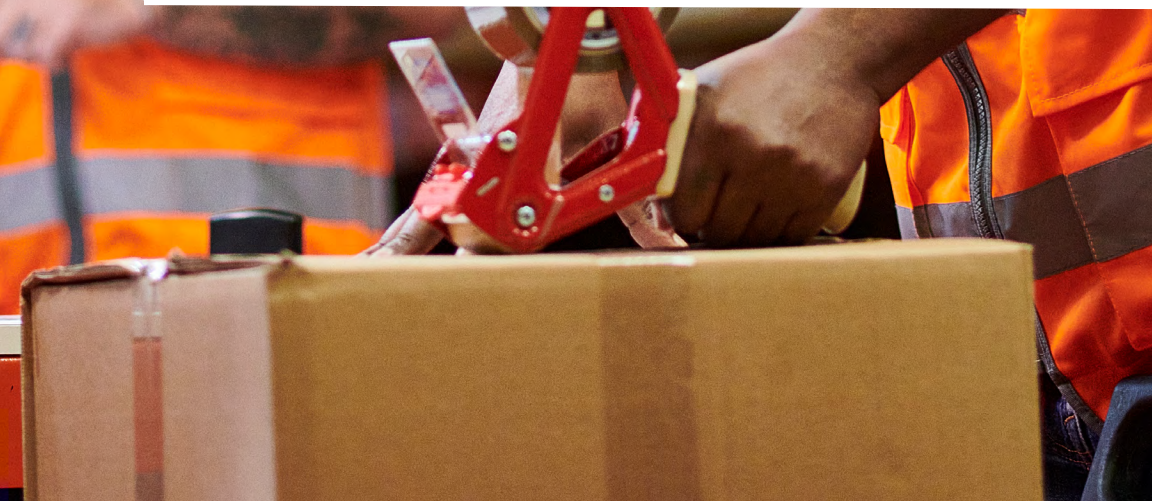
Cross-Border

A Consumer Products Industry Guide to Doing Business in Canada



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FOREWORD

McCarthy Tétrault LLP's Retail and Consumer Markets Group is pleased to present the third edition of Cross-Border: A Consumer Products Industry Guide To Doing Business in Canada. The Retail and Consumer Markets Group takes this opportunity 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 we look forward to another successful decade.

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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.

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.

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.

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 representative offices in 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 our **Profile**.

Unless otherwise indicated, the information in this publication is current as of January 1, 2025.

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: (i) determining whether to operate as a branch or a subsidiary, (ii) the type of entity and jurisdiction (in the event of a subsidiary or new Canadian entity), (iii) ensuring the application of and compliance with Canadian registration requirements such as extra-provincial registrations, business number registration, goods and services tax, harmonized sales tax and provincial sales tax registrations, worker's compensation registrations and, in certain provinces, employer health tax registration, (iv) abiding by applicable transfer pricing and customs valuation requirements and (v) developing efficient inter-corporate structures for sales, provision of services and licensing of intellectual property. Some Canadian jurisdictions have corporate director residency requirements. Any tax considerations should also consider the *Income Tax Act's* General Anti-Avoidance Rule ("GAAR"), which prevents abusive tax avoidance transactions.

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. Employment laws in Canada can differ quite significantly from those in other jurisdictions. It is essential that employment policies, agreements and handbooks comply with applicable provincial and federal legislation. In Canada, while certain employers are regulated federally, the vast majority 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 and Digital

Canadianize your terms and conditions. Issues relevant to establishing a Canadian e-commerce 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 privacy, accessibility, 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 consumer goods, including the advertising of sale and bargain prices and claims of what constitutes "ordinary" prices. Canadian competition laws also apply to issues of price fixing and price maintenance, including Minimum Advertised Price policies. Consumers must understand these parameters when establishing their marketing and pricing strategies. 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.

Labelling, marketing and advertising have different language requirements in Québec. In the province of Québec, generally all language appearing on labels must be in French, and no other language may appear with greater prominence. This can also extend to public advertising, product documentation and websites.

Consumer Protection

Get up to speed on Canadian consumer protection legislation. If your business includes direct sales to consumers, the various consumer protection regimes in Canada come into play, including applicable federal and provincial laws and legislation across Canada related to consumer protection. As with employment laws, consumer protection legislation varies from province to province and consideration should be given to ensuring a consistent yet tailored approach across Canada.

Intellectual Property

Your business can benefit from intellectual property ("IP") protection in Canada. There are four main forms of intellectual property protection in Canada, which are trademarks, patents, industrial design and copyright. Most acts regulating IP are federal legislation with the Canadian Intellectual Property Office ensuring compliance. Canada is also part of various international treaties on IP, such as the World Trade Organization agreement on *Trade-Related Aspects of Intellectual Property Rights*, which makes Canada robust for IP protection. Finally, provincial laws also play a role in IP protection, mostly in enforcing IP rights and in regulating other spheres of IP, such as IP contracts, business names and personality rights.

Privacy and Cybersecurity

Develop a Canadian-specific privacy and cybersecurity compliance plan (or tailor your existing plan to your Canadian operations). Canada has privacy legislation that applies to consumers from coast to coast, including unique laws in certain provinces. Your plan should start

with a clear picture of how you handle personal information, alignment of your consent processes to Canadian law and a customer-facing privacy policy. You should also update your incident response plan, as Canada has mandatory breach notification for data breaches. Also, it is important not to make the mistake of thinking the European Union's General Data Protection Regulation ("GDPR") compliance means compliance in Canada.

Anti-Spam Legislation

Canadian anti-spam legislation 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.

Modern Slavery Legislation

Canada's *Fighting Against Forced Labour and Child Labour in Supply Chains Act* (the "Act") may impose new reporting obligations on your business. The Act came into force January 1, 2024 and takes on Canada's international commitment to contribute to the fight against forced labour and child labour. Businesses that qualify as "reporting entities" under the Act are required to meet their reporting obligations by May 31 of each year. Canada's government published guidance on the Act's requirement, which includes a guideline on who is a "reporting entity." Among others, reporting entities will have to prepare a report that meets all the requirements in the Act, answer an online questionnaire and publish their report on a prominent place on their website. Failure to comply with the Act may be punishable with fines up to C$250,000. Directors, officers or agents may also be held liable under the Act.

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MERGERS AND ACQUISITIONS

By Chrystelle Chevalier-Gagnon

MERGERS AND ACQUISITIONS

The consumer products industry has experienced significant mergers and acquisition ("M&A") activity in recent years, including acquisitions by both financial investors and strategic purchasers, as well as strategic consolidation across key markets to fuel growth.

More and more, alternatives to pure M&A are considered, including strategic partnerships, joint ventures and synthetic joint ventures (i.e. licensing and distribution), which allows consumer products businesses to expand their audiences and broaden market presence without incurring the costs of a full-scale acquisition. Such partnerships can take various forms, such as co-branding, joint marketing campaigns or exclusive product lines.

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

M&A of Private Companies

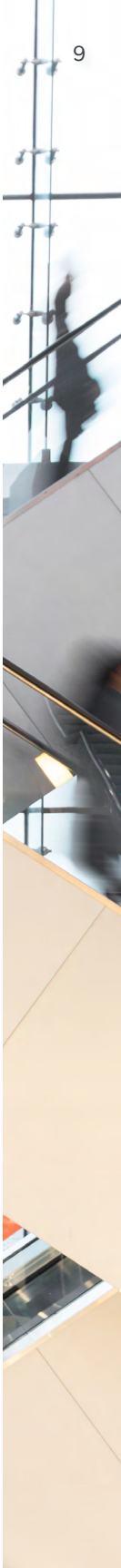
A private business in Canada is typically owned by fewer than 50 shareholders and its securities are not offered or sold to the public.

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 agreement, 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.



M&A 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 board of 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 ("TSX") requirements will also apply in certain circumstances. 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]

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 take-over 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%).

1 These include: (i) 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), (ii) normal course purchases on an exchange at the market price not exceeding 5% of the issuer's outstanding securities in a 12-month period, (iii) 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 (iv) 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.

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.

Other Alternatives to Pure M&A Transactions

These structures can be custom and tailor-made to the needs of the parties; there is no one-size-fits-all. They can range from a minority investment, a majority investment, an equal partnership or a licensing or distribution agreement, to name a few. For example, a joint venture can be ideal for projects or objectives requiring specialized knowledge, market access or technological capabilities that a single company may not possess.

The agreements governing those relationships can be complex and need to be carefully drafted to address the myriad of possibilities and outcome, including governance, liquidity and dilution rights, decision-making procedure and termination rights in case of defaults or otherwise. The pros and cons of each structure are to be carefully considered and discussed with advisors.

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, legislation for the protection of the French language and anti-spam;

— Other key issues include brand protection, greenwashing 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 or most-favoured nation provisions 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; and

— Acquisitions of Canadian businesses are subject to the *Competition Act* (Canada) and acquisitions by foreign acquirors are subject to the *Investment Canada Act* (Canada). See **Competition and Pricing** 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 AND PRICING

By Casey Halladay

COMPETITION AND PRICING

The federal *Competition Act* (the "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 persons involved in arrangements with competitors that fix prices, restrict supply/output, allocate customers or markets or that are involved in bid-rigging, deceptive telemarketing, or willful or reckless misleading advertising. Agreements between (unaffiliated) employers to fix wages or key terms of employment and bilateral no-poach agreements are also criminal offences. The Act's non-criminal or civil provisions allow the Competition Tribunal, on application by the Commissioner of Competition, 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, agreements among competitors (and, in limited circumstances, between non-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. The Competition Tribunal has the power to impose monetary penalties for abuse of dominant position, civil anti-competitive agreements and misleading advertising. 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, refusal to deal and abuse of dominance (and in some instances, to obtain disgorgement orders).

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/service, allocate customers or markets for the production or supply of a product/service or restrict the production or supply of a product/service. 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 willful or reckless misleading advertising are also offences, as are agreements between unaffiliated employers to fix wages or key terms of employment and bilateral no-poach agreements.

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

Abuse of Dominant Position

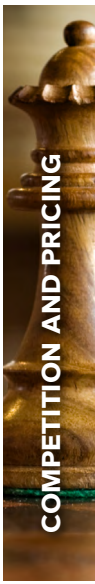
Abusing a dominant position in a market constitutes a reviewable practice that could give rise to an order (including monetary penalties up to the greater of C$25 million or three times the value of the benefit derived from the practice or, if that is not reasonably determinable, 3% of global revenues) 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 issue remedial orders or

administrative fines. 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 a rival's entry into or expansion in a market, there could be an abuse of dominant position. The Commissioner only needs to prove that the company engaged in anti-competitive acts that were intended to have a negative effect or that the acts had a negative effect more generally to be granted a prohibition order.

THERE IS NOTHING WRONG WITH TOUGH COMPETITION, EVEN FROM A DOMINANT FIRM. HOWEVER, WHEN A FIRM'S INTENTION IS TO ELIMINATE COMPETITION OR PREVENT A RIVAL'S ENTRY INTO OR EXPANSION IN A MARKET, THERE COULD BE AN ABUSE OF DOMINANT POSITION.

The Act includes a non-exhaustive list of anticompetitive 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 such an anti-competitive act. Excessive pricing has also recently been added as conduct that could constitute an anti-competitive act; however, as there is no guidance yet on this point, it is unclear what the test for determining "excessive" will involve. Additionally, any "conduct" of a dominant firm that has an anti-competitive effect in any plausible competitive market may also result in enforcement action or a prohibition order. The *Competition Act* does not define "conduct" nor does it limit its scope.



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 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 or in additional product training in order to improve after-sale service levels. However, in some circumstances, price maintenance may adversely affect competition. For example, price maintenance may be found to be anti-competitive (i.e. have 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 businesses 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 retailer or distributor is cut off from supply and its business is seriously affected because no potential suppliers are 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 in whole or in part 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; and

— 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 prohibit the supplier from continuing to engage in the conduct or order the supplier to accept the customer who was refused supply on usual trade terms.

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; and

— The practice has (or is likely to lead to) substantially lessened competition.

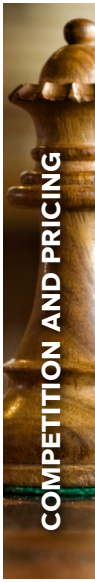
In recognition that exclusive dealing, tied selling and market restriction may be used for pro-competitive reasons, there are some exceptions in the Act.

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 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 anticompetitive conduct, even if unfounded, is expensive and disruptive.

Merger Control

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). This must be done within one year of closing for notifiable transactions and within three years of closing for non-notifiable deals. If the Commissioner believes that a merger is likely to prevent or lessen competition substantially, and the Commissioner of Competition challenges the merger before the Competition Tribunal, 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 or order a remedy which has the effect of preserving the level of competition that would prevail but for the merger. The Commissioner may also apply to the Competition Tribunal for an injunction; at the time of application the merger is automatically prohibited from closing on an interim basis until the application has been disposed of by the Tribunal. 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. practice, although their application may be different. Of particular note, this list of criteria includes actual or likely increases in market share or concentration as a result of the merger.



The Commissioner of Competition does not always have the burden of proving that a merger is likely to prevent or lessen competition substantially. Any transaction after June 20, 2024 that results in or is likely to result in an increased market share in excess of 30% or concentration beyond prescribed thresholds is presumed to be anti-competitive, unless the merging parties can prove otherwise on a balance of probabilities. This concentration threshold is based on the Herfindahl-Hirschman Index (HHI), which is calculated by summing the squares of firms' market shares in a defined market. A merger is considered presumptively anti-competitive if the HHI increases or is likely to increase by more than 100 and either the total HHI is or is likely to be more than 1,800 or the market share of the parties to the merger or proposed merger is or is likely to be more than 30%.

THE COMMISSIONER OF COMPETITION CAN REVIEW AND CHALLENGE ALL MERGERS, WHETHER OR NOT THEY ARE NOTIFIABLE. THIS MUST BE DONE WITHIN ONE YEAR OF CLOSING FOR NOTIFIABLE TRANSACTIONS AND WITHIN THREE YEARS OF CLOSING FOR NON-NOTIFIABLE DEALS.

Certain types of transactions that exceed prescribed thresholds require pre-merger notification and the filing of information with the Commissioner. 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, from or into Canada generated by those assets, exceeds C$93 million (2024; 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% of voting shares in the public company context, more than 35% in the private or non-corporate entity context or an acquisition of more than 50% of a public company's voting shares or private entity equity 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.

Private Right of Access

In addition to a risk of enforcement action from the Competition Bureau, companies also face the possibility of litigation by private parties before the Competition Tribunal using the private right of access regime. 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, refusal to deal and abuse of dominance.

At present, the Competition Tribunal will only grant leave where the private applicant's business as a whole is directly and substantially affected by the allegedly reviewable conduct. However, beginning June 20, 2025, this test will be amended to allow for successful applications where only part of an applicant's business is directly and substantially affected. The Competition Tribunal will also have the discretion to approve applications

that it determines are “in the public interest.” It remains to be seen how this new test will be interpreted by the Competition Tribunal.

Beginning June 20, 2025, private parties can also apply to the Competition Tribunal to recover monetary awards for certain types of reviewable conduct, such as price maintenance, exclusive dealing, tied selling, refusal to deal and abuse of dominance. If granted, these disgorgement damages may be ordered for an amount up to the value of the benefit derived from the conduct. This new potential remedy is likely to increase the incentive for private parties to pursue this course of action, resulting in greater litigation risk for companies as a result.

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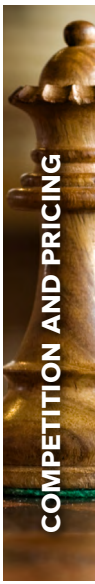

BRANDING AND INTELLECTUAL PROPERTY PROTECTION

By Vincent Kam-Sun Yip, Véronique Wattiez Larose, Marissa Caldwell and Vino Wijeyasuriyar

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* ("CETA") with the European Union. 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 *Canada-United States-Mexico-Agreement* ("CUSMA"), 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 CUSMA, 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 or "Paris Convention"), 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 (i) the claim element is not clearly intended by the patentee to be non-essential and (ii) 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 practise a patented invention in certain circumstances if a Canadian patent or patent application is not in good standing.

Pursuant to the CUSMA, Canada is required to provide patent term adjustment in order to compensate patentees for unreasonable patent office delays. Legislation amending the *Patent Act* to provide for patent term adjustment was passed in 2023 and scheduled to come into force no later than January 1, 2025. Unlike the U.S., a patentee will need to file a request for patent term adjustment, and the additional patent term will run concurrently with any applicable Certificate of Supplementary Protection.

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. 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.

Following amendments to the *Copyright Act* that came into force in December 2022, copyright protection now endures for the 70 years after the life of the author (prior to this amendment, such protection expired after 50 years). This extension is not retroactive, meaning that works that were already in the public domain prior to the coming into force of this amendment remain unaffected. This change brings the Canadian copyright landscape into alignment with CUSMA obligations, which require the term of copyright protection to extend to life of the author plus 70 years.

As developments in artificial intelligence ("AI") lead to increasingly accessible generative AI systems and sophisticated outputs, the Government of Canada is grappling with the broader implications of these technologies. On one hand, content generated by an AI system raises questions of authorship and ownership of the generated outputs.

Going further still, the training of these AI models by scraping the internet creates a thorny problem of infringement of copyright-protected works and limited traceability (i.e. to clearly demonstrate that a particular output was "informed by" a copyright-protected work that it encountered in its training). To this end, Innovation, Science and Economic Development Canada held a public consultation on AI and copyright, welcoming submissions from the public until mid-January of 2024. It remains to be seen whether this consultation will result in further amendments to the *Copyright Act*.

Industrial Designs

The *Industrial Design Act* protects the original features of shape, configuration, pattern, 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 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 Intellectual Property 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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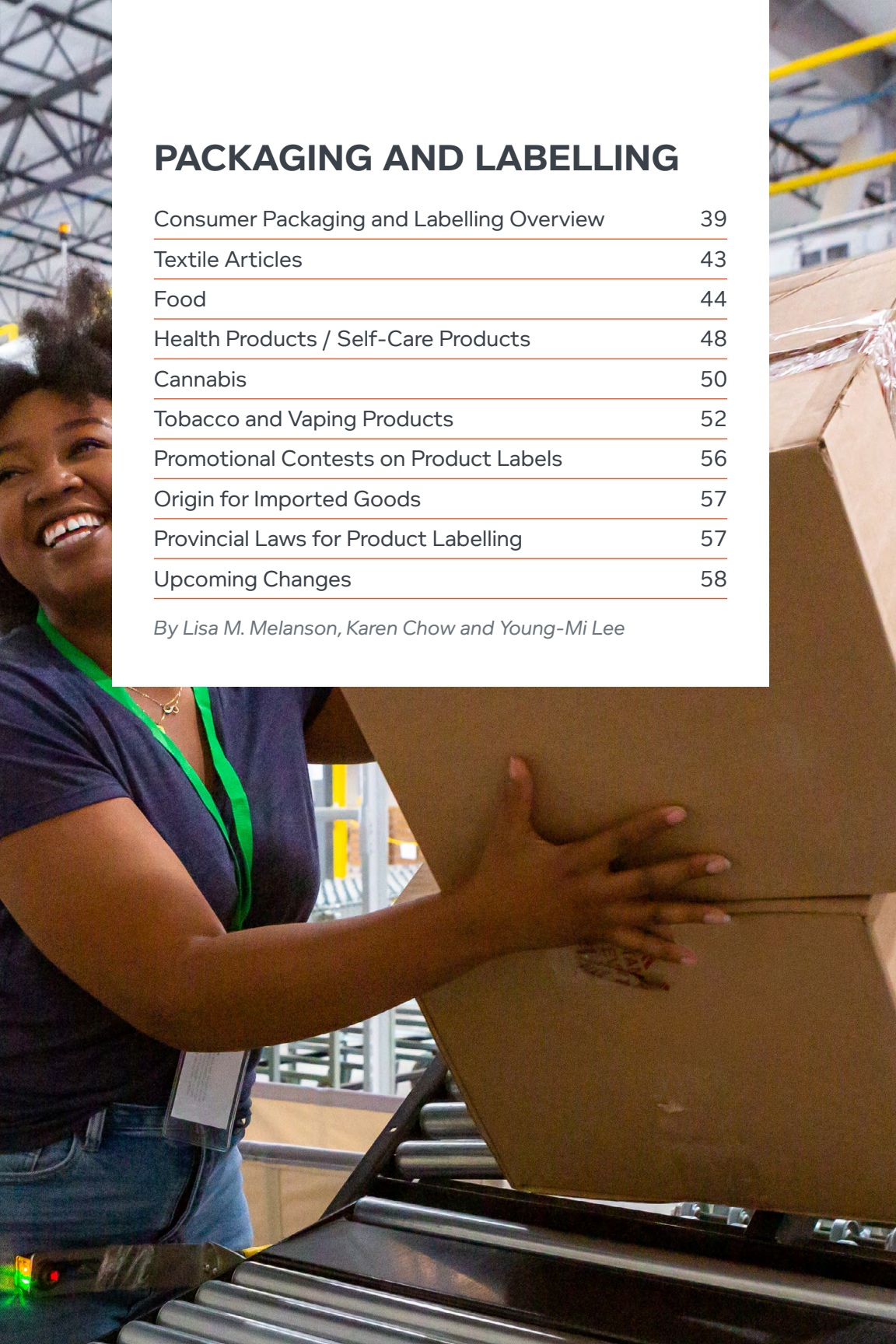
PACKAGING AND LABELLING

By Lisa M. Melanson, Karen Chow 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. Retailers, 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, which represents 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.

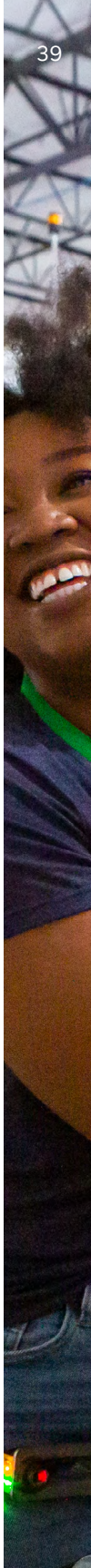
Consumer Packaging and Labelling Overview

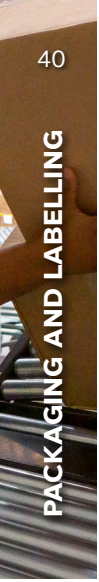
The *Competition Act* (Canada) is the principal statute that governs advertising in Canada, and it can have an important impact on consumer packaging and labelling. The legislation creates a general prohibition against false or misleading language, including false or misleading statements on product 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").





PACKAGING AND LABELLING

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 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; and

— The dealer identification, represented by the name and mailing address of the place of business of the person (individual, corporation, business, head office, distributor or 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]

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

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.

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.

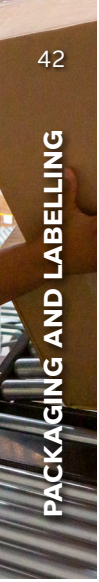
Toys and Baby Products

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").

In addition, many types of baby products are 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 also may be subject to regulations under the CCPSA, as discussed in the Textile Articles section 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 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.



Pursuant to the EEA and EER, for instance, Natural Resources Canada requires that the EnerGuide label be present on appliances such as clothes dryers and washers, dishwashers, refrigerators, freezers, cooktops, ovens and room air conditioners. In addition, 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.

Federal radio standards include *Radio Standards Procedure RSP-100: Certification of Radio Apparatus and Broadcasting Equipment* ("RSP-100"), 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 and includes without limitation the following consumer products: cellular phones, cordless phones, remote car garage door openers and wireless routers; and

— 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, 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* (Canada) and *Precious Metals Marking Regulations* (Canada) 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

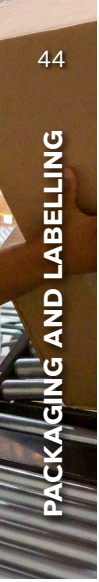
Apparel and other textile articles are notably excluded from the general CPLA and CPLR requirements and instead are governed by the following legislation:

— *Textile Labelling Act* (Canada) ("TLA"); and

— *Textile Labelling and Advertising Regulations* (Canada) ("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 five percent 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, especially 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* (Canada) ("FDA") and *Food and Drug Regulations* ("FDR") and/or the *Safe Food for Canadians Act* (Canada) ("SFCA") and *Safe Food for Canadians Regulations* ("SFCR"), with an exemption from the application of the CPLA and CPLR. 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 and 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, gluten and/or added sulphites, (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 and not to allergens that result from cross-contamination. With respect to incidental allergen contamination,

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* (Canada) 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.

precautionary declarations, like the familiar "may contain peanuts" warning, are not mandated by any legislation and are considered voluntary. However, retailers, 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.

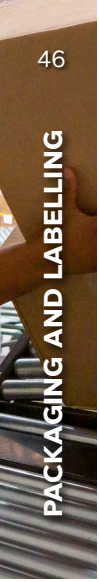
In April 2019, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (Canada) were amended to impose penalties for failing to comply with food labelling requirements. These penalties serve to enhance the CFIA's enforcement tool box in instances of labelling non-compliance.

Finally, since 2013, Health Canada has led multiple initiatives to modernize Canada's food labelling system and address current and future challenges to food labelling. Such undertakings have now resulted in three rounds of notable changes to Canada's labelling regulations. Further details are provided below.

2016 Amendments to the FDR: Nutrition Labelling

Significant amendments to the FDR, imposing new requirements for nutrition labelling, ingredient lists and food colouring, took effect on December 14, 2016. These amendments were 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.

The transition period for implementation of the 2016 labelling requirements ended on December 14, 2023, and all regulated parties must now be compliant. However, products that were imported,



manufactured in Canada or packaged at retail before December 14, 2022 or a date established with the CFIA between December 14, 2022 and December 14, 2023 can still remain in the warehouse and continue to be sold on store shelves.

2022 Amendments to the FDR: Front-of-Package Labelling

In further amendments to the FDR, Health Canada addressed one of its key objectives: to help Canadians more easily identify foods that are high in certain ingredients of public concern. These further FDR amendments, which took effect on July 20, 2022, introduce a front-of-package ("FOP") nutrition symbol that indicates a high quantity of any of the following ingredients: saturated fat, sugars and sodium. Pursuant to the amended regulations, a FOP nutrition symbol must now appear on the principal display panel of a prepackaged food that exceeds the threshold (e.g. percent daily value) for any of those three ingredients. The FOP nutrition symbol must be bilingual and include the words "Health Canada" at its bottom.

The 2022 amendments to the FDR also include new restrictions on nutrient-content claims. Following introduction of the FOP nutrition symbol, certain representations relating to saturated fat, sugars and/or sodium may now be restricted. For example, the "unsweetened" claim is prohibited on the principal display panel when it carries a symbol for "high in sugars"; similarly, the representation that a food is for use in a sodium-restricted diet is prohibited when the principal display panel carries a symbol for "high in sodium." Other changes to the FDR relate to high-intensity sweeteners, hydrogenated fats and oils and the amount of vitamin D required to fortify animal milk and margarine.

The food industry has been given a transition period ending on December 31, 2025 to meet the new 2022 requirements. Notably, the transition provisions for different package components (e.g. FOP labelling, nutrient-content claims and vitamin D) are independent of one another. Regulated parties can choose to comply with the requirements for one package component before another, as long as they comply with all requirements by the end of the transition period (i.e. by December 31, 2025). Implementation of any requirement for a given package component during the transition period will trigger implementation of all requirements for that component, but will not trigger immediate compliance for any other package component.

The CFIA's transition timeline for the 2022 amendments includes two phases. In Phase I (from July 20, 2022 to December 31, 2025), the CFIA will focus on education and promotion of compliance with the new requirements. In Phase II (starting January 1, 2026), the CFIA will start actively monitoring compliance with the new requirements. While all labels are expected to comply with the new regulations, products that are imported, manufactured in Canada or packaged at retail before January 1, 2026 can remain in the warehouse and continue to be sold on store shelves. Throughout both phases, the CFIA may take action in cases of inaccurate, false or misleading labelling information.

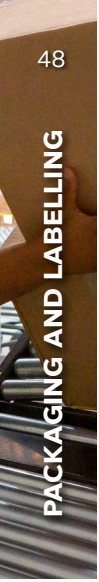
2022 Amendments to the FDR and SFCR: Food Product Innovation

Under the scheme of its Food Product Innovation Initiative, Health Canada amended the FDR and SFCR, effective July 21, 2022, to: (a) repeal some standard container sizes and incorporate by reference the remaining standard container sizes, (b) incorporate by reference class names, (c) harmonize and streamline food-commodity-specific labelling requirements and (d) clarify that the licensing provisions of the SFCR do not apply to restaurants and similar enterprises. Since the foregoing amendments did not require any changes to existing food labels, industry was not provided with a transition period for compliance.

Supplemented Foods

The FDR was also recently amended to create a new division for supplemented foods (Division 29), with an effective date of July 21, 2022. A supplemented food is generally considered to be a prepackaged product that is manufactured, sold or represented as a food and contains added nutrients (e.g. vitamins, minerals, amino acids, etc.) or herbal or bioactive ingredients that may perform a physiological role beyond merely providing nutrition. Previously, there was no specific regulatory framework for supplemented foods in Canada. Since 2012, as an interim measure, Health Canada used temporary marketing authorizations ("TMA") to approve the sale of these products on a case-by-case basis and under specific conditions. Therefore, the current amendments are long overdue.

The new regulatory framework for supplemented foods includes the creation of a "List of Permitted Supplemented Food Categories" and a



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

As amended, the FDR now sets out new requirements for labelling and advertising of supplemented foods in addition to the general requirements for prepackaged foods. A supplemented food facts table, containing information on each supplemental ingredient, is required to replace the nutrition facts table on the product label. 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 must display a caution identifier on the principal display panel of its label.

As with conventional food products, the labels of supplemented foods may carry nutrition and health-related statements and claims on a voluntary basis. However, when they are made, they must comply with the applicable regulatory requirements and must be substantiated in accordance with Health Canada standards of evidence for health-food claims.

With the advent of this regulatory framework, TMA letters will no longer be issued for supplemented foods; instead, compliance with the new regulations is required. With respect to supplemented foods already on the market via TMAs, companies have been provided a grace period of three and a half years, ending on December 31, 2025, to comply with the new regulatory regime.

Health Products / Self-Care Products

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

— *Food and Drug Regulations;*

— *Medical Devices Regulations;*

— *Cosmetic Regulations;* and

— *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

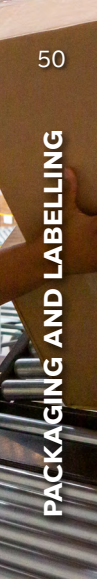
The FDA defines "cosmetic" to include "any substance or mixture of substances manufactured, sold or represented for use in cleansing, improving or altering the complexion, skin, hair or teeth [including] deodorants and perfumes." Labelling of cosmetics is governed by the FDA, *Cosmetic Regulations*, CPLA and CPLR, as mentioned above, and also by the *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[6]. 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 to Canada and can present an unfamiliar and novel

6 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.



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.[7]

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 the inner label 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.

In 2022, Health Canada made sweeping changes to the NHPR that will impose revised labelling standards. The labelling-specific provisions, including the requirements for a product facts table, are scheduled to take effect on June 21, 2025. For further details, please consult the Upcoming Changes section below.

Cannabis

The *Cannabis Act* (Canada) ("CA") came into force on October 17, 2018, along with two sets of supporting regulations: the *Cannabis Regulations*

7 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.

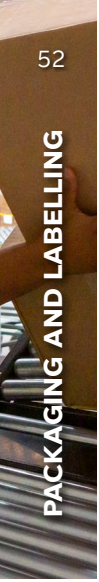
and the *Industrial Hemp Regulations*. The cannabis legislation categorizes cannabis and related products according to use: (i) cannabis for non-medical purposes, (ii) cannabis for medical purposes and (iii) health products containing cannabis or for use with cannabis.

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* (Canada) ("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 Appearance, Packaging and Labelling Regulations* ("TPAPLR") came into force on August 1, 2023. This legislation consolidated all tobacco product appearance, packaging and labelling requirements under a single set of regulations by amending the previous *Tobacco Products Regulations (Plain and Standardized Appearance*) and repealing the *Tobacco Products Information Regulations* and the *Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)*. The TPAPLR updated health-related messages and extended health warnings and toxicity information to all tobacco product packaging. It also mandated health warnings directly on cigarettes, little cigars with tipping paper and tubes, with a rotation scheme that alternates a series of health-related messages every 24 or 36 months, depending on the product.

A transition period to implement the new labelling requirements ended on January 31, 2024 for manufacturers and on April 30, 2024 for retailers. With respect to implementation of health warnings, additional compliance periods have been given to manufacturers and retailers; these also differ based on the product (e.g. for regular-sized cigarettes: January 31, 2025 for manufacturers and April 30, 2025 for retailers).

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.

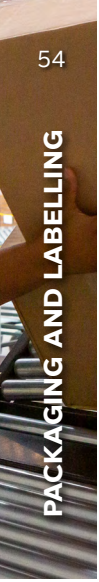
Claims on labels of non-food products are generally regulated by the Competition Bureau. For food products, label claims are subject to specific regulatory requirements overseen by the CFIA. Retailers, manufacturers and distributors should be highly critical when considering product claims, as even the 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 to comply with 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 product claims are considered in more detail below in light of current policies of the Competition Bureau and the CFIA.

Environmentally Friendly and Green

Environmental claims on consumer products are becoming increasingly popular as companies compete to attract environmentally-conscious consumers. At the same time, such claims have attracted the attention of regulatory authorities, with a concomitant increase in scrutiny and enforcement.

As discussed in the Competition Bureau's guidelines, environmental claims that are non-specific, incomplete, irrelevant or vague (e.g. "environmentally friendly," "green" and "sustainable") may be considered false or misleading and should be avoided. Furthermore, environmental statements on product labels should be specific as to the environmental aspect or improvement that is claimed. For 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 particularly 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.

In an effort to address widespread false and misleading environmental ads and claims (also known as "greenwashing"), significant changes were introduced to the *Competition Act* on June 20, 2024 and are currently in force. The new greenwashing provisions require that: (a) statements relating to the environmental benefits of a product be supported by adequate and proper testing and (b) statements relating to the environmental benefits of a business or business activity be based on adequate and proper substantiation in accordance with an internationally recognized methodology.

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

According to CFIA guidance, a food can be described as "natural" if the food and its ingredients: (a) do not contain, and have never contained, an added vitamin, mineral nutrient, artificial flavouring agent or food additive, (b) have not had any constituent or fraction thereof (aside from water) removed or significantly changed (e.g. decaffeination) and (c) have not been subjected to processes that have significantly altered their original physical, chemical or biological state. However, the foregoing represents only general guidance provided to industry, as the CFIA has relaxed its principles with an evidence-based rationale.

With its new approach, the CFIA will now recognize "natural" claims that may not fully adhere to the general guidance, provided there is sufficient evidence to substantiate the claims and show that they will not mislead consumers. For example, a food may be fortified with vitamins that

have been sourced from a plant or animal and/or derived from minimal processes. While the general guidance would not necessarily recognize a food as natural if it contains added vitamins or additives (e.g. milk with added vitamins A and D or enriched flour), companies can use evidence-based measures to demonstrate how their products can still be considered "natural" and satisfy the CFIA that the claims are not misleading.

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 also 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.

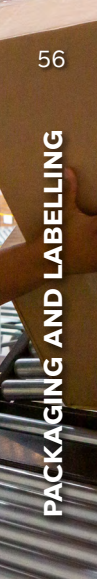
Local

The CFIA has adopted a policy which recognizes "local" food 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[8]

Both the Competition Bureau and the CFIA distinguish the claims "Product of Canada" and "Made in Canada" in a similar manner.

8 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. For further details, please consult the Upcoming Changes section below.



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 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 (also known as publicity 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* (Canada), 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.

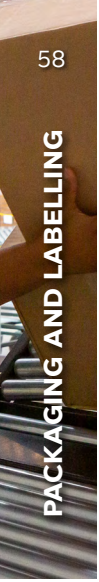
Origin for Imported Goods

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-Canada-United States-Mexico Agreement ("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* (Canada) 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 exempt from the country-of-origin marking requirements.

Provincial Laws for Product Labelling

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 (Charte de la langue française)*. 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.

Upcoming Changes

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

Self-Care Framework

Health Canada is in the process of updating its approach to 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 planned updates. The proposed regulatory framework is intended to improve labelling for NHPs, among other things, and will roll out in three phases:

— Phase I: Improving the labelling of NHPs;

— Phase II: Risk-based approach to regulatory oversight for non-prescription drugs; and

— 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 amended the labelling requirements in the NHPR in an effort to ensure that label information is more clear, consistent and legible for consumers and in order to align with rules that have already been established for non-prescription drugs. The 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, specific font types and contrast and (iv) modernized contact information, including acceptance of an 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, which are not yet effective, will come into force on June 21, 2025. Products authorized by Health Canada before this date will have a transition period until June 22, 2028 to comply with the new requirements. Products authorized by Health Canada on or after June 21, 2025 are expected to comply with the new requirements from the outset.

Going forward, Health Canada intends to propose consultations concerning amendments to the FDR that would introduce a risk-based approach to regulatory oversight for all self-care products. Health Canada is also working to propose, for consultation, amendments to support continuous improvement of the NHP regulatory framework.

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" claims on food labels, following completion of the public consultation that 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 current guidance.

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% in accordance with the proposed changes. As noted above in the Claims on Product Labels section, 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.

New Greenwashing Law

As mentioned above in the discussion of product claims, new provisions were added to the *Competition Act* in June 2024 to target greenwashing. These provisions require companies to have testing or substantiation to support certain environmental claims. The Competition Bureau is currently assessing the impact of these new requirements, especially with respect to enforcement, and expects to provide updated guidance in due course.

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SUPPLY CHAIN, TRADE AND CUSTOMS

By John Boscariol and Martha Harrison

SUPPLY CHAIN, TRADE AND 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 trade law can come nearly as an afterthought. Even experienced manufacturers 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 European Union ("EU"), the *Canada-United Kingdom Trade Continuity Agreement*, the *Comprehensive and Progressive Agreement for 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 products 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 and 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 (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 five percent 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* (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 May 3, 2023, nearly a year and a half after it had been introduced in the Canadian Senate, Bill S-211, which enacts the *Fighting Against Forced Labour and Child Labour in Supply Chains Act* ("Supply Chains Act"), passed its final reading in the House of Commons.

The *Supply Chains Act* applies broadly to any entity that produces, sells or distributes goods in Canada or elsewhere, to any entity that imports into Canada goods produced outside Canada and to any entity that controls another entity engaged in such production, sale, distribution or importation. "Control" in this context can be either direct or indirect (e.g. through a subsidiary). Parent companies of "entities" (as that term is defined in the *Supply Chains Act*) that produce, sell or distribute goods in Canada or elsewhere are therefore also captured.

An "entity" is defined as any business that is listed on a Canadian stock exchange or has a connection to Canada (defined as having a place of business in Canada, doing business in Canada or having assets in Canada) and also meets at least two of the following three conditions for a minimum of one of its two most recent financial years:

— The entity has at least C$20 million in assets;

— The entity has generated at least C$40 million in revenue; or

— The entity employs an average of at least 250 employees.

Each entity subject to the *Supply Chains Act* will be required to include the following in the report:

— The steps the entity has taken during its previous financial year to prevent and reduce the risk that forced labour or child labour is used at any stage in the production of goods in Canada or elsewhere by the entity or in the production of goods imported into Canada by the entity;

— The entity's structure, activities and supply chains;

— The entity's policies and its due diligence processes in relation to forced labour and child labour;

— The parts of the entity's business and supply chains that carry a risk of forced labour or child labour being used and the steps it has taken to assess and manage that risk;

— Any measures taken to remediate any forced labour or child labour;

— Any measures taken to remediate the loss of income to the most vulnerable families that results from any measure taken to eliminate the use of forced labour or child labour in its activities and supply chains;

— The training provided to employees on forced labour and child labour; and

— How the entity assesses its effectiveness in ensuring that forced labour and child labour are not being used in its business and supply chains.

The application of the *Supply Chains Act* is still subject to some ambiguity. For example, based on current administrative guidance, entities may be exempt from reporting obligations if they engage only in "minor dealings" of the regulated business activities. Concepts such as "minor dealings" are not administratively defined and are subject to a case-by-case assessment. Now that the first reporting period has passed, there will likely be additional administrative guidance issued by Public Safety and Emergency Preparedness, the regulator charged with administering and enforcing the law.

The *Supply Chains Act*'s implementation brings Canada one step closer to its international counterparts, and we anticipate that Canada will continue to introduce additional supply chain legislation, including potentially a specific due diligence law.

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 manufacturers and distributors of consumer products. 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 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 EU, 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 CPTPP. 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 EU 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 member 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 mold 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, South 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, 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* (Canada).

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, 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 and Donovan Plomp

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

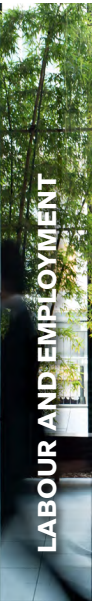
leave, family responsibility leave, emergency leave, crime-related death and disappearance leave and domestic or sexual violence leave.

Important minimum standards considerations for consumer products businesses include:

— 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.

In Ontario, employers that employ 25 or more employees on January 1 of any year must have a written policy on disconnecting from work in place before March 1 of that year. The term "disconnecting from work" is defined as meaning not engaging in work-related communications, including emails, telephone calls, video calls or sending or reviewing other

messages, to be free from the performance of work. However, employers are not required to create a new right for employees to disconnect from work and be free from the obligation to engage in work-related communications in its policies. Employee rights under employment standards legislation to not perform work are established through other employment standards rules.

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

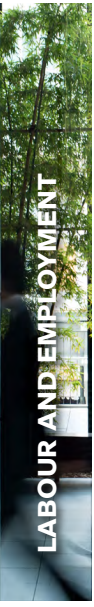
Notice of Termination of Employment

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 the *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.

Other Contractual Considerations: Non-competes and Pay Transparency

Some provinces have legislation that restrict certain contractual provisions. For example, in Ontario, employment non-competition covenants are not permissible, other than for executives and in relation to business transactions.

In British Columbia, pay transparency legislation prevents employers from prohibiting employees from disclosing their pay to another employee or applicant of the employer, as well as imposes certain reporting provisions.

In short, employers should have legal review of their offer letters and policies to ensure compliance.

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 a degree of employer "free speech" during a union drive; however, there are some important differences and, in British Columbia and Québec, for example, employers may have somewhat less latitude for commentary during an organizing drive. In any jurisdiction, 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 some jurisdictions, with sufficient support, there may not be a representation vote. When a vote is ordered, 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 communications strategically 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 and 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.

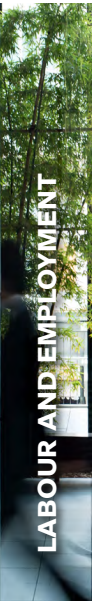
Recruitment

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, 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;

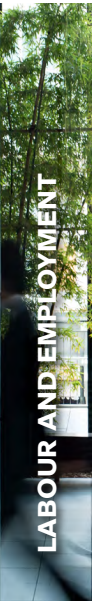
— Develop and maintain individualized accommodation and return-to-work plans for employees;

— Maintain materials regarding policies and procedures, which support employees with disabilities and provide information on how to request accommodation; and

— 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 follow-up 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, Bullying 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. In British Columbia, the workers compensation authority requires employers to have a bullying and harassment policy. 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, bullying 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 it 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 that 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.

Among the many applicable rules pursuant to the *Charter of the French Language*, some that stand out for the retail sector include: (i) the employer must limit imposing on job applicants or employees the requirement that they have a certain level of knowledge of a language other than French, (ii) written communications with staff must be in French, including offers of employment and promotion, collective agreements and employer policies, (iii) all trainings for staff must, if they are offered in another language than French, also be available in an equivalent format in French and (iv) no one may be dismissed, laid off, demoted or transferred for not knowing a language other than French, unless it is a BFOR.

Businesses that employ at least 50 people (25 as of June 1, 2025) 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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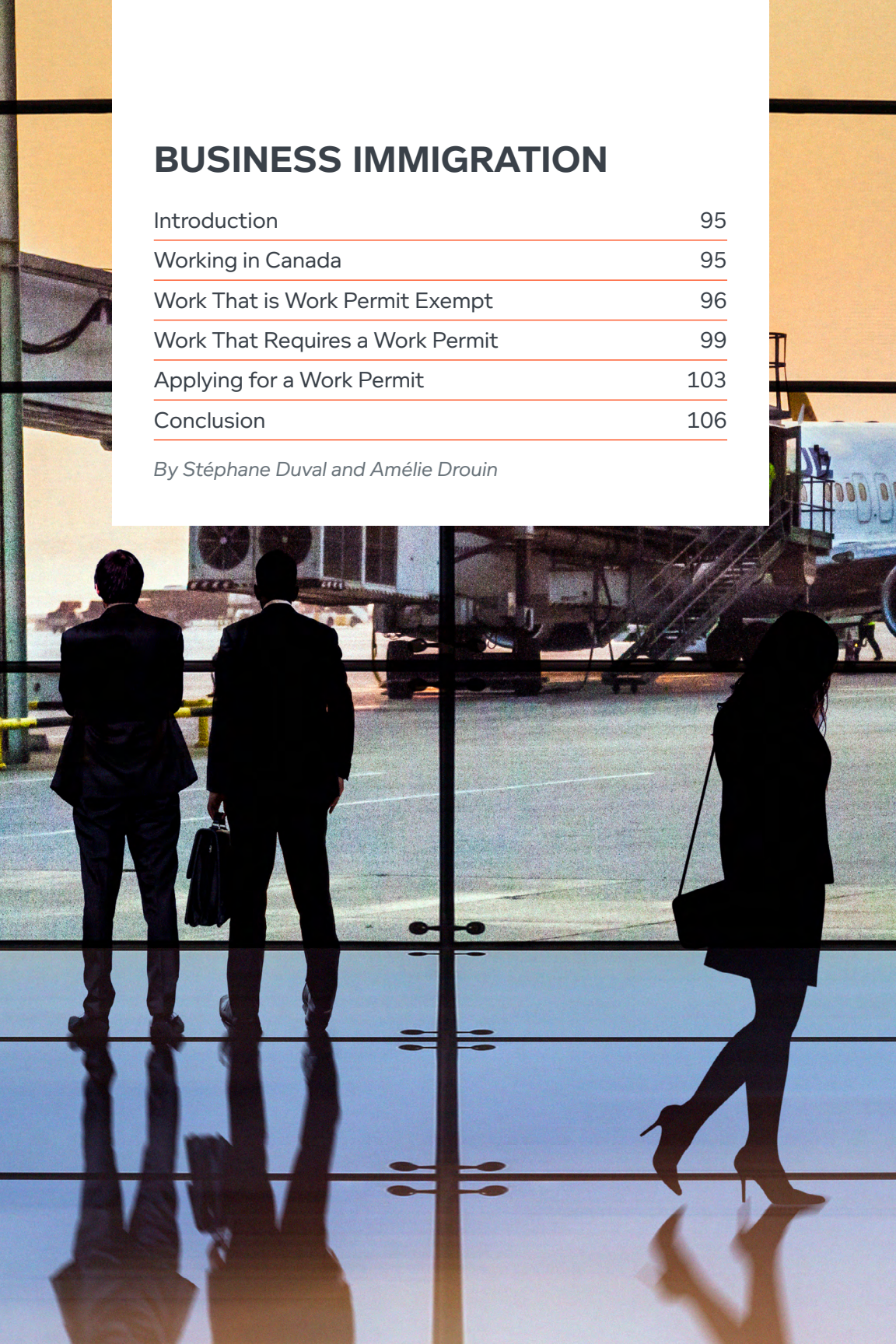
BUSINESS IMMIGRATION

By Stéphane Duval and Amélie Drouin



BUSINESS IMMIGRATION

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 over a million[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* (the "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.

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]

1 Statistics Canada, "Estimate of the number of non-permanent residents by type, quarterly", (September 25, 2024), available online: **https://doi.org/10.25318/1710012101-eng**.

2 *Immigration and Refugees Protection Regulations* (SOR /2002-227), s. 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:

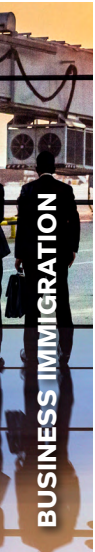
  — The primary source of remuneration for the business activities is outside Canada;

  — The principal place of business remains predominately outside Canada; and

  — The actual place of accrual of profits remains predominately outside Canada.[4]

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

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



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 or 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[6] 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 leased outside Canada or to supervise the dismantling of equipment or machinery purchased in Canada for relocation outside Canada.

5 Government of Canada, "What is a business visitor?", (June 10 , 2024), available online: **https://www.cic.gc.ca/english/helpcentre/answer.asp?qnum=434&top=16**.

6 Immigration, Refugees and Citizenship Canada, "Immigration Guidelines".

— **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.

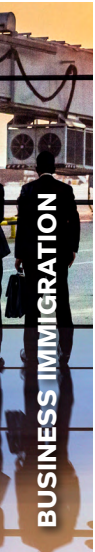
— **Provide intra-company training and installation activities:** Foreign nationals coming to provide training or installation of equipment for a branch or subsidiary company of their foreign employer are considered to be business visitors. The same prohibition against hands-on building and construction 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's Training, Education, Experience and Responsibilities ("TEER") category 0 or 1 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 can 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 post-secondary academic, vocational or professional training program (or a secondary-level vocational training program in Québec) of a duration of at least six months that leads to a degree, diploma or certificate can work off-campus without a work permit for up to 24 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.

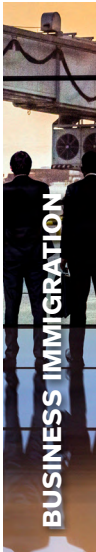
Under the TFWP, employers must first obtain a positive Labour Market Impact Assessment ("LMIA") in order for the foreign national to then be able to apply for a work permit. An LMIA is a document issued by ESDC following a thorough assessment of Canada's labour market in order to determine whether or 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.[7]

If all the conditions are met, a positive LMIA will 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 they are 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*).

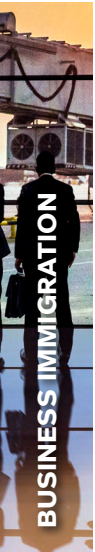
Global Talent Stream

As mentioned previously, global mobility is important, and Canada has realized the importance of attracting highly skilled individuals that can contribute to the 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; and

— **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 and engineering industry.



7 *Immigration of Refugee Protection Regulations* (SOR /2002-227), s. 203(1.1) and (3).

Simplified Process for Certain Occupations in Québec

In Québec, certain occupations that require work permits are subject to a facilitated LMIA process that exempts employers from demonstrating recruitment efforts, as there is a recognized labour shortage for these occupations. The list of occupations is 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 the IMP work permit categories are based on the Immigration and Refugees Protection 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 allow 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.

— **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, Colombia, Peru, South Korea, to name a few.

— **Spouses of certain study permit or work permit holders:** Spouses/common-law partners of individuals who hold certain categories of Canadian work permits or study permits for certain designated study programs 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, absent which Canadian jobs would be greatly affected, a short-term work permit can be obtained (usually 30 days or less).

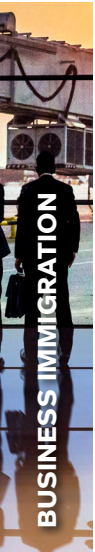
— **Francophone mobility:** French-speaking foreign nationals that have been recruited for a non-primary agriculture position outside of Québec can obtain work permits.

— **Bridging open work permit:** Foreign nationals currently in Canada with a valid status as a worker and whose application for permanent residence has passed an initial completeness check 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 PhD 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 an eligible program of study 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 have had similar reciprocal opportunities working for an affiliate of the Canadian company 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

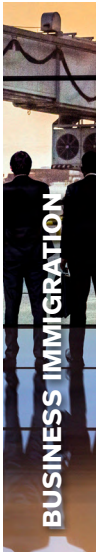
The work permit can be applied for once an LMIA is issued (if applicable) or when the foreign worker is exempted from the obligation of obtaining an LMIA. The foreign worker can apply for their work permit upon entry into Canada or at a visa office abroad, depending on their country of citizenship.

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-exempted applicants (except certain people, including U.S. citizens and green card holders) 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. The application must be submitted to the visa office responsible for the foreign national's country of citizenship or their country of current legal residence.



In addition, residents 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

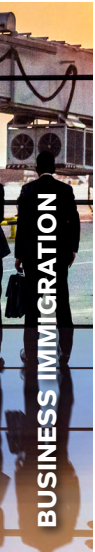
Employers seeking to hire visa-exempt foreign nationals under one of the IMP categories might have their application pre-approved by the International Mobility Workers Unit, an in-country service available to visa-exempt nationals not currently in Canada.

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, 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 foreign workers in their employ are routine occurrences, and audits can be initiated retroactively, for up to six years after the issuance of a work permit.

— **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 national 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;

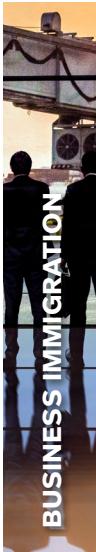
— The publication of the employer's name and address on a public website with details of the violation(s) and/or consequence(s); and/or

— 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 (or would constitute) 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 (TRP), granted on a temporary basis in the case of an established and compelling 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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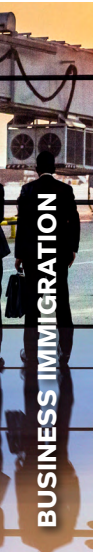


E-COMMERCE

By Evie Bouras 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 consumers 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 and foreign ownerships restrictions on the sale of "cultural products."

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" (May 25, 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 and of the General Regulations enacted thereunder[6] and will soon be replaced by the *Better for Consumers, Better for Business Act;*[7]

— In Québec, Title I, Chapter III, Section 1.3 of the *Consumer Protection Act;*[8]

— In Nova Scotia, ss. 21V-21AF of the *Consumer Protection Act* and the *Internet Sales Contract Regulation* enacted;[9] and

— In Newfoundland and Labrador, Part V, Division 2 of the *Consumer Protection and Business Practices Act*.[10]

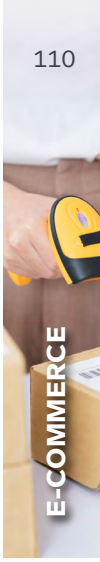
Provincial e-commerce laws impose obligations on e-commerce merchants before and after the sale of goods and services to consumers. In general, these laws require: (i) pre-sale disclosure of information and (ii) delivery of a copy of the agreement to the consumer.

The thresholds for when these rules apply vary. In British Columbia, Manitoba, Québec and Newfoundland and Labrador, 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 *Better for Consumers, Better for Businesses Act*, SO 2023, c. 23.
8 *Consumer Protection Act*, CQLR c. P-40.1.
9 *Consumer Protection Act*, RSNS 1989, c. 92; *Internet Sales Contract Regulation*, NS Reg 91/2002.
10 *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. Marchants 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 and Labrador, 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 Labrador 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 also require the merchant's email address, if available. Newfoundland and Labrador 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 and Labrador 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 and Labrador, 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

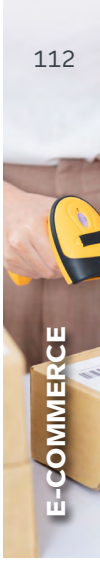
Key dates related to sales are required as pre-sale disclosures. These may include, as applicable:

— 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 on **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 and Labrador 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 and Labrador, 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 and Labrador, 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 and Labrador 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".[11] 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).

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

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.

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.[12]

CASL is much stricter than the U.S.'s *CAN-SPAM Act* ("CAN-SPAM") 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.

12 *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.

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 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.[13] 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

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

guarantees, (iii) drip pricing, (iv) false or misleading ordinary selling price representations, (v) untrue, misleading or unauthorized uses of tests and testimonials, (vi) bait and switch selling, (vii) the sale of a product above its advertised price, (viii) unfair promotional contests and (ix) 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,[14] 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.

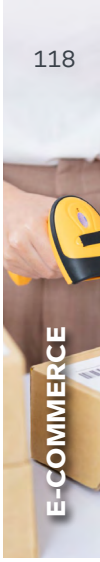
The *Competition Act* is discussed thoroughly in **Competition and Pricing**. Canadian consumer protection laws are discussed in **Consumer Protection Laws**.

Accessibility Laws

Web Content Accessibility Guidelines ("WCAG") is an internationally accepted standard for web accessibility developed by the World Wide Web Consortium, an international team of experts. WCAG sets out standards for how to make web content more accessible to people with disabilities, which include visual, auditory, physical, speech, cognitive, language, learning and neurological disabilities.[15]

E-commerce merchants need to take notice of WCAG. The Ontario *Integrated Accessibility Standards* requires that all public websites for private sector organizations with 50 or more employees as well as designated public sector organizations conform to WCAG 2.0 Level AA.[16]

14 For example, see ss 14(1),(2), 17(1) of the Ontario *Consumer Protection Act*, supra note 5.
15 World Wide Web Consortium, "Web Content Accessibility Guidelines (WCAG) 2.0" (December 11, 2008), online: **https://www.w3.org/TR/WCAG20/**.
16 *Integrated Accessibility Standards*, O Reg 191/11, s. 14(2).



The Ontario government has provided a useful guide for companies to follow to ensure compliance with WCAG 2.0 standards.[17] This guide includes recommendations for: (i) testing compliance of current websites and (ii) working with web developers to ensure future websites satisfy WCAG criteria.

Other jurisdictions have adopted similar legal requirements including in British Columbia under its *Accessible British Columbia Act* and Manitoba under its *Accessibility for Manitobans Act*.

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 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.

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17 Ontario, "How to make websites accessible", (November 7, 2014), online: **https://www.ontario.ca/page/how-make-websites-accessible**.

PRODUCT LIABILITY AND REGULATORY COMPLIANCE

By Christopher Hubbard and Martha Harrison

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* (Canada) obligations applicable to the sale of consumer products and prescribing both general regulatory compliance rules as well as specific regimes for specially regulated goods;

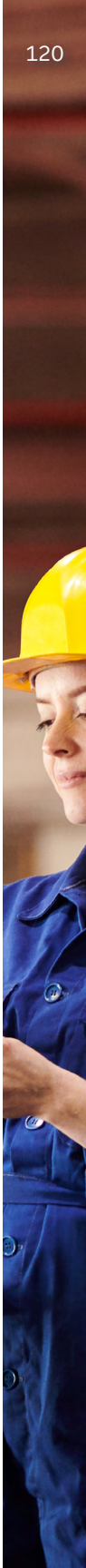
  — *Food and Drugs Act* (Canada) and *Safe Food for Canadians Act* (Canada) obligations applicable to the sale of food, drugs, medical devices, natural health products, cosmetics and a host of other specially regulated products;

  — 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 *Civil Code of Québec*. 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 that 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.

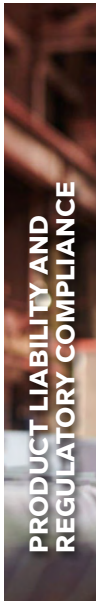
Consumer product companies can also be subject to common law obligations regarding the sale of products. In some circumstances, there may be a common law duty to warn customers about a product defect or to initiate remedial action such as a recall. The duty to warn is a continuing duty and can be triggered 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.

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. Product liability class actions often also raise related insurance issues and contractual issues with partners in the supply chain.



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;

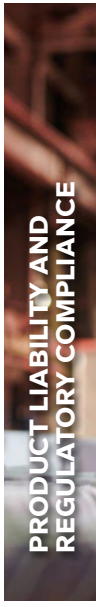
— A defect that may reasonably be expected to result in an individual's death or in serious adverse effects on their health, including a serious injury;

— 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

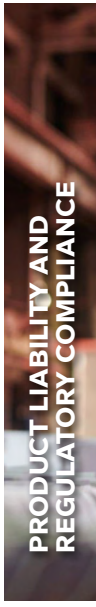
identify the name of the supplier, the location where the product was sold and the period during which the product was sold. Companies must maintain the required records at their place of business in Canada (subject to exemption from the Minister), and they must be retained for six years. There is no 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 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 (among other regulated goods and commodities). Food includes any article sold for use as food or drink for humans, including 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 a recall is necessary.

Recalls of Consumer Products and Food Consumer Products

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 quickly and efficiently remove from the market unsafe products that a retailer has sold.

Additional Regulations Applicable to Specific Products

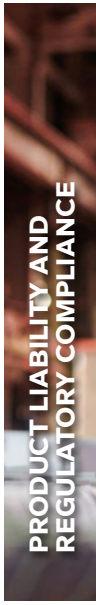
Additional regulations under the CCPSA, FDA or SFCA may apply to specific products. For example:

— 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; and

— 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") 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 FDA);

— 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*).

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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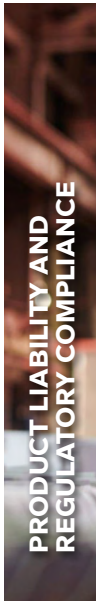

CYBERSECURITY, PRIVACY AND DATA PROTECTION

By Jade Buchanan, Marissa Caldwell and Eugen Miscoi

CYBERSECURITY, PRIVACY AND DATA PROTECTION

Whether handling customer contact information for simple service requests or handling large volumes of sensitive information, most consumer product manufacturers engage with customers. That requires complying with Canada's complex patchwork of privacy legislation. The consequences of non-compliance can be significant.

— **Fines** – The Québec regime now has European Union ("EU") GDPR-level fines and proposals at the federal level, if enacted into law, would have even higher fines (up to 5% of global revenue).

— **Reputation –** Our privacy regulators are media-savvy, holding press conferences and releasing detailed reports when they wish to draw attention to a specific topic or practice. Doing so often means targeting well-known consumer brands inflicting reputational harm in the process.

— **Class Action Litigation** – Findings from our privacy regulators are often adopted as the basis for class action litigation based on invasion of privacy arising from the misuse or improper collection or disclosure of personal information.

A Patchwork Of Legislation

There are several new and forthcoming laws in Canada that relate to privacy rights and the collection, use and disclosure of personal information.[1] For the past two decades, the default law applicable to the private sector in Canada has been the *Personal Information Protection and Electronic Documents Act*[2] ("PIPEDA"), a federal act enforced by the Office of the Privacy Commissioner of Canada ("OPC"). Under the PIPEDA regime, if a province has substantially similar privacy legislation, that provincial legislation applies[3] for actions that take place entirely

1 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 shopping habits, and can be in any format, including voice recordings and video surveillance records.

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

3 Whether PIPEDA continues to apply to commercial activity in those provinces is not a settled issue. For example, see *Joint investigation of Clearview AI, Inc. by the Office of the Privacy Commissioner of Canada, the Commission d'accès à l'information du Québec, the Information and Privacy Commissioner for British Columbia, and the Information Privacy Commissioner of Alberta*, PIPEDA Findings #2021-001, February 2, 2021. In that finding, the OPC and its provincial counterparts in Alberta, B.C. and Québec took jurisdiction over a company that was operating outside of Canada but collecting personal information from individuals across Canada.

within its borders (with some exceptions). This is the case in British Columbia, Alberta and Québec.[4] PIPEDA compliance has been a cross-border organization's first step in adapting their privacy framework to Canada, but provincial laws have sometimes applied instead.

Provincially, Québec has adopted *An Act to modernize legislative provisions as regards the protection of personal information* ("Law 25"). Law 25 received royal assent on September 22, 2021 and drastically changed Québec's privacy regime via a three-phased entry into force on September 22 of 2022, 2023 and 2024. Many aspects of Law 25 go beyond the federal and other provincial requirements for businesses in the private sector.

These reform efforts are unfolding in the context of a broader global movement toward ever-increasing privacy obligations for businesses that collect and process personal information in the context of their operations.

The potential for substantial fines under Québec's Law 25 represent a significant shift in how Canadian privacy legislation is enforced, introducing hefty penalties for non-compliance, including:

— For most contraventions: Up to C$10 million or 2% of worldwide turnover, whichever is greater.

— For more severe violations: Up to C$25 million or 4% of worldwide turnover, whichever is greater.

Principled Guidelines for Businesses

Canada's privacy laws remain rooted in the Ten Fair Information Principles, which establish core obligations for businesses and more broadly drive interpretation of privacy law and policy in Canada.[5] The OPC has used the ten principles to develop guidance specific to technology that may

4 Alberta and British Columbia jointly prepared their privacy laws, though they were never identical and have subsequently been amended to each have some distinct aspects. Both are called the *Personal Information Protection Act,* or together the "PIPAs." *Personal Information Protection Act*, SBC 2003, c. 63 and *Personal Information Protection Act*, SA 2003, c. P-6.5.

5 The Ten Fair Information Principles were expressly included as a schedule to PIPEDA. While not expressly incorporated into provincial legislation, they remain foundational. For example, see Ten Principles of Privacy Protection from the Province of British Columbia on the "Ten Principles of Privacy Protection", online: <**https://www2.gov.bc.ca/gov/content/employment-business/business/managing-a-business/protect-personal-information/principles**>.

have only been niche or theoretical when PIPEDA was originally passed. Of particular interest to product manufacturers who produce internet-of-things or smart devices is the OPC's application of the principles in its guidelines called **Privacy Guidance for Manufacturers of Internet of Things Devices**.[6]

To comply with these principles, businesses should prioritize the following actions:

Be **accountable** for the personal information under your control:

— Appoint an individual 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 (usually the Privacy Officer); Communicate their title and contact information to your staff, the public and your customers.

— Develop and implement policies and practices for handling personal information, including a complaints process to allow for individuals to **challenge compliance**;

— Be **open** about policies and practices with respect to personal information by adopting an external and internal privacy policy, as well as personal information management practices to ensure compliance with applicable privacy laws. Customers must be able to acquire information about these policies and practices from the appointed individual without unreasonable effort; and

— Allow **individuals to access** their information by being prepared to provide a customer with information if they make a request about the existence, use and disclosure of their personal information. This provision of access is mandatory with certain narrow exceptions.

Identify the purposes of your collection and use of personal information:

— Explain to customers why you are collecting their personal information and how it will be used. If the information is going to be used for a different purpose, obtain new consent for these purposes; and

6 Office of the Privacy Commissioner of Canada, "Privacy guidance for manufacturers of Internet of Things devices", (August 2020), online: <**https://www.priv.gc.ca/en/privacy-topics/technology/gd_iot_man/#h03**>.

— Develop these purposes to be contained in both your internal privacy policies and external privacy notices. Privacy policies are often long-form documents that inform employees on how to safely handle customer data and information and customers on the details of the use, storage and collection of their information. Privacy notices can provide customers of your overall privacy practices or inform customers "just-in-time" when you are seeking their consent to collect or use their data. These just-in-time notices provide a digestible and short summary of the policy as it applies in the moment to the relevant action or request.

Obtain meaningful **consent** before or during the collection of information:

— Businesses 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. A common approach is to incentivize consent, typically by providing discounts or access to sales for customers who consent to receive SMS or email marketing messages;[7]

— A growing number of uses of information have been found to require explicit or express consent. There are a few statutory exceptions that apply to the consent requirement, such as disclosures of personal information in the context of certain business transactions and disclosure compelled by law;

  — Express consent entails a positive affirmation or acceptance and is likely to be required for sensitive information, such as medical or financial information, or large amounts of non-sensitive information; and

  — Implied consent is assumed when the purposes are obvious for the time of collection, for example when a customer provides their email address to receive a digital receipt, and the email address is solely used for that purpose;

— 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,

7 The sending of commercial electronic messages will require consent under Canada's Anti-Spam Legislation, and the associated processing of personal information will require consent under the applicable privacy legislation, unless an exception applies. See: **E-commerce**

use or disclosure of the personal information to which they are consenting;

— The OPC and the privacy commissioners of B.C. and Alberta have provided interpretive assistance in the "Guidelines for obtaining meaningful consent."[8] Some of the practical recommendations arising from the Guidelines include that organizations should:
  — Notify individuals of a particular risk associated with the processing of their personal information, namely if it is highly sensitive;
  — Weave privacy notices throughout the user experience as "just-in-time notices" rather than only having such information found in the privacy policy; and
  — Employ consent language in contracts, forms (including web forms) and other documents utilized when collecting personal information from customers, employees and any other individuals.

Limit the amount and types of information to what is necessary and within the lawful purposes:

— Be cautious about over-collection and retention. Information beyond that which is necessary to complete a purchase is unlikely to be considered a reasonable use; and

— Avoid indiscriminately retaining information. Ensure that your privacy policy includes provisions detailing when and under what circumstances data will be safely disposed of. If it is personal information that was used to make a decision about an individual, it should be retained for a different period of time than if it was simply used to fulfill its reasonable purpose and will not need to be accessed again for that purpose.

Ensure the **accuracy** and completeness of information:

— Businesses must make reasonable efforts to ensure customer personal information that is collected is accurate and complete. This includes verifying the name or details of a transaction before recording them; and

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

— Customers should be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

Protect sensitive information through **security safeguards**:

— Businesses should protect personal information in their custody or under their control by making reasonable security arrangements to prevent loss, unauthorized access, collection, use, copying, modification, disposal or similar risks; and

— 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.

Emerging Key New Principles and Concepts

This section addresses principles and concepts that are prominent in Québec's Law 25. Many were implicit in prior laws or emerged as best practices or through interpretation by privacy commissioners, and they are featuring more prominently in this second major wave of Canadian privacy legislation. The following principles and concepts are most likely to be of interest to businesses operating in Canada.

Privacy by Design and Profiling

Québec's *Private Sector Act*,[9] or Law 25, requires businesses to prioritize consumer privacy by ensuring that technological products or services with privacy settings provide the highest level of confidentiality by default.[10] Ultimately, the result is that the collection of personal information by technological products or services must be defaulted to "off" or "as little as is necessary" at the time of purchase/sign-up, etc.

In particular, Law 25 requires businesses to also be transparent when using technology that can **identify**, **locate** or **profile** customers.[11] Businesses are obligated to inform consumers about the use of such technology and explain how these functions can be activated. "Profiling" in this context involves analyzing personal information to assess characteristics, including but not limited to purchasing behaviour, preferences or economic situation. Businesses must clearly communicate

9 *Act respecting the protection of personal information in the private sector*, CQLR c. P-39.1 ("*Private Sector Act*").
10 *Private Sector Act*, s. 9.1.
11 *Ibid.*, s. 8.1.

their data collection practices, ensuring customers understand how their information might be used for personalized marketing or analytics.

Valid Consent Principles

Businesses must navigate detailed consent requirements under Québec's *Private Sector Act* when handling consumer personal information. As with PIPEDA and the PIPAs, Law 25 distinguishes between express and implied consent, emphasizing the need for explicit consent in certain situations. Under Law 25, businesses operating in Québec or selling to customers in Québec should ensure that their consent processes include the following elements in order to obtain valid consent:[12]

— **Clear**: Consent must express the individual's true intentions and choice;

— **Free**: It must involve an actual choice with the concerned individual having control;

— **Informed**: The individual must be able to easily understand the request;

— **Specific**: The request must specifically define the intended purposes;

— **Granular**: Consent must be sought for each intended purpose;

— **Understandable**: The consent request must be in clear and simple terms;

— **Temporary**: Consent must be for a limited time; and

— **Separate**: The request must be made separately from any other information.

While certain exceptions exist, including disclosing personal information for the purposes of considering or effecting business transactions, for research or emergencies and legal obligations, these should be interpreted narrowly. The nuanced nature of these requirements, coupled with potential legal risks, underscores the importance of robust data governance strategies.

In practice, consumer product manufacturers do not always have direct interactions with a customer that the need to obtain express consent.

12 *Ibid.*, s. 14.

When developing a consumer product or deploying it in Canada, businesses should consider how they can create an interface with customers to obtain, track and manage express consent.

Data Anonymization

Under PIPEDA and its provincial counterparts, businesses must also **destroy** or **anonymize** personal information once its purpose is fulfilled, but Law 25 adds more detailed requirements. Once the purpose for collecting or using personal data is achieved, businesses are obligated to either destroy the information or anonymize it for legitimate uses, unless legal retention periods apply. Law 25 considers that "information is anonymized if it is, at all times, reasonably foreseeable in the circumstances that it irreversibly no longer allows the person to be identified directly or indirectly."[13]

Anonymization of personal information requires the organization to have a serious and legitimate purpose for anonymizing personal information following a process that adheres to "generally accepted best practice s" and respects regulation criteria and for it to be at all times reasonably foreseeable that the anonymized personal information irreversibly no longer allows the person to be identifies directly or indirectly.

The applicable regulation[14] outlines a process to be followed when anonymizing personal information. Key steps include:

— Establishing legitimate purposes for anonymization;

— Engaging qualified personnel to oversee the process;

— Conducting thorough risk assessments before and after anonymization;

— Implementing appropriate anonymization techniques;

— Performing periodic reassessments to ensure ongoing anonymity; and

— Maintaining detailed records of anonymization activities.

13 *Ibid*., s. 23.

14 Government of Québec, "Regulation respecting the anonymization of personal information." *Gazette Officielle du Québec*, (May 15, 2024), online: <**https://www.publicationsduquebec.gouv.qc.ca/fileadmin/gazette/pdf_encrypte/lois_reglements/2024A/106829.pdf**> ("Regulation").

Privacy Impact Assessment

Businesses operating in Québec must implement robust Privacy Impact Assessment ("PIA") processes. Under Law 25, PIAs, defined as evaluations that businesses undertake to identify and assess the potential risk to individuals' privacy,[15] are mandatory for:

— Projects involving personal information communication for research;[16]

— Projects to acquire, develop or overhaul an information system or electronic service delivery system that collects, uses, communicates, keeps or destroys personal information;[17] examples of information systems include, a smart card or RFID system, a statistical system or a computerized file processing system; and

— Communicating personal information outside of Québec or entrusting a person or body outside of Québec with the task of collecting, using, communicating or keeping personal information, information system development or data transfers outside Québec. (This specific type of PIA is often referred to as a Transfer Impact Assessment or "TIA").[18]

Key steps to conducting a PIA include defining project objectives, inventorying personal information, assessing privacy factors and developing risk mitigation strategies. Businesses should integrate PIAs and TIAs into their project management workflows, involving key stakeholders such as legal, IT and customer relations teams.

Right to Data Portability

Businesses operating in Québec must conform to the significant changes in data management practices which became effective as of September 22, 2024 under the *Private Sector Act*. Businesses will be required to provide Québec residents with their computerized personal information in a structured and commonly used technological format, upon request.[19] This new regulation applies to a wide range of entities, including those outside Québec that handle data of Québec residents.

While there are some restrictions on what data must be provided, businesses should err on the side of transparency. Adapting to these

15 *Private Sector Act*, *supra* note 10, s. 3.3.
16 *Ibid.*, s. 21.
17 *Ibid.*, s. 3.3.
18 *Ibid.*, s. 17.
19 *Ibid.*, s. 27.

changes will not only ensure compliance but also build trust with customers by demonstrating a commitment to data privacy and user rights.

Automatic Decision Making

Businesses leveraging automated decision-making systems would also be required to prioritize transparency and accountability under Law 25.

Under Law 25, if a business will use personal information to render decisions based exclusively on the automated processing of such personal information, it must inform the individuals concerned that the decision was carried out exclusively through automated processing. Such notice must be provided at the same time that the individual is informed of the decision. Québec residents are also empowered with the right to request and receive information relating to the personal information that was used to make the automated decision, along with the main parameters involved in the decision-making process. This requirement is particularly important for businesses looking to incorporate the use of AI in their operations.

To ensure compliance, businesses should:

— Develop comprehensive documentation of automated processes;

— Train staff to explain system operations and individual impacts;

— Establish efficient procedures for handling detailed explanation requests; and

— Update privacy policies to reflect automated decision-making practices.

Hot Topics

While Canadian privacy statutes did not change considerably between 2003 and 2021, Canada's privacy commissioners tend to focus on prominent issues, often driven by technological trends or enforcement in other jurisdictions. Law 25 has also shifted the focus to new topics.

This section details some of the current areas of regulatory focus and enforcement and, in some cases, litigation. Any risk-based compliance program should consider each of these issues carefully.

Cookies

Québec's Law 25 introduces significant changes to cookie management practices, presenting both challenges and opportunities for businesses.[20] For businesses, this means:

— Essential cookies used solely as connection indicators are exempt from certain obligations, provided they don't identify, locate or profile individuals;

— Non-essential cookies that track user preferences or behaviour must be deactivated by default, adhering to privacy by design principles outlined in sections 8.1 and 9.1 of the *Private Sector Act*;

— Implement user-friendly cookie consent banners that allow customers to customize preferences or opt out of non-essential cookies;

— Provide clear, specific information about each cookie's purpose and data collection practices before obtaining consent;

— Ensure consent mechanisms are easily accessible and withdrawable; and

— Maintain thorough documentation of user consents for compliance purposes.

Unlike PIPEDA and the PIPAs,[21] Law 25 requires clear, specific consent for non-essential cookies, potentially impacting user tracking and personalization strategies. Businesses must now carefully categorize their cookies, distinguishing between essential and non-essential types, and implement user-friendly consent mechanisms. This shift necessitates

20 *Ibid.*, s. 9.1 and 8.1.

21 Office of the Privacy Commissioner of Canada, "Policy position on online behavioural advertising", (August 2021), online: **<https://www.priv.gc.ca/en/privacy-topics/technology/online-privacy-tracking-cookies/tracking-and-ads/bg_ba_1206/>**.

a review of current data collection practices and may require updates to website designs and privacy policies.

Data Breach Reporting

Canada has had mandatory breach reporting for over a decade as a result of changes in Alberta in 2010. It was added to PIPEDA in 2018[22] and Law 25 when it began coming into force in 2021.[23] For businesses, this means:

— Implementing robust data security measures to prevent incidents;

— Developing a clear incident response plan that includes risk assessment protocols;

— Training staff to quickly identify and report potential confidentiality incidents;

— Establishing a process for promptly evaluating if an incident poses a "risk of serious injury" or "real risk of significant harm" based on data sensitivity, potential consequences and likelihood of misuse; and

— Implementing and documenting mitigation measures to address immediate risks and prevent future incidents.

In practice, data breach management is a cross-functional effort. Privacy teams may manage smaller scale or low-impact breaches on their own, such as the loss of a small number or records or information being sent to an unintended but responsible recipient. Larger breaches, such as data extortion attacks, will require the coordination of several teams with decisions often being made at the highest levels.

Blurring of Controller-Processor Binary

The EU's GDPR distinguishes between the roles, responsibilities and liabilities of data processors and data controllers. The controller determines the purpose and means of processing personal data in accordance with applicable privacy laws and regulations, while the processor executes the controller's instructions, processing personal data on their behalf.

22 Office of the Privacy Commissioner of Canada: "What you need to know about mandatory reporting of breaches of security safeguards", (August 13, 2021), online: <https://www.priv.gc.ca/en/privacy-topics/business-privacy/breaches-and-safeguards/privacy-breaches/respond-to-a-privacy-breach-at-your-business/gd_pb_201810/>.

23 *Ibid.*, s. 3.6.

In Canada, data controller and data processor are not defined under PIPEDA or provincial sector privacy laws. Instead, Canadian laws refer to "organizations" that are in control of and accountable for compliance with privacy law requirements and "third party service providers" who fulfill the role of the processor.

While the defined roles of controller and processer do not clearly exist under Canadian law, the concept can be helpful in assessing responsibility in service provider scenarios. Under Canadian law, the party responsible for reporting data breaches is by default the controller, as they are responsible for instructing and guiding compliance of a processor (service provider). If a processor unlawfully processes data without instructions from the controller or experiences a breach well beyond the control of the controller, the responsibility can fall on the processor. Realistically, these roles easily become blurred in the context of modern integrated business relationships, as many businesses are both controlling and processing personal information. For example, a device manufacturer maker might only sell through third party retailers but offer a warranty or loyalty program that requires retailers to provide sale information to the manufacturer. In that case, both manufacturer and retailer may have responsibility for the same sets of personal information.

The blurred nature of these relationships becomes even more complex because Canada is not as prescriptive as the GDPR when it comes to the requirements for contracts between controllers and processors. While contracts are required and Law 25 imposes the requirement for specific clauses, businesses need to carefully consider contracts with third parties where personal information is being exchanged to ensure they will not have unintended consequences for compliance.

Cross-Border Transfers

Canada's privacy commissioners and other privacy advocates continue to see the EU's GDPR as the world's most extensive standard privacy and data security law. The GDPR restricts businesses from transferring personal information to a country outside of the European Economic Area unless the European Commission has granted an "adequacy decision" for the level of data protection afforded by the laws of that jurisdiction or if the organization can demonstrate appropriate safeguards for the protection of such information. In early 2024, Canada received a renewed

"adequacy decision" applicable to PIPEDA, therefore allowing personal information to continue to be transferred to Canada from the European Economic Area.

Personal Pricing Models

Personal pricing models are an emerging practice in which the personal information of a customer is used to assess or predict the highest price they are willing to pay for a good or service, thus identifying and capturing the consumer surplus. The use of algorithms with inputs of personal information for this purpose has been referred to as an online form of discriminatory pricing and raises concerns about privacy, competition and consumer fairness.

Personalized pricing is similar to dynamic pricing, which is commonly used for things like ride-sharing services and in the hotel and airline industries. While dynamic pricing is informed by market factors unrelated to the specific customer, for example the level of supply and demand or the time of purchase, personalized pricing is instead informed by variables associated with the individual customer. These variables may include the shopping habits, purchasing record and other personal information used to create a profile of the consumer for predictive analytics.

There is no Canadian statute or court decision that specifically addresses the legality of personal pricing models determined by algorithms. Additionally, it is yet to be seen how recent amendments to the *Competition Act* barring "excessive and unfair selling prices" will be interpreted by the Competition Bureau and courts.[24] This will likely be an issue worth watching over the coming years.

Profiling Consumers

As AI analytics and consumer profiling technologies continue to advance and become more widely adopted, updates in the regulation of AI analytics involving personal information have implications for businesses operating in Canada.

For example, AI-generated inferences and predictions about individuals have been considered to be a collection of personal information. In Québec, the use of AI to produce predictive indicators has been deemed to be a "collection" and not just a "use" of personal information.[25] This has

24 *Competition Act*, R.S.C. 1985, c. C-34, s. 78(1)(k).
25 *Enquête concernant le Centre de services scolaire du Val-des-Cerfs*, November 9, 2022, 1020040-S.

important implications for the application of privacy laws and particularly consent provisions to businesses who employ AI to make predictions about individuals.

Similarly, in a 2020 joint finding of the federal and Alberta privacy commissioners, consent requirements for the usage of data collected by facial recognition software were extended to require express opt-in consent even for a momentary collection of data in a public setting, followed by anonymization.[26] The purposes of collection must also be found to be reasonable, and a blanket use of facial recognition technology for "loss prevention" has not been found to meet that threshold for the use of biometric surveillance.[27] The emphasis on express consent and the bounds of a reasonable purpose complicates uses of customer personal information, even when accompanied by reasonable safeguards and where the chances of any plausible harm to individuals is low.

Privacy Class Actions

A wider trend in Canadian privacy class actions reflects that plaintiffs may be more likely to find success in certifying a class action alleging misuse or improper collection of data, rather than in relation to liability for data breaches.[28] This trend follows a trio of decisions by the Ontario Court of Appeal, which held that businesses that collect and store personal information about individuals cannot be held liable for the breach of the common law privacy tort of "intrusion upon seclusion" if the data breach was caused by an unknown, malicious third party. However, the British Columbia Court of Appeal recently re-opened the door to data breach class actions by ruling that individuals can claim damages for breach of privacy against companies that have suffered a breach as a result of their alleged failure to adequately protect personal information in their custody or control.[29]

Several Canadian class actions have been filed or are underway in the area of advertising, specifically relating to offline sales conversions and look-

26 *Re Cadillac Fairview*, PIPEDA Findings #2020-004, October 28, 2020.
27 *Re Canadian Tire*, BCIPC 17, April 2023.
28 In July 2023, the Supreme Court of Canada denied leave to appeal to the plaintiffs of four landmark data breach class actions: *Setoguchi v. Uber*, 2023 ABCA 45; *Owsianik v. Equifax*, 2022 ONCA 813; *Winder v. Marriot*, 2022 ONCA 815; and *Obodo v. Trans Union*, 2021 ONCA 814. However, breach class actions are not doomed for failure, as cases are still finding success at certification. See: *Lam v. Flo Health Inc.*, 2024 BCSC 391.
29 *Campbell v. Capital One Financial Corporation*, 2024 BCCA 253 and *G.D. v. South Coast British Columbia Transportation Authority*, 2024 BCCA 252.

a-like audiences used by major online advertisers. Tools that measure the effectiveness of online advertising for in-store sales are highly desirable for businesses to inform their marketing strategies.

Following a ruling to this end from the Privacy Commissioner of Canada, class action litigation is making its way through the courts.[30] In his statement at a news conference, the Privacy Commissioner made the following statement about the use of these tools:

> "This is a reminder to all companies, as they increasingly look to deliver services online and offer e-receipts, that they must be clear and transparent about how and why they are asking for consumers' personal information, and that they must obtain meaningful consent from their consumers before sharing this information with third parties."[31]

The finding turned on specific details, including the contract between the advertiser and business and the information presented to customers at the point of sale, as well as the reasonable expectations of customers.

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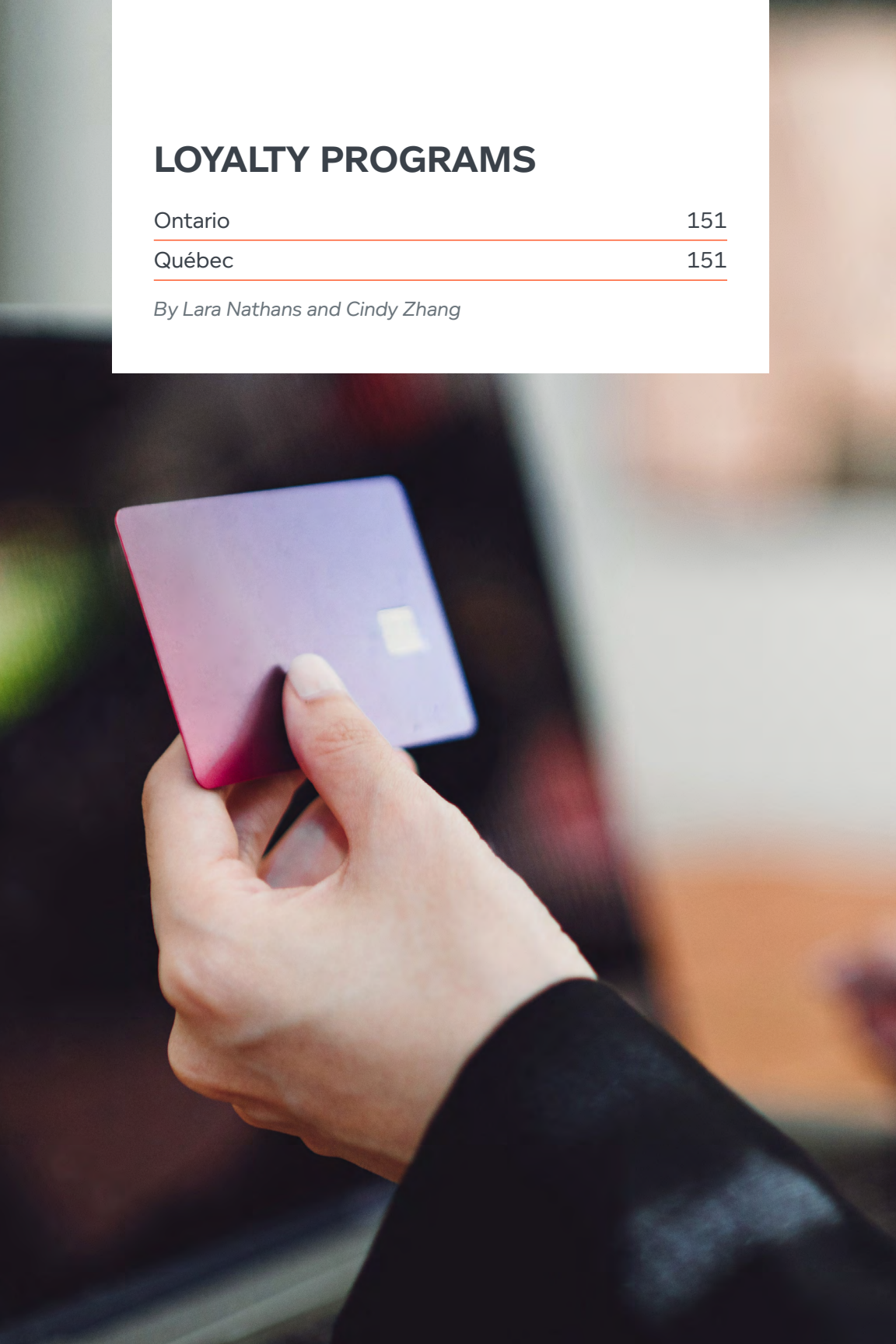
30 *Re Home Depot*, PIPEDA Findings #2023-001, January 26, 2023.

31 Statement by the Privacy Commissioner of Canada following an investigation into Home Depot of Canada Inc.'s compliance with PIPEDA, Office of the Privacy Commissioner of Canada, January 26, 2023, online: <**https://www.priv.gc.ca/en/opc-news/speeches/2023/s-d_20230126/**>.

LOYALTY PROGRAMS

By Lara Nathans and Cindy Zhang



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, such as notice and disclosure requirements, may be subject to certain protections in provincial consumer protection legislation across the country. With Bill 16, New Brunswick's consumer protection legislation is also facing amendments that may impact loyalty programs, but as of September 2024, these amendments are not yet in force.

Certain narrow exceptions are available to the restrictions on expiry, such as if no purchase is required, or points are issued gratuitously.

Loyalty programs are also impacted by general consumer protection legislation related to consumer contracts. Please see our **Consumer Protection Laws** chapter for more information.

Ontario

Ontario legislation prohibits the expiry of rewards points due to the passage of time. Any provision to the contrary is void. However, a rewards program may still be terminated, and accumulated rewards may expire in some cases, including where the agreement so provides.

As noted in our **Consumer Protection Laws** chapter, Ontario has introduced a new and revised *Consumer Protection Act* (which has received royal assent but, as of September 2024, is not yet in force). These amendments may impact loyalty programs and other types of consumer contracts. Please see the **Consumer Protection Laws** chapter for additional details.

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 provides 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.

Please see our chapter on **Consumer Protection Laws** for more information.

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CONSUMER PROTECTION LAWS

By Stephanie Sugar 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 when 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 there was an unfair practice occurring when they entered into, or potentially after, the time they entered into the contract.

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 and manufacturers 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; however, if there is any representation or undertaking given to consumers by way of advertising or otherwise, then manufacturers and distributors may be held liable if a consumer has reasonably relied on those representations to their economic detriment.

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, Environment Canada 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. Amendments to the *Competition Act* in recent years have extended this in particular to areas such as 'greenwashing' and ESG claims, which may implicate a manufacturer or distributor's advertising on a broad basis to include claims made by the company in respect of sustainability or environmental efforts.

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. Additionally, there are civil remedies available for breach of the *Competition Act* in respect of misleading or false advertising claims. 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. Retailers cannot contract out of any provisions of consumer protection laws that apply in the jurisdiction where a customer resides, regardless of the location of the retailer or manufacturer, or where the product is shipped from. In some jurisdictions (e.g. Ontario) clauses which restrict dispute resolution to arbitration or non-court proceedings are not enforceable. 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. Under the new Ontario consumer protection law, the inclusion of any such clause for application to Ontario residents risks making the entire agreement unenforceable.

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); and

— 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 it 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 is governed by the *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 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 online[1]. 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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1 Government of Alberta, "File a consumer complaint against a business", available online: **https://www.servicealberta. ca/file-a-complaint.cfm**.

PROPERTY DEVELOPMENT AND LEASING

By Annie Gagnon-Larocque and Marie-Josée Marcoux

PROPERTY DEVELOPMENT AND LEASING

The following aspects of property development and leasing will likely be of interest to retailers considering bricks and mortar locations in Canada, as well as distributors or manufacturers of consumer products.

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 Ontario properties, however, are in the land titles system, which is operated by the province pursuant to the *Land Titles Act* (Ontario) (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* (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.

MOST PROVINCES HAVE LEGISLATION GRANTING POWER TO MUNICIPALITIES TO REGULATE THE SUBDIVISION AND SERVICING OF LANDS.

Subject to certain exceptions, the *Planning Act* 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).

In the retail and consumer products context, 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 land owners 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

THE LIABILITY FOR IMPROPER ENVIRONMENTAL PRACTICES RUNS WITH THE LAND AND CAN BE INHERITED BY FUTURE OWNERS OF THE PROPERTY.

owners of the property, which is important in all types of real property transactions, including those in the retail space, such as the purchase of shopping centres, strip plazas and the like. In certain circumstances, any "guardian" of a property, such 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 regarding the particularities of foreign ownership of Canadian real property.

Some Taxes on the Transfer of Real Property in Canada

Withholding Obligations

The *Income Tax Act* (Canada) (the "ITA") contains provisions that protect Canada's ability to collect taxes when a non-resident disposes of "taxable Canadian property" (which can include Canadian real estate, shares of a corporation that holds Canadian real estate, property used in carrying on a business in Canada and other types of 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 situated in Canada that is capital property and up to 50% of the purchase price of land inventory situated 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 situated 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") 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") (which is 13% or 15% depending on the particular province) 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.

In general, if the purchaser is registered for GST/HST purposes and is acquiring the taxable real property for use, consumption or supply in the course of its commercial activities, it will generally be entitled to recover the GST/HST payable by way of claiming an input tax credit on its GST/HST returns such that there should be no cash flow implications for the purchaser in respect of the GST/HST self-assessment.

QST

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

PST

The provinces of British Columbia, Manitoba and Saskatchewan respectively levy a provincial sales tax ("PST") under their respective regime on the sale of tangible goods and certain taxable services. There is generally no PST applicable on the sale of real property in these provinces.

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 retail, manufacturing and distribution centres and mixed-use real property as well as hotels, casinos and other types of real estate 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, 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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DISPUTE RESOLUTION AND CONFLICT MANAGEMENT

By Stephanie Sugar, Diana Wang and Evie Bouras

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, and the ceiling in British Columbia is also C$35,000. The ceiling in Alberta is currently C$100,000, and in Québec it is C$15,000.

The superior courts of each province and territory try 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 to cases which deal with federal statutes or federal subject matter. The Court's jurisdiction includes inter-provincial and federal-provincial disputes, intellectual property proceedings, copyright and trademark disputes, citizenship appeals, *Competition Act* cases and cases involving Crown corporations or departments or the government of Canada. The Trial Division (also known as the Federal Court) 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. 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 to the Supreme Court of Canada 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 capped at 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. All 10 Canadian common law provinces have class proceedings legislation, as does the civil law jurisdiction of Québec, and procedure under the Federal Court rules. 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" (known as "authorization" in the province of Québec).

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 a 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. However, in general the certification of a class proceeding in Canada is a much lower bar than under the Federal Rules in the United States.

Alternative Dispute Resolution

Alternative Dispute Resolution 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 where consumer contracts are in issue. Consumer protection legislation in Ontario, for example, prohibits mandatory arbitration clauses from applying to consumer contracts. No such prohibition applies to contracts between businesses or for commercial operations.

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 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 are 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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ADVERTISING, MARKETING AND CONTESTS

By Casey Halladay

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 the greater of C$10 million in the case of a first offence by a corporation and three times the value of the benefit derived from the deceptive conduct or, if that amount cannot reasonably by determined, 3% of the corporation's annual worldwide gross revenues. The Commissioner can also seek an injunction before any determination of the merits. 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 it 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 the greater of C$10 million in the case of a first infringement by a corporation (C$15 million for subsequent infringements) and three times the value of the benefit derived from the deceptive conduct or, if that amount cannot reasonably by determined, 3% of the corporation's annual worldwide gross revenues.

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 has appointed a 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. Drip pricing has now been explicitly included as potentially reviewable conduct in the Act. The Competition Bureau has recently completed its first successful drip pricing application against Cineplex to the Tribunal, where Cineplex was ordered to pay a financial penalty of C$38.9 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.

Greenwashing

Allegations of companies engaging in misleading or unsubstantiated environmental claims, also known as "greenwashing," have proliferated in recent years. As Canadians have become more concerned about climate change, companies have returned in suit by creating products that are more sustainable and better for the environment. However, it is a deceptive marketing practice to make a representation in the form of a statement, warranty or guarantee of a product's benefits for protecting or restoring the environment or mitigating the environmental, social and ecological effects of climate change that is not based on an adequate and proper test. This reviewable conduct is not limited only to representations about a company's products; it also captures general representations as to the benefits of a business or business activity not based on adequate and proper substantiation in accordance with internationally recognized methodology.

If a corporation is found to have engaged in this type of reviewable conduct, it may be ordered to pay up to the greater of C$10 million in the case of a first infringement (C$15 million for subsequent infringements) and three times the value of the benefit derived from the deceptive conduct or, if that amount cannot reasonably by determined, 3% of the corporation's annual worldwide gross revenues.

While greenwashing was already an enforcement priority for the Competition Bureau, the addition of a specific greenwashing provision in the Act in 2024 will likely lead to even greater enforcement in this area.

Private Right of Access

Beginning June 20, 2025, private parties will be able to apply directly to the Competition Tribunal for allegations of deceptive marketing. To be successful, the Competition Tribunal will need to be satisfied that granting the private access application is "in the public interest." As this

test is different from that in place for private applications for other forms of reviewable conduct, it remains to be seen how this new test will be interpreted by the Competition Tribunal. This will undoubtably increase the number of cases litigated in this area, carrying with it greater risk for companies as it will allow for a new avenue for redress for consumers outside of the class action space. However, private parties will not be able to apply to the Competition Tribunal for disgorgement damages, thereby potentially limiting their incentive to utilize this stream of redress.

Contests and Promotions

Contests and promotions are highly valued marketing tools for retailers and consumer products manufacturers in Canada, who must pay close attention to how their contests and promotions are structured in order to comply with the restrictions under the *Criminal Code* (Canada) and the requirements of the Act. A retailer or 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 run the risk of being 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 retailer or consumer products manufacturer must also:

— Provide adequate and fair disclosure of the number and approximate value of the prizes and certain other information within the knowledge of the contest sponsor that would affect materially the chances of winning a prize (for example, the odds of winning and whether there is a regional allocation of prizes);

— 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, retailers or consumer products manufacturers offering a contest or promotion typically prepare "short-form rules" that contain the required information and other key contest conditions, and they 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).

Until October of 2023, Québec law and regulations imposed additional requirements on businesses and manufacturers that conducted contests open to Québec residents. For example, the provider of the

contest had to file a notice of contest as well as the contest rules and contest advertisements with the Régie des alcools, des courses et des 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). These requirements have been repealed, opening the Québec market up to contests offered in the rest of Canada without any incremental obligations.

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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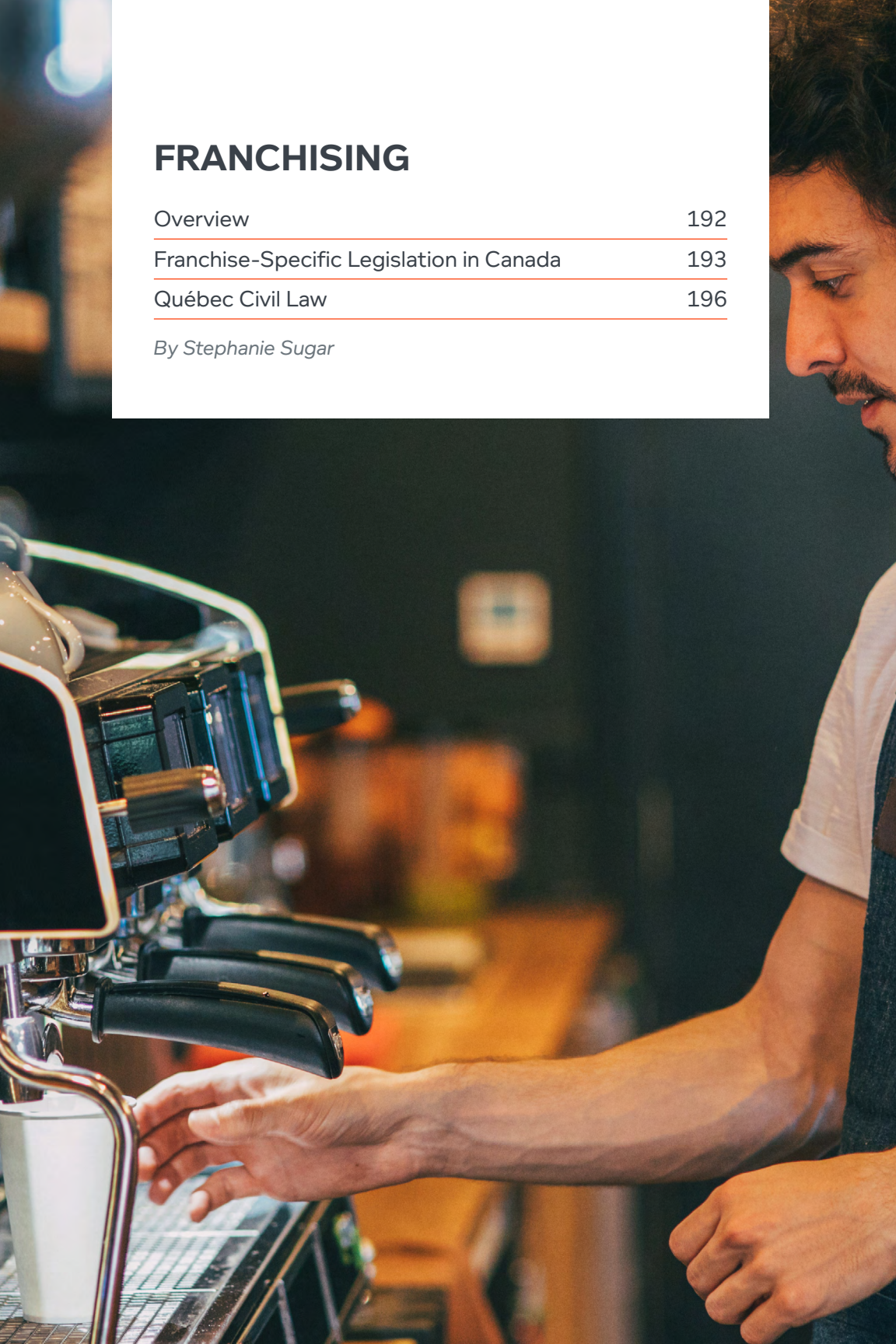
FRANCHISING

By Stephanie Sugar



FRANCHISING

Overview

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

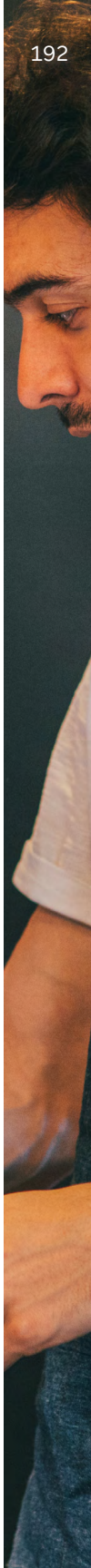
According to the Canadian Franchise Association, the leading national franchise industry group, approximately 1,200 franchised brands operate in Canada through 76,000 franchised units, employing one in 10 Canadians directly or indirectly in a franchised system and generate approximately C$120 billion 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, seven provinces have enacted franchise-specific legislation: Ontario, British Columbia, Alberta, Manitoba, New Brunswick and Prince Edward Island (Statutory Provinces), with Saskatchewan having also enacted legislation that is expected to come into force in 2024.

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 ("FDD"), 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 a franchise agreement (which is broadly defined and can be a lease or other type of agreement and not only the main commercial contract) or (ii) the payment of consideration by the franchisee. Certain provinces have enacted limited exemptions for contracts such as non-disclosure agreements or prospective location agreements, which can be signed without pre-contract disclosure.

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 that could reasonably and objectively be considered to have an impact on a franchisee's decision to make the investment in the franchise system.

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, (ii) disclosure of prior mismanagement of a location and (iii) whether the location or system is a new or 'untested' concept.

As a result of the expansive view that Canadian courts have taken to interpreting franchise legislation, 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, (iii) the franchisee acquires the franchise from a third party without any active involvement of the franchisor or (iv) the investment in the franchise is very large and there is a presumption that the franchisee is more highly sophisticated.

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 receive 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. Courts have held that certain deficiencies are 'fatal flaws' (e.g. the failure to provide a signed certificate or the requisite financial disclosure) and as such constitute an effective failure to provide disclosure.

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;

— To be loyal;

— 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;

— To avoid creating false expectations; and

— 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 program 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. v. 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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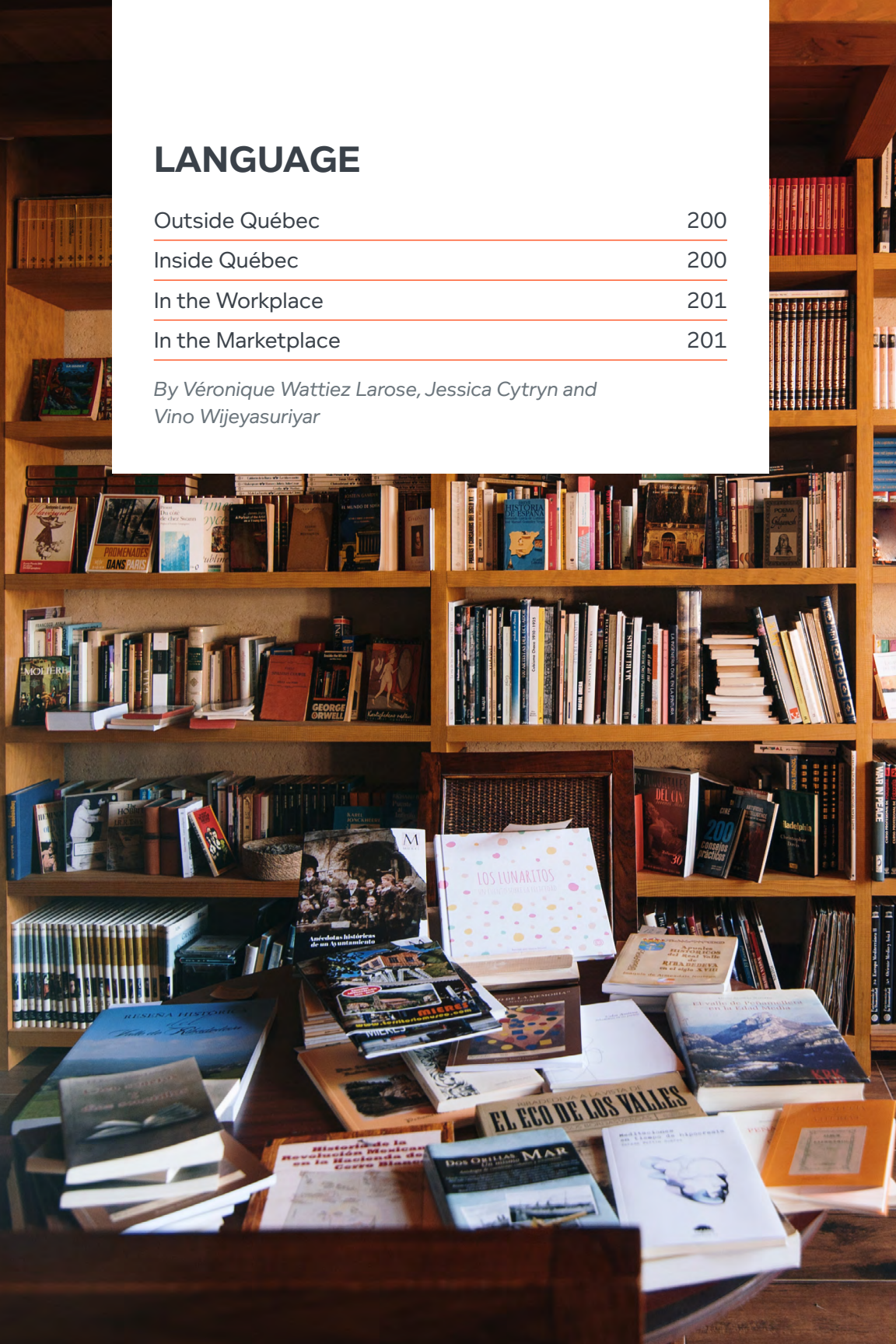
LANGUAGE

By Véronique Wattiez Larose, Jessica Cytryn and Vino Wijeyasuriyar



LANGUAGE

Canada's Constitution grants English and French equal status in Canada's Parliament and federal courts. In some provinces, every law must be published in both English and French, 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. Language rules in most of Canada apply primarily to government institutions, not private businesses.

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.

Although Canada is bilingual at the federal level, provincial and territorial 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* (the "Charter") affirms French as the province's only official language. The Charter grants French language rights to everyone in Québec, including workers and consumers. Those doing business in Québec are subject to rules about how they operate inside the province, including the language in which they interact with the public and with their employees, customers and business partners.

In the Workplace

In Québec, written communications with workers must be in French, including offers of employment and promotion and collective agreements. With limited exceptions, 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 and if the employer took all reasonable means to avoid requiring knowledge of the other language.

Starting on June 1, 2025, businesses that employ 25 people (current threshold is 50) within Québec for at least six months must register with a provincial regulator (the Quebec 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 100 employees or more must establish an internal francization committee that monitors the use of French in the workplace.

In the Marketplace

Product packaging and labelling: Every 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 include equivalent French text that is no less prominent than the non-French text displayed. There are some notable exceptions to this rule, including for certain software products and for cultural and educational products.

Trademarks recognized in Canada may appear exclusively in a language other than French on product inscriptions unless a corresponding French version of the mark appears on the Canadian trademarks register. Starting on June 1, 2025, generic terms and descriptions (excluding exceptions such as business names and product names) contained in non-French trademarks used on products and packaging will need to appear in French on the product or on a medium permanently attached to it.

Public signage: Public signs, posters and commercial advertising must be in French. These may include other languages, but the French text must have a much greater visual impact, defined as "marked predominance" (essentially twice the size) and have equivalent legibility and permanent

visibility as text in another language. Billboards and signs visible from a public highway, on a public transport vehicle or in a bus shelter must be exclusively in French. Pursuant to the newly introduced s. 27.7 in the *Regulation respecting the language of commerce and business*, public signage visible from outside premises must be accompanied by terms in French (in particular a generic term, description of the relevant products or services or a slogan) in order to meet the threshold for "marked predominance".

Similarly to the exceptions for product packaging, trademarks recognized in Canada may appear exclusively in a language other than French on public signs, posters and commercial advertising unless a corresponding French version of the mark appears on the Canadian trademarks register. Starting on June 1, 2025, where a non-French trademark appears on a public sign, poster or commercial advertising, the space allotted to overall French subject matter must have greater visual impact than the trademark, which is interpreted as being twice the size. It must also have equivalent legibility and permanent visibility.

Marketing and advertising: All marketing and advertising to the public, including websites, social media, leaflets, catalogues, brochures, order forms, invoices and receipts must include equivalent French text that is no less prominent than any non-French text displayed. This means that, for example, businesses operating in Québec must have a French version of their website that contains the same content as the English version.

Pre-determined contracts: Contracts whose essential elements are pre-determined by one party (such as order forms and website terms of use and privacy policies) must be drafted in French, and the French version must be presented to the party that did not draft the contract before such party can make the decision to be bound by a version in English or another language. Failure to do so may open the door to an action to cancel the contract.

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THREE SPECIAL CASES

By Martha Harrison, Ranjeev Dhillon, Evie Bouras, Rami Chalabi and Matthew Sanders.

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

1 *Food and Drugs Act*, R.S.C. 1985, c. F-27, s. 2.

licence application package consists of a number of elements, which may 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**. Note that recent proposed changes to packaging and labelling requirements are expected to make labelling simpler and potentially allow for more brand differentiation.

Cannabis

With the enactment of the *Cannabis Act*, 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-licences 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; and

— 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. 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* (the "Act") and its 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). The *Safe Foods for Canadians Act* and its regulations aim 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's regulations prescribe 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, mezcal 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 pre-packaged cocktail) requires a list of ingredients on its label, whereas standardized products like vodka and gin do not.

After more than 30 years without an update, the product standard rules for beer contemplated in the Act were amended in 2019 in order to adapt to the rapidly growing craft and flavoured beer market. Among other things, these long-awaited amendments changed the product standard definition of beer to include certain authorized flavourings and additives including honey and herbs.

International manufacturers should not presume that global product standards and labelling will work in Canada. Not only does Canada have additional translation and label content requirements, vignettes and claims on product are also strictly monitored. In particular, illustrations and narratives that advertise alcoholic content, "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 alcohol 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 provincial 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 *Canada-United States-Mexico Agreement* ("CUSMA"), 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 and territory 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 SAQ, for example, has a *Purchasing and Merchandising Policy*, 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," 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. We also note that each province in Canada has

enacted legislation regarding alcohol advertising within their jurisdiction that may or may not align with the principles outlined in the Code. Certain provinces have additional requirements. For example, there is the need to include a social responsibility message in all advertising in Manitoba (e.g."Please drink responsibly").

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 and the development of low-alcohol, non-alcoholic and de-alcoholized beverage categories will have a significant impact on standards, sales, profitability and consumer choice.

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DIRECT TO CONSUMER

By Chrystelle Chevalier-Gagnon

DIRECT TO CONSUMER

An attractive sales channel for many consumer brand manufacturers continues to be the Direct-to-Consumer ("D2C") model. 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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McCARTHY TÉTRAULT PROFILE

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 are connected with industry leaders and engage with industry associations. These connections, along with 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 representative offices 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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