at which a judge will attempt to mediate the dispute.

Arbitration

Contracts will often contain mandatory arbitration clauses requiring parties to resolve disputes through arbitration instead of through the courts. However, these provisions are not always enforceable. Consumer protection legislation in Ontario, for example, prohibits mandatory arbitration clauses from applying to consumer contracts. No such prohibition applies to contracts between businesses.

Arbitration, where permitted, nonetheless may offer a number of advantages relative to domestic court procedure, depending on the circumstances. For example, arbitration is generally a confidential process, affords the parties the ability to select a decision-maker with a particular skill set or expertise, and may be faster than the court system. However, there may be situations where the ability to resort to the courts is more appropriate, so the relative merits of these processes must be considered in designating a dispute resolution mechanism in any commercial contract.

Conflict Management

Loss Prevention

Businesses in Canada may retain the services of security personnel to prevent crime and loss and maintain order inside their premises. In limited circumstances, an individual may be briefly detained for an "investigative detention." This is a form of citizen's arrest. Clear guidelines for this process are essential for businesses who employ security personnel.

Citizens' arrests are governed by the amendments to the *Criminal Code*

found in the federal *Citizen's Arrest and Self-Defence Act*. A person who owns or has lawful possession of property, or those authorized by them, may arrest persons committing criminal offences on or in relation to their property.

Generally, investigative detention is permitted only where there are reasonable grounds to believe that there is a connection between the individual detained and a criminal offence.

A citizen's arrest can be made either during the commission of the offence or within a reasonable time after an offence is committed, provided there is a reasonable belief that a peace officer could not have made the arrest instead. A citizen's arrest can only be made if the person making the arrest can establish that a particular offence was in fact committed, not just that they had reasonable grounds to suspect that an offence was committed. In all jurisdictions, any detention should be brief and the local city police should be contacted without delay, as soon as possible after the detention. While the acceptable length of the detention depends on the circumstances, it has been held that lengthier detentions of approximately 40 minutes or more should be avoided, as they risk being considered more formal arrests. Detentions in circumstances where no offence has been committed or that exceed an acceptable length may result in criminal liability or civil liability for false imprisonment.

Force should only be used if reasonably necessary in the interests of safety. Whether the use of force is reasonably necessary depends on whether there is a realistic threat of harm, the alternatives open to the security guards, and the seriousness of the offence. In assessing the realistic threat of harm, relevant considerations include: the individual's behaviour; the relative size, strength and age of both the individual and the security guards; the number of security guards; and whether the individual has a weapon.

Whether the *Canadian Charter of Rights and Freedoms* applies to a citizen's arrest performed by a security guard depends on a number of factors which may vary by province. Businesses are accordingly best advised to consult legal counsel in developing specific citizen's arrest protocols in each region where they operate.

Consumer products businesses should also be aware that there is specific provincial legislation governing the private security sector. While

this legislation varies slightly from province to province, generally, the legislation sets out requirements for private security personnel to be licensed, sets out certain standards of conduct to which the personnel must adhere, and governs the uniforms that security personnel can wear. For example, in British Columbia, among other things, security personnel may not carry or use firearms, any restraining device or weapon prohibited by the Criminal Code, or any item designed to debilitate or control a person. They are also generally prohibited from using dogs while engaged in security work.

Protests

In Canada, citizens have rights to freedom of peaceful assembly and freedom of expression under the *Charter of Rights and Freedoms*. While these rights are zealously guarded, they do not permit trespass or violence.

Although the local police department should be contacted to deal with all issues respecting protests, businesses should be aware of the scope of actions they can lawfully take to deal with protest activity.

Protest activity may take place inside or outside a factory or office building, interfering with the entry and egress of personnel or visitors. A staff member may approach the protestors to request that they co-operate by leaving or ceasing interference with the entry.

Protestors Inside

If protestors gain entry to an office, factory or other private premises, a business can respond in a number of ways. Before using any force, protestors should be advised that their activities are in breach of the provincial trespass legislation or in violation of some other criminal law, and the protestors should be asked to leave. Once that culpable behaviour is identified to the protestors and the protestors refuse to leave, the local police department should be called.

If police intervention does not resolve the situation, staff may, in some circumstances, use reasonable force to deal with the protestors. While the reasonableness of amount and type of physical force used to remove or apprehend the protesters varies, generally, no force may be used unless and until notice has been given to the protestor and the protestor remains aggressive and refuses to leave, and/or poses a threat to either the personnel or the public.

Protestors Outside

The ability of businesses to take action in respect of protestors outside their premises who are interfering with the entry and exits of visitors, guests and employees, is much more limited. Generally, if the protestors refuse the staff's request for them to leave, staff may call the local police department. Even if the protestors refuse to cease their interference after police intervention, staff may generally not use force or attempt to effect a citizen's arrest. If the protest continues over a prolonged period, it may be necessary to seek an injunction in court restraining the protestors.

Consumer products businesses are best advised to seek legal advice in developing an appropriate protocol for handling protests at or near their premises.

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LANGUAGE

By Véronique Wattiez Larose and Jessica Cytryn

LANGUAGE

Language rules in most of Canada apply primarily to government institutions, not private businesses. Canada's Constitution grants English and French equal status in Canada's Parliament and federal courts. Every law must be published in both English and French in some provinces, including Québec. The federal *Official Languages Act*, given additional profile by the *Canadian Charter of Rights and Freedoms*, requires that all federal institutions provide services in either language wherever there is demand for it, or wherever the travelling public is served. Public education is available in either official language, where numbers warrant.

Outside Québec

Outside Québec, the main area where language rules apply to the private sector is with respect to consumer packaging. Regulations under the federal *Consumer Packaging and Labelling Act* mandate that specific information on prepackaged consumer products sold in Canada must be labelled. That information must be set out in both English and French. Exceptions include religious, specialty-market and test products, and language-sensitive products, such as books and greeting cards.

Canada's Constitution grants English and French equal status in Canada's Parliament and federal courts.

Although Canada is bilingual at the federal level, other governments in Canada may apply their own language policies to matters within their jurisdiction. New Brunswick and the three northern territories are officially bilingual. Several provinces have adopted legislation to ensure that public services are available in French where warranted; but only Québec's language legislation regulates how businesses operate.

Inside Québec

Québec's *Charter of the French Language* (Charter) affirms French as the province's official language. The Charter grants French-language rights to everyone in Québec, including workers and consumers. Those doing business in Québec — anyone with an address in Québec and anyone who distributes, retails, enters into agreements or otherwise makes a product available in Québec — is therefore subject to rules about how they interact with the public and how they operate inside the province.

Disclaimer: Considerable amendments to the Charter are expected to come into force shortly pursuant to Bill 96. These amendments will clarify and reinforce the existing measures that are laid out in this Chapter, introduce new requirements and restrictions, and significantly increase the risk of non-compliance with Québec language laws. These changes, once confirmed, will be reflected in the next update of this chapter.

In the Workplace

In Québec, written communications with workers must be in French, including offers of employment and promotion and collective agreements. No one may be dismissed, laid off, demoted or transferred for not knowing a language other than French — but knowledge of English or another language may be made a condition of hiring if the nature of the position requires it.

Businesses that employ a certain number of people within Québec for at least six months must register with a provincial regulator (the Québec French Language Office or OQLF) to obtain a francization certificate by demonstrating that the use of French is generalized at all levels of the business (including in relation to the use of information technology and in communications with clients, employees and investors). Businesses where the use of French is not generalized at all levels may be subject to a francization program in order to achieve this goal over time. In addition, businesses with at least 100 employees must establish an internal francization committee that monitors the use of French in the workplace.

In the Marketplace

Rules about how businesses communicate in Québec's marketplace differ according to whether the communication is in a public or private place. Billboards and signs visible from a public highway, on a public transport vehicle or in a bus shelter must be exclusively in French. Public signs, posters and commercial advertising located elsewhere may include other languages, but the French text must predominate. Non-French business names must be accompanied by a French version appearing no less prominently, unless

Rules about how businesses communicate in Québec's marketplace differ according to whether the communication is in a public or private place.

the non-French name has been trademarked and a French version has not. Moreover, anyone carrying on business at a Québec location must register a French language business name.

With respect to the trademark exception for public signs, pursuant to regulations adopted in 2016, any person having as part of its public signage a trademark that is only in English will have to add one of the following three elements in French: (i) a generic term or a description of the products or services concerned; (ii) a slogan; or (iii) any other term or indication, favouring the display of information pertaining to the products or services to the benefit of consumers or persons frequenting the site. This new requirement is intended to address concerns expressed by certain francophone consumers in Québec to the effect that English-language trademarks were dominating the urban commercial landscape in some cities. Amendments limiting the trademark exception for public signs and requiring a more prominent use of French in the presence of non-French trademarks are expected to come into force shortly once Bill 96 passes.

Communications such as leaflets, catalogues, brochures, order forms, invoices, receipts for business which have a physical establishment in the province of Québec as well, user manuals, warranties and product packaging must include French text that is no less prominent than any non-French text displayed. Because such communications are not displayed in a public place, however, the French text need not predominate. The latter rule applies not only to communications and product labelling, but also directly to certain products that use words. Subject to certain cultural exceptions, for example, the words on toys and games must be available in French alongside any other language version. In the case of software products, if a French-language version of the software exists and has been made commercially available somewhere in the world, then non-French versions may be sold in Québec only if a functionally equivalent French-language version is simultaneously made available in Québec on terms and conditions that are equally attractive to those applicable to the non-French version.

Québec courts have held that certain provisions of the Charter apply to websites. For example, product and service descriptions on websites may be subject to French-language requirements since they are akin to a commercial catalogue. Similarly, standard form contracts (such as

website terms of use and privacy policies) as well as order forms must be drafted in French according to the Charter. In general, if a company has a physical establishment in Québec and its website advertises products or services sold in Québec, then the above-mentioned aspects of the website may be subject to French language requirements.

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FRANCHISING

By Adam Ship

FRANCHISING

Overview

The franchise business model is commonly used in Canada and has experienced significant growth over the last decade. Franchise systems have been used by consumer goods businesses for, among other things, bottling and packaging, providing services and distribution.

According to the Canadian Franchise Association, the leading national franchise industry group, approximately 1,300 franchised brands operate in Canada through 75,000 franchised units, employing more than one million Canadians and generating approximately C$100 billion in annual revenue.

Foreign franchisors can expand into Canada with or without opening a branch office or incorporating a local subsidiary. These decisions will be driven in large part by tax considerations.

Foreign franchisors often pursue expansion in Canada through master franchising or area development arrangements with Canadian companies that have a track record of successfully bringing foreign brands to the Canadian market. These structures essentially involve the foreign franchisor delegating a number of the roles that it usually plays in its domestic market to the Canadian master franchisee or area developer. A master franchisee will have territorial rights to grant sub-franchises on its own account and will often provide ongoing support to local sub-franchisees. The rights of an area developer, by contrast, are limited to opening multiple units directly or through an affiliate.

Foreign franchisors can also directly franchise in Canada. This involves the foreign franchisor (or its Canadian subsidiary) entering into franchise agreements with individual franchisees for specific units in Canada.

Several areas of Canadian law interact with the franchise business model in specific ways. Below, we focus on the most direct form of legal regulation of franchising in Canada: franchise-specific legislation. We also include a section on Québec.

Franchise-Specific Legislation in Canada

The jurisdiction to regulate franchising is held by Canada's provinces. To date, six provinces have enacted franchise-specific legislation: Ontario,

British Columbia, Alberta, Manitoba, New Brunswick and Prince Edward Island (Statutory Provinces).

While there are subtle differences between the franchise statutes found in the Statutory Provinces, they are largely consistent and focus on pre-sale disclosure. It is common for franchisors in Canada to use national Franchise Disclosure Documents (FDDs), where they grant franchises in more than one Statutory Province. Many franchisors will also voluntarily provide their national FDD to prospective franchises in non-Statutory Provinces.

A franchisor granting franchises in one of the Statutory Provinces must provide a prospective franchisee with an FDD not less than 14 days before the earlier of either: (i) the signing of the franchise agreement; or (ii) the payment of consideration by the franchisee.

FDDs must contain all material facts, which includes both facts that are specifically prescribed in the regulations passed under the applicable franchise statutes and all other facts that could reasonably be expected to have a significant impact on the value of the franchise or the franchisee's decision to purchase the franchise.

For example, the regulation passed under the Ontario franchise statute currently prescribes more than 25 different categories of information that must be included in an FDD. Some of the key subject areas include: (i) detailed background information about the franchisor, its directors and officers; (ii) upfront costs to the franchisee to establish the franchise; (iii) information concerning the closure of other franchises in the system; (iv) information about specific policies and practices of the franchisor, such as those imposing restrictions on goods and services to be sold and those relating to volume rebates or other financial benefits obtained by the franchisor; (v) information concerning the expenditures of any advertising fund to which the franchise must contribute; and (vi) information concerning territorial rights granted to the franchisee and/or reserved to the franchisor.

The FDD must also include all agreements relating to the franchise as well as all other material facts beyond those specifically prescribed.

A number of court decisions have interpreted Canadian franchise legislation as requiring an FDD to include facts and information that are material to the individual location being granted to a franchisee, for

example: (i) an FDD must include any head-lease entered into between the franchisor and the third-party landlord, where the franchisor requires the franchisee to be responsible for the head-lease through a mandatory sublease; and (ii) one court has found an FDD to be deficient where it failed to disclose that the previous owner of the franchise seriously mismanaged the location.

As a result of these and other similar decisions, FDDs in Canada are drafted to include not only facts that are material to the franchisor and the franchise system, but also facts that are material to the individual franchise being granted.

Additionally, every FDD must contain the franchisor's financial statements in either audited or review-engagement form for the most recently completed fiscal year, unless an exemption is available to the franchisor. The FDD can include an opening balance sheet for the franchisor if either the franchisor has been operating for less than one year or 180 days have not yet passed since the end of the franchisor's first fiscal year.

Each of the Canadian franchise statutes currently contains an exemption from the requirement to include financial statements for large, mature franchisors that meet the prescribed criteria.

Where a "material change" occurs between the delivery of an FDD and the signing of the franchise agreement or the payment of consideration, a franchisor must also provide the prospective franchisee with a Statement of Material Change describing those material changes. This must be delivered as soon as practicable after the change has occurred.

Canadian franchise legislation contains a number of exemptions from the requirement to deliver an FDD. There are differences in the exemptions available in the various Statutory Provinces and the courts have generally interpreted the exemptions narrowly. Generally speaking, the exemptions are limited to where: (i) the franchisee already has intimate knowledge of the franchise system; (ii) the financial risk to and investment by the franchisee are very small; or (iii) the franchisee acquires the franchise from a third party without any active involvement of the franchisor.

Statutory rescission is the primary remedy to a franchisee who fails to receive an FDD or who receives a deficient FDD. Statutory rescission gives the franchisee the right to both terminate all franchise and ancillary

agreements with the franchisor without penalty or further obligation and substantial financial compensation to put the franchisee back into its pre-sale position.

Given the scope of the rescission remedy, franchisors granting franchises in the Statutory Provinces have strong motivation to ensure their FDDs are fully compliant and up to date each time they are delivered to prospective franchisees. The length of time during which a franchisee may seek rescission depends on the gravity of the deficiency in the FDD: (i) a 60-day limitation period for minor, non-material deficiencies; or (ii) a two-year limitation period for significant deficiencies or failure to provide an FDD.

In addition to pre-sale disclosure, Canadian franchise legislation also establishes reciprocal duties of good faith and fair dealing for parties to a franchise agreement and provides franchisees with the right to associate with one another.

The duty of good faith requires the franchisor to consider the legitimate interests of its franchisees before exercising contractual rights, and imposes a standard of commercial reasonableness on the parties. The application of the duty is highly fact-dependent and there is a large body of case law that has interpreted the duty in the context of different types of franchise disputes.

Franchisors are prohibited from interfering with or restricting franchisees' statutory right to associate with one another in any way and any provision in a franchise agreement that attempts to restrict association between franchisees is void. This provision has been interpreted by Canadian courts to provide franchisees with the right to join together in litigation against the franchisor, for example in a class action.

All Canadian franchise legislation expressly prohibits parties to a franchise agreement from contracting out of or waiving any of the rights or duties contained in such legislation. This means that a foreign franchisor granting franchises in the Statutory Provinces cannot use a choice-of-law clause or any other provision in its franchise agreements to avoid the application of these franchise-specific statutes.

Québec Civil Law

While there is no specific franchise legislation in force in Québec, the Civil Code of Québec (CCQ) may impose substantive obligations on franchisors.

Under the CCQ, "external clauses" (that is, contractual terms and conditions contained in ancillary documents outside the franchise agreement) must be brought to the attention of prospective franchisees at the pre-contractual phase to be enforceable against the franchisees. This may apply to certain provisions of a franchisor's Operations Manual, which contain what are akin to contractual terms and conditions.

The Québec Court of Appeal has held that the duty of good faith under the CCQ requires a franchisor to bring to the attention of a prospective franchisee any information that might have a decisive impact on the prospective franchisee's willingness to enter into the franchise agreement (*9150-0595 Québec inc. v. Franchises Cora inc., 2013 QCCA 531*). This constitutes a form of pre-sale disclosure obligation embedded within the CCQ's duty of good faith.

Once a franchise agreement has been entered into, the CCQ may also impose substantive implied obligations on franchisors, outside the written terms of the contract. In the franchising context, Québec courts have recognized fairly broad implied duties on franchisors arising from the nature of the franchise relationship, including:

- To inform.
- To provide technical and commercial assistance.
- To co-operate and collaborate.
- Loyalty.
- To respect the other party's reasonable expectations and commercial interests.
- To treat parties in similar situations consistently.
- To assist a co-contractor in difficulty and mitigate contractual damages despite clear contractual terms.
- To take reasonable measures to maintain the strength and relevance of the brand.
- Not to create false expectations.
- To exercise one's rights reasonably.

The above duties are owed by a franchisor to each individual franchisee and to the entire network of franchisees. The Québec courts have applied

these implied duties to sanction conduct by franchisors, even where the franchise agreement did not expressly prohibit the applicable conduct.

For example, in one of the leading cases on the duty to co-operate in franchising, the franchisor developed a market strategy that put certain of its own corporate stores in direct competition with its franchisees. Nothing in the franchise agreement prevented the franchisor from competing with its franchisees and, in fact, the franchise agreement expressly favoured the franchisor on this issue. However, the Québec Court of Appeal held that the franchisor had breached its "implied obligations which form part of the broader contractual scheme." In the court's view, the franchisor's liability flowed from failing to assist its franchisees in adapting to the system change. The court held that the franchisor, bound by an obligation of good faith and loyalty to its franchisees, had a duty to work with them to prevent economic harm or at least minimize the impact of the system change (*Provigo Distribution inc. v. Supermarché A.R.G. inc.*, 1997 CanLII 10209 (QC CA)).

In 2015, the Québec Court of Appeal applied its earlier decision in Provigo in the context of a dispute between franchisor Dunkin Brands and some of its Québec franchisees. Based on the theory of implied obligations and the duty of good faith, the court read into the franchise agreement an implied obligation on the part of the franchisor to protect and enhance its brand and found that the franchisor had failed to do so. The franchisor was found liable for its failure to do anything in the face of the collapse of the brand in the regional market. Rather than respond to the franchisees' concerns regarding its declining brand, the franchisor sought to impose an expensive renovation programme and required franchisees to sign a release preventing them from bringing a lawsuit of any kind against the franchisor. The court held that the franchisor had breached its implied duty to its franchisees and awarded substantial damages (*Dunkin' Brands Canada Ltd. c. Bertico inc.*, 2015 QCCA 624). The Québec Court of Appeal's reasoning was cited with approval by the Supreme Court of Canada in 2019 (*Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28).

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DIRECT TO CONSUMER

By Carmen Francis

DIRECT TO CONSUMER

An increasingly attractive sales channel for many consumer brand manufacturers, the growth of the Direct-to-Consumer (D2C) model has only accelerated over the course of the COVID-19 pandemic. Initially a space occupied primarily by D2C-only e-commerce startups, D2C sales have increasingly been embraced by established brands as presenting a unique opportunity to sell directly to consumers without the involvement of platforms, retail partners, wholesalers, or distributors. As a practical matter, the brand-consumer immediacy that D2C sales offer also brings with it a more immediate relationship between brands and a number of significant regulatory and compliance regimes.

Navigating Existing Partnerships

A primary consideration for brands contemplating a move into the D2C model is whether existing contractual relationships with intermediaries (whether distributors, retail partners, or otherwise) will be compromised — or indeed whether existing arrangements preclude the pursuit of a D2C channel altogether. Consumer brands' intermediary stakeholder relationships should therefore be front of mind when considering a foray into D2C sales, and a comprehensive review of existing contractual commitments should be conducted from the outset. This will allow brands to identify potential pain points for business partners, negotiate necessary contractual amendments, and position themselves to properly assess the viability of launching a D2C strategy.

Enhanced Regulatory Engagement

Because a move into the D2C space ultimately places brands in a more immediate relationship to consumers, D2C sales may trigger the application of regulatory regimes that were previously mediated through third parties. For instance, brands that formerly relied upon an intermediary – such as a distributor or retail partner – for the purposes of customer interactions will be required in the D2C context to consider the application of consumer protection laws to direct consumer sales. Customer returns, refunds, and consumer-facing e-commerce activities may all present new legal considerations. Similarly, where product has been sold directly to consumers, brands may be required to engage more directly with regulatory agencies for the purposes of managing product

withdrawals, recalls or other corrective actions. For those brands selling product on a cross-border basis, decisions need to be made with respect to who will act as the importer of record for D2C sales, and who will be responsible for paying any duties or taxes owed on imported products. For these reasons, consumer brand manufacturers need to ensure they have the appropriate internal and external resources in place to navigate these and other compliance considerations that may have otherwise been handled by intermediaries.

Data and Cybersecurity Considerations

A significant driver of the move toward D2C sales is the array of data collection opportunities that D2C channels present. Direct interactions with consumers, potentially yielding valuable insight into preferences, spend, geography, and other demographic data points, can be leveraged to further refine marketing and advertising efforts, for instance. In light of the individual personal information that can be gathered through D2C sales and e-commerce interactions, data and cybersecurity are of paramount importance. Brands considering the launch of a D2C channel should determine at the outset what types of personal information they intend to collect from individual consumers through direct purchases, and for each type, the purposes for which the brand intends to use it. Specifically, does the brand intend to sell or share this data with other entities, or send targeted advertisements to website visitors? In each case, a robust privacy policy, appropriate consents, and tailored information security program should be developed and implemented, while key cybersecurity threats should be identified in advance of launching any D2C activities.

There is no question that D2C models constitute an important opportunity to advance omnichannel sales strategies, provided that consumer brands identify and prepare for the attendant increase in regulatory and compliance touch points.

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THREE SPECIAL CASES

By Martha Harrison

THREE SPECIAL CASES

Canada's Natural Health Products Framework

Canada has developed a regulatory approach to Natural and Non-Prescription Health Products (NHPs) that differs in many respects from other jurisdictions, including the United States, where no equivalent product category exists. While many products that would be considered to qualify as NHPs within the Canadian regulatory framework are not required to obtain market authorizations to distribute in other jurisdictions, manufacturers, distributors and retailers should be aware of the more restrictive approach adopted by Canadian authorities in relation to the introduction of NHPs into the Canadian market. In Canada, NHPs are subject to a stand-alone licensing and approval regime administered by the Natural and Non-Prescription Health Products Directorate (NNHPD) at Health Canada.

The legislative structure for the NHP regime is set out in the *Natural Health Products Regulations* (NHPR), enacted pursuant to the *Food and Drugs Act*. Together, these define the scope of products that fall within the category of NHPs. Generally speaking, vitamin and mineral supplements, herb and plant-based remedies, homeopathic medicines, traditional medicines (including traditional Chinese medicines), probiotics, amino acids and essential fatty acids intended for human use, and certain personal care products (shampoos, toothpastes, antiperspirants, etc.) are all regulated as NHPs. To the extent that producers of consumer goods intend to sell these types of products into the Canadian market, the potential application of the NHPR should be taken into consideration. A "cosmetic" in one jurisdiction might constitute a NHP in Canada!

Licensing Requirements

As a threshold requirement, a product licence must be obtained before a NHP can be sold in Canada. The activity of selling a NHP is defined as including offering for sale, exposing for sale, and having in one's possession for sale or distribution whether or not the distribution is made for consideration.[1] Given this expansive definition, the NNHPD considers a wide array of activities related to NHPs to fall within its purview and within the broader licensing framework. A complete NHP licence application package consists of a number of elements, which may

1. *Food and Drugs Act*, R.S.C., 1985, c. F-27, s. 2.

include proposed label text, safety summary reports, finished product specifications, and efficacy-related evidentiary data. The composition of a given NHP licence application submission is determined by the application type — whether for a homeopathic product, a traditional medicine product, a product with a specific recommended use, etc. Accordingly, determining into which category a given product falls is in many respect the starting point for the NHP licence application process.

Evaluation and Approval Process

In evaluating licence applications, the NNHPD adopts a risk-based approach that focuses on the elements of an application that most directly relate to the product's safety and efficacy. It is not uncommon for the NNHPD to request additional data or clarifications in the course of an application evaluation, and applicants should be prepared to respond to such requests promptly in the interest of moving the processing timeline forward.

Once a licence application has received the NNHPD's approval, Health Canada will assign a product identification number (either a Natural Product Number or a Homeopathic Medicine Number, depending on the nature of the product), and the product will be listed on Health Canada's Licensed Natural Health Products Database. The Database provides public access to information about approved NHPs including the licence holder's name, a list of all medicinal and non-medicinal ingredients, the dosage form, recommended uses, and risk information.

Approved NHPs are also subject to prescribed packaging and labelling requirements imposed under the NHPR, which require that both an inner and an outer label accompany the product. The principal display panel of both the inner and outer labels must display the following information:

- The product's brand name;
- The product identification number as assigned by Health Canada;
- The dosage form;
- The words "sterile" and "stérile" (where applicable); and
- The net amount in the immediate container, represented by weight, measure, or number.

For more detail related to the mandatory labelling rules for NHPs, see Packaging and Labelling.

Natural Health Products and Cannabis

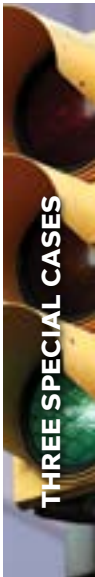
Since the legalization of cannabis by the Canadian government in October 2018, there has been considerable interest within the consumer products sector in developing NHPs that contain cannabis or related derivatives and extracts — in particular, cannabidiol (CBD). At present, the NHPs are only permitted to include parts of the cannabis plant that are not subject to the *Cannabis Act* (for instance, cannabis derivatives produced in accordance with the *Industrial Hemp Regulations* that do not contain isolated or concentrated phytocannabinoids). Because CBD is currently regulated pursuant to the *Cannabis Act*, it cannot legally be included as an ingredient in an NHP at this time. By contrast, a number of approved NHPs contain hemp as an acceptable ingredient. This is a nascent industry in Canada, and we anticipate potentially significant regulatory updates by Health Canada in connection with CBD personal care products in particular. Many players in the personal care industry are certainly hoping to take advantage of new potential product lines in this space. For more information regarding the application and scope of the *Cannabis Act*, see Packaging and Labelling.

Cannabis

With the enactment of the *Cannabis Act* (Canada), Canada became the first G7 nation to federally legalize adult use of recreational cannabis permitting its production, distribution and sale. Since that time, the regulatory regime has evolved and the cannabis industry has continued to grow at a rapid rate, both domestically and internationally.

Licensing

Responsibility for the oversight of the cultivation, production and distribution of cannabis is shared between federal, provincial and territorial governments and municipalities. Health Canada provides licensing and a legal framework for the cultivation and production of cannabis through various licences. An individual or business is required to obtain a licence issued by Health Canada in order to conduct various cannabis-related activities, including the cultivation of cannabis, the sale of cannabis for medical purposes, analytical testing and research, with various sub-licenses being available based on the nature and size of the activity. Notably, a processing licence under the *Cannabis Act* has become increasingly important, as it allows a licence holder to carry



out various activities that are critical to the production of value-added products, such as cannabis oils and gel capsules.

Licences related to distribution are issued at a provincial and territorial level. The distribution of cannabis varies by province and territory through private sales, government sales or a hybrid of the two.

Cannabis-Infused Products

The *Cannabis Regulations* provide the regime for legal production and sale of edible cannabis, cannabis extracts, and cannabis topicals.

The regulations introduced strict production parameters and guidelines with respect to these products, including:

- a requirement that any edible cannabis products be "shelf-stable" and not require any refrigeration or freezing.
- a restriction on the use of caffeine, vitamins and minerals to fortify edible products.
- a limitation of 10mg of THC per unit and per package.
- a prohibition on the co-packaging of edible cannabis products alongside food products.

Branding and Advertising

The *Cannabis Act* imposes strict prohibitions with respect to the branding, advertising and promotion of cannabis products. These restrictions are intended to protect public health and safety, with a particular focus on restricting youth access to cannabis, and include strict rules on how cannabis can be advertised and requirements that any advertising or promotion is not aimed at, or accessible by, young persons. The *Cannabis Act* also imposes strict plain packaging requirements with respect to cannabis products.

While the restrictions on promotion and advertising are extensive, the *Cannabis Act* does allow limited informational and brand preference promotion.

Products Containing Cannabidiol

There continues to be a growing demand for products containing cannabidiol (CBD), a phytocannabinoid that is thought to have certain therapeutic qualities. While it is possible to extract CBD from both

cannabis and industrial hemp, CBD and all products containing CBD are regulated under the *Cannabis Act*. This includes CBD derived from industrial hemp plants, as well as CBD derived from other varieties of cannabis. A person wishing to produce CBD products is therefore required to obtain the appropriate licence under the *Cannabis Act*.

Import and Export of Cannabis Products

The past several years have seen a number of countries legalize cannabis for medical purposes. However, international trade in cannabis remains highly restricted. Cannabis (including CBD) is currently a controlled substance under the United Nations' *Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol*, and consistent with its international obligations, the import and export of cannabis to and from Canada is only permitted in certain limited circumstances, including that the import or export must be for a legitimate scientific or medical purpose.

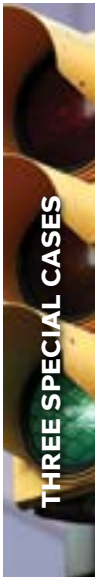
Strategic Alliances

We have seen new entrants into the cannabis sector through strategic alliances or significant equity investments into large cannabis companies. The emergence of strategic partners with established, consumer-facing brands has provided cannabis companies with both capital and know-how to help execute on their long-term strategy, while providing established companies with access to a new, high-growth industry. This trend is expected to continue, as companies from other sectors (pharmaceuticals, consumer-packaged goods) continue to monitor the space.

Navigating Canadian Alcoholic Beverage Distribution Rules

The regulation of the manufacture, distribution, marketing and sale of alcoholic beverages in Canada is shared between federal, provincial and territorial governments. Before entering the Canadian market, alcohol manufacturers and distributors need to understand a myriad of regulatory requirements.

Federal statutes regulate the importation into Canada and inter-Canadian distribution of alcoholic beverages (across provincial and territorial borders), as well as several related taxation and excise matters. Product composition standards and marketing rules covering alcoholic beverages (including wine and beer) are also federally regulated. Provincial and



territorial statutes regulate intra-provincial liquor distribution, through Crown liquor corporations or private enterprise, or both.

Federal Product Regulatory Standards for Alcoholic Beverages

In Canada, the *Food and Drugs Act* (Act) and regulations prescribe, among other things, product and compositional standards for foods, including alcoholic beverages (note that the provinces also prescribe specific liquor standards that complement the Act). Recently, the *Safe Foods for Canadians Act* and regulations were enacted largely to enhance food safety regimes in Canada.

Many of the federal standards are developed in order to ensure the consumer is making informed purchasing decisions. As a very basic example, a product marketed as wine in Canada must be composed of fermented grapes, and only grapes. Where other fruit juice is fermented and/or added to the grape juice, it is considered a "fruit wine." The Act also prescribes permissible additives, and even some manufacturing practices, that shape the ultimate prescribed alcoholic beverage (including beer, wine, whisky, rum, gin, brandy, liqueurs, spirituous cordials, vodka, tequila, mescal and cider).

There are also product compositional and marketing rules for non-standard liquor products. For example, an alcoholic beverage that does not have a prescribed compositional standard (such as a mixed drink) requires a list of ingredients on its label, whereas a standardized product does not.

Interestingly, the product standard rules contemplated in the Act have not been updated in more than 30 years. We understand that industry and federal regulators are keen to do so — particularly in the beer industry where a variety of crafts and flavours are now readily distributed in Canada.

The federal *Consumer Packaging and Labelling Act* (CPLA) and regulations contemplate the packaging and labelling standards that are applicable for both foods and liquor. International manufacturers should not presume that global product standards and labelling will work in Canada. Not only do we have additional translation and label content requirements, vignettes and claims on product are also strictly monitored. In particular, illustrations and narratives that advertise "natural" ingredients or manufacturing processes, "organic" content, or various environmental claims, are currently on the

enforcement radar of the various regulators (usually the Canadian Food Inspection Agency (CFIA)).

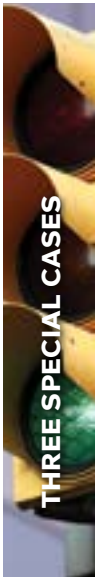
Various Considerations of Provincial Procurement and Distribution

Once international manufacturers and distributors are satisfied that their products are compliant with Canadian standards, the products can be sold into the Canadian market. Perhaps not surprisingly, that is not as easy as finding a contractual partner and executing a sourcing deal.

Each province and territory has a distinct distribution and sales regime, and has a corporation or other government authority that is responsible for regulating the sale and consumption of liquor. Most provinces have what is generally referred to as a "closed" system, where the Crown corporation is responsible for the importation of product into the province, as well as retail sales. Some provinces, such as Alberta, use a private sector retail network, while others, including Ontario, British Columbia, and Québec, use a combination of private and public retail outlets. The Liquor Control Board of Ontario (LCBO) is the world's largest importer/purchaser of alcoholic beverages.

The procurement process for liquor has been a frequent subject of discussion in the international sectors, and has been challenged from a trade perspective multiple times at the World Trade Organization and through dispute resolution procedures pursuant to regional trade agreements, such as the *North American Free Trade Agreement* (NAFTA), largely due to the perception that it is a protectionist system. While each province and territory maintains its separate procurement process, most use similar methods. Manufacturers seeking to enter into the Canadian market will need to consider each province separately, in order to be successful in having their alcoholic beverage products listed.

The standard procurement measures include internal processes established by the Crown corporations, which contemplate product profiles that the liquor authority wants to fill. This system takes historical purchasing patterns and new trends into account. The LCBO, for example, has a *Product Management Policy and Procedures Manual*, which sets out the listing access rules. Usually, pursuant to the various internal processes, a contract is formed as between the manufacturer and the Crown authority, which sets out supply obligations, pricing considerations, set-off rights, etc. The product often has to satisfy



chemical analysis testing, must be compliant with applicable packaging and labelling standards, and, in many cases, must be shipped in containers containing province-specific markings for ease of stocking.

Agents operating on behalf of manufacturers often provide services in connection with provincial procurement processes. These services can be particularly helpful at the initial stages of negotiation with the applicable Crown corporation.

Advertising of Alcoholic Beverages in Canada

The advertising of alcoholic beverages in Canada is regulated. Largely based on the federal Canadian Radio-Television and Telecommunications Commission's (CRTC) alcoholic beverage broadcast code (known as the Code), the rules for broadcast commercial messages are comprehensive. Commercial messages cannot attempt to influence underage consumption, portray products as having a "status symbol," or indicate that consumption of the product is essential to the enjoyment of an activity, portray consumption in unlawful situations (such as while driving), etc. To ensure conformity among advertisers, the Advertising Standards Council (ASC) of Canada provides pre-clearance services for advertising compliance purposes, including the federal Code rules, and also reviews print and out-of-home advertising for additional provincial advertising restrictions.

As a result, global marketing campaigns may not be permitted in Canada, and Canada-specific commercials and print copy may need to be developed.

The Canadian consumer is becoming more and more interested in trying new product trends in alcoholic beverages — indeed, this is a profitable and growing market in Canada. Looking forward, we expect that the convergence between the alcoholic beverage sector and the cannabis sector will have a significant impact on standards, sales, profitability, and consumer choice.

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MCCARTHY TÉTRAULT PROFILE

By Lara Nathans and Trevor Lawson

MCCARTHY TÉTRAULT PROFILE

Our Retail and Consumer Markets Group

With unmatched industry experience, practical and contextual advice, and custom, integrated teams, McCarthy Tétrault's Retail and Consumer Markets Group helps clients overcome the daily challenges inherent in the industry and take advantage of emerging trends that benefit their businesses. Our deep-rooted knowledge and global business experience enable us to advise on significant mandates across all sectors: Consumer Products, Food, Beverage & Agribusiness, Franchise & Distribution, Hospitality and Retail, and pair clients with the most experienced and capable professionals to provide top-tier legal and strategic business advice, whatever the challenge. Our firm has built a proactive, integrated and experienced industry team across a range of disciplines and regions to meet the needs of consumer-facing businesses in Canada, the U.S. and internationally.

We are embedded in the industry and led by retail and consumer product-focused lawyers who draw upon their legal skill and our experience in related industries, such as technology and financial services, to meet the industry's broader legal needs. We are active in numerous industry associations, such as the Retail Council of Canada, the International Council of Shopping Centres, the Retail Industry Leaders Association, the International Group of Department Stores, the Canadian Franchise Association and Food & Consumer Products of Canada. We are on the inside of information flow — which is key to keeping our clients ahead in a dynamic industry landscape.

The team has experience identifying promising foreign markets and developing entry strategies that overcome market obstacles. Similarly, we leverage our relationships and expertise to assist companies with their strategic and legal issues when entering and expanding in the Canadian market.

With on-the-ground expertise in each of Canada's major business centres and a strong understanding of how legislation differs from province to province, we help our clients succeed in each unique market. We are proud to be a fully bilingual firm and offer the legal support needed to meet both English and French language requirements.

Embedded in the Industry

Immersed in the industry, we connect with industry leaders and engage with industry associations. These connections, and our understanding of emerging trends, are key to keeping our clients ahead. The firm's seamless approach means clients only need to call once to solve a problem or seize an opportunity.

Industry Insights

We speak frequently at industry events, including those hosted by the Retail Council of Canada, the Retail Industry Leaders Association, the International Group of Department Stores, Luxury Law Summit, Food and Consumer Products of Canada and our own Retail and Consumer Markets Summit. Through our active involvement and seat at the table, we know exactly the emerging challenges you face and how to tackle them.

Our Annual Retail and Consumer Markets Summit highlights the latest industry trends and legal developments and features practical tips to address timely issues affecting retailers and consumer-facing businesses. For more news about the industry in Canada, please visit our blog: Consumer Markets Perspectives.

With offices in Canada's major commercial centres as well as in New York City and London, U.K., McCarthy Tétrault delivers integrated business law, litigation, tax law, real property law, and labour and employment law services nationally and globally.

Please contact any of the lawyers listed below to assist you in providing a detailed analysis of the issues relevant to your business.

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