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Cross-Border

A Retailer's Guide to
Doing Business in Canada

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A Retailer's Guide to Doing Business in Canada

third edition

FOREWORD

McCarthy Tétrault LLP's Retail and Consumer Markets Group is pleased to present the third edition of *Cross-Border: A Retailer's Guide to Doing Business in Canada*. As we celebrate our 10th anniversary, the Retail and Consumer Markets Group would like to thank our clients and supporters for the opportunity to work together and have an impact on the retail and consumer markets landscape across Canada.

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

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INTRODUCTION



INTRODUCTION

What are the key considerations for retailers carrying on business in Canada? What are the potential opportunities, and where are the possible pitfalls?

Cross-Border: A Retailer's 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 retail business in Canada.

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

The discussion in each chapter is intended to provide general guidance, and is not an exhaustive analysis of all provisions of Canadian law with which your business may be required to comply. For this reason, we recommend that you seek the advice of one of our lawyers on the specific legal aspects of your proposed investment or activity. With offices in Canada's major commercial centres, as well as New York City and London, U.K., McCarthy Tétrault has substantial presence and capabilities to help you successfully establish and operate a retail 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 August 1, 2019.

**CROSS-BORDER: A
RETAILER'S 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 RETAIL
BUSINESS IN CANADA.**

CANADIAN MARKET ENTRY: KEY CONSIDERATIONS

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By Lara Nathans

CANADIAN MARKET ENTRY: KEY CONSIDERATIONS

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

Tax and Corporate Structure Considerations

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

Customs and Trade

Consider administrative and regulatory issues in your supply chain design. Certain governmental agencies, such as the Canada Border Services Agency, have significant rights to regulate the importation of goods. Certain categories, such as apparel and accessories, have relatively high duty rates, which should be considered in strategy and projections.

Labour and Employment

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

There is no "at will" employment in Canada. Unlike the United States and other countries, unless the employment agreement specifies a

particular termination package, or there is a legal justification for a termination, an employer must provide reasonable notice of termination or pay in lieu of notice.

E-commerce

Canadianize your terms and conditions. Issues relevant to establishing a Canadian website include compliance with Canadian provincial e-commerce and consumer protection legislation; security; domain name acquisition and meeting “Canadian presence requirements;” meeting foreign ownership restrictions on the sale of “cultural products;” meeting French language requirements applicable for selling into or in Québec; and legal issues relating to marketing, advertising, contests and promotional programs.

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 retail goods, including the advertising of sale and bargain prices, claims of what constitutes “ordinary” prices, and issues of price fixing, price maintenance, and price discrimination. Retailers must understand these parameters when establishing their marketing and pricing strategies. Advertising and promotions law in Canada is generally regulated federally by the *Competition Act*. 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. Foreign retailers need to ensure that they are compliant with the various consumer protection regimes in Canada, including applicable federal and provincial laws and legislation across Canada related to consumer



protection. Consider a robust compliance program that addresses issues such as disclosure, returns, claims and pricing.

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 retailers from coast to coast to coast, including unique laws in certain provinces. Your plan should start with a customer-facing privacy policy and an incident response plan, as Canada now has mandatory breach notification for data breaches. Also, do not make the mistake of thinking GDPR compliance means compliance in Canada.

Anti-Spam Legislation

Canadian anti-spam legislation (CASL) applies to you even before you enter Canada. Get compliant with Canada's anti-spam legislation, which is one of the toughest in the world. The laws apply even to organizations outside of Canada to messages that are received in Canada. Penalties can be as high as C\$10 million and the regulator has not hesitated to go after legitimate businesses for their email and text messaging practices.

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By Lara Nathans and Matthew Harris



MERGERS AND ACQUISITIONS

The retail sector has experienced significant mergers and acquisitions activity in recent years, including acquisitions by both financial investors and strategic purchasers, as well as acquisitions of businesses that offer e-commerce, data analytics or digital capabilities, or offer pure play e-commerce platforms physical store opportunities.

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

Acquisition of a Private Business

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

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

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

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

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

Mergers & Acquisitions of Public Companies

Take-Over Bids

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



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

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

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



Generally, under corporate statutes, where a bidder successfully acquires 90% of the voting shares of a target corporation (other than shares held by it or its affiliates prior to making the offer) pursuant to a public takeover bid made to all shareholders, the shares of those who did not tender their shares to the offer can be acquired at the same price as under the offer pursuant to a statutory compulsory acquisition procedure. Where this procedure is not available because the 90% threshold has not been reached, but at least 66 $\frac{2}{3}$ % 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 $\frac{2}{3}$ %).

Related-Party Transactions

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

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



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

Key Considerations for Retailers

Key issues retailers should consider in acquiring new businesses (whether bricks and mortar, e-commerce, digital or some combination of the foregoing) include:

- Due diligence and representations and warranties regarding consumer protection, data protection, privacy and anti-spam.
- Other key issues include brand protection, employment law issues and loyalty and credit card program, if applicable.
- Potential consents that may be required, such as landlord, supplier or customer consents, and the relationships with the third parties that require such consent.
- Any restrictive covenants in agreements entered into by the target or the vendor that will present an issue for the purchaser.
- The transfer of some permits and licences, even due to a change of control, may require approval of the applicable governmental authority. Certain types of permits and licenses may not be transferred and a new permit or license of such nature will need to be obtained.
- Acquisitions of Canadian businesses are subject to the *Competition Act* (Canada) and acquisitions by foreign acquirors are subject to the *Investment Canada Act*. See **Competition 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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By Oliver Borgers and Dominic Thérien

COMPETITION AND PRICING

The federal *Competition Act* (Act) contains both criminal and civil provisions aimed at preventing certain deceptive advertising practices (discussed in greater detail in [Advertising, Marketing and Contests](#)) and sets out prohibitions on how competitors may deal with each other, as well as how businesses treat their customers and suppliers. There are criminal sanctions against persons involved in arrangements with competitors that fix prices, restrict supply or allocate customers or markets, or that are involved in bid-rigging, deceptive telemarketing, or wilful or reckless misleading advertising. The Act's non-criminal or civil provisions allow the Competition Tribunal, on application by the Commissioner of Competition, 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 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 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 and refusal to deal.

Criminal Offences

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

Penalties for persons found guilty of such activities include imprisonment for up to 14 years and/or multi-million dollar fines. A violation of the criminal provisions of the Act can also result in a civil suit for damages by

persons who have suffered a loss as a result of such violation. Competition class actions involving allegations of price-fixing are frequent.

An area that can represent a significant risk relating to potential or perceived price-fixing behaviour is participation in a trade association, or similar organizations, where competitors get together. While trade associations are legitimate and serve a useful purpose, they are perhaps the most fertile ground for allegations of price-fixing conspiracies. Competition and anti-trust 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 C\$15 million) by the Competition Tribunal if it results in a substantial lessening of competition. To start with, there must be a *dominant position or control of a market*. A monopoly is not a prerequisite, but there must be a relatively high market share and barriers to entry, such that the dominant firm or firms can, to a substantial degree, dictate market conditions and exclude competitors.

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

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



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.

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

PRICE MAINTENANCE PRACTICES ARE COMMON IN MANY MARKETS AND CAN BE PRO-COMPETITIVE. HOWEVER, IN SOME CIRCUMSTANCES, PRICE MAINTENANCE MAY ADVERSELY AFFECT COMPETITION.

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.

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

by, for example, encouraging retailers to engage in marketing efforts for a particular product. However, in some circumstances, price maintenance may adversely affect competition. For example, price maintenance may be found to be anti-competitive (i.e. has an “adverse effect on competition”) if: (i) price maintenance facilitates less vigorous price competition among suppliers; (ii) retailers compel a supplier to adopt price maintenance to facilitate less-vigorous price competition among retailers or to exclude discount retailers; or (iii) an incumbent supplier uses price maintenance to guarantee margins for retailers to make them unwilling to carry the products of rival or new entrant competitors to the supplier.

Where the Competition Tribunal finds, on application by the Commissioner of Competition or private parties, that price maintenance conduct is likely to adversely affect competition, it can make a remedial order prohibiting the conduct or require the supplier or retailer (as the case may be) to do business with another person on usual trade terms. The Competition Tribunal cannot fine or make other monetary awards for unlawful price maintenance. However, where conduct attracts the Competition Bureau’s attention, it is important to keep in mind that 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 none of the potential suppliers is willing to deal with the company. For the Act to apply, the following requirements must be met:

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

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

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

Exclusive Dealing, Tied Selling and Market Restriction

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

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

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

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

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

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

The Commissioner of Competition can review and challenge all mergers (meaning the acquisition of control over a significant interest in the whole or a part of a business), whether or not they are subject to pre-merger notification requirements under the Act (as described below), within one year of closing. If the Commissioner believes that a merger is likely to prevent or

THE COMMISSIONER OF COMPETITION CAN REVIEW AND CHALLENGE ALL MERGERS, WHETHER OR NOT THEY ARE NOTIFIABLE, WITHIN ONE YEAR OF CLOSING.

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. The Act includes a list of criteria to be considered by the Competition Tribunal when determining whether a merger substantially lessens competition. Such criteria are generally similar to those found in U.S. case law, although their application may be different. The Act also provides a uniquely Canadian “efficiencies defence” to anti-competitive mergers, which applies in cases where the efficiencies from the merger are likely to be greater than and offset the transaction’s anti-competitive effects.

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 or from Canada generated by those assets, exceeds C\$96 million (2019; this threshold is adjusted annually). Equity investments are also notifiable if the financial thresholds are met and the applicable equity thresholds are exceeded (more than 20% in the public company context, more than 35% in the private or non-corporate entity context or an acquisition of more than 50% of a public company 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.

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BRANDING AND INTELLECTUAL PROPERTY PROTECTION

Branding and intellectual property protection are key areas of concern to retailers.

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

Trademarks

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

In 2019, the *Trademarks Act* underwent significant amendments as a result of Canada's 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 years. Accordingly, for trademark registrations issued after June 17, 2019, the first term of a trademark registration is for 10 years and is renewable for successive 10-year terms on payment of a renewal fee. While a trademark endures for as long as the owner uses it to identify his or her wares or services, registrations can be attacked on the basis of non-use or invalid registration.

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

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

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

Pursuant to the USMCA, Canada is required to provide a scheme for “pre-established damages” for trademark infringement, with the damages being “in an amount sufficient to constitute a deterrent to future infringements and to compensate fully the right holder for the harm caused by the infringement.” Canadian trademark law has never had pre-established damages; how the Canadian government proposes to do so remains to be seen.

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

Patents

The *Patent Act* provides that any new, useful and unobvious invention that falls within the statutorily defined categories, namely, art, process, machine, manufacture or composition of matter (or any improvement of any of these) is patentable. Higher life forms per se are not patentable, but engineered genetic material and cell lines containing such genetic material typically are patentable. Algorithms per se are not patentable, but computer program products or methods that implement a tangible solution, or produce a discernable effect or change, generally are patentable.

A patent grants its owner the exclusive right in Canada to make, sell or use the invention for a fixed term. In general, the first inventor to file for patent protection will be entitled to a patent. There is no requirement that the invention be made in Canada. The application in Canada must generally be filed 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, but an application by another inventor with an earlier filing date will effectively prevent the grant of a patent. It is therefore important to file as early as possible in Canada or in a *Paris Convention* country, and not rely on the grace period. The making of an invention available to the public includes publication (e.g., by publication of an earlier patent application or by distribution of a product embodying the invention). Pending patent applications will be published by the Canadian Intellectual Property Office 18 months after the earliest filing date claimed by the applicant. The patent will last for a maximum of 20 years from the date of filing in Canada, provided all annual maintenance fees are paid in a timely manner.

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 previously held that Amazon’s application did not qualify as having patent eligible subject matter under the *Patent Act*, and the Federal Court overturned this decision. In late 2011, the Federal Court of Appeal allowed the appeal of the Federal Court’s decision. The Court of Appeal dismissed the view that a business method may become patentable subject matter merely because it has a practical embodiment or a practical application, but the Court of Appeal agreed with the trial judge that patentable subject matter must either be 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. The Amazon.com decision is thought by many to herald a new era of increasing acceptance for patents directed to computer-implemented inventions and business methods in Canada.

Other patent decisions of note in Canada in recent years have included a unanimous Supreme Court of Canada decision, which held that Pfizer Canada’s patent describing and claiming sildenafil, the active ingredient for the prescription drug VIAGRA,[®] failed to satisfy the disclosure requirements of the *Patent Act* because the person skilled in the art would have to conduct further testing to determine which of two stated compounds in the specification would actually work. On June 30, 2017, the Supreme Court of Canada rendered its decision on the promise of the patent doctrine in *AstraZeneca Canada Inc. v. Apotex Inc.* This doctrine allowed patents to be invalidated on the basis of a lack of utility due to a failure to fulfil promises identified from the specification and the claims, and it was used to invalidate Astra Zeneca’s patent covering specific salts esomeprazole at both trial and appeal level. In its decision, the Supreme Court stated that the promise of the patent doctrine is unsound, has no basis in the *Patent Act*, and is “incongruent with both the words and scheme of the *Patent Act*.” The court also stated that utility should be assessed using a two-step analysis: (i) identify the subject matter of the invention as claimed; and (ii) whether the subject matter is useful — is it capable of a practical purpose. The court also confirms that a scintilla of utility will be sufficient to satisfy the utility requirement and the utility does not have to be disclosed in the disclosure.

As a result of CETA, in September 2017, the *Patent Act* was amended to provide for the issuance of Certificates of Supplementary Protection to compensate patentees for the effective loss of patent term due to delay as a result of pursuing drug regulatory approval in Canada. Notice of Compliance summary proceedings in Canada has also been replaced with full actions that will result in final determinations of patent infringement and validity.

Proposed amendments to the *Patent Act*, which include amendments for implementation of the *Patent Law Treaty*, are scheduled to come into force in October 2019. Some notable changes include shortened time frames during prosecution, removal of reinstatement as of right, removal of the grace period to enter national phase in Canada within 42 months of the filing date of a PCT application, and correction of Patent Office errors.

The USMCA requires Canada to enact a system for restoring patent term for unreasonable delays in the prosecution and issuance of any patents. “Unreasonable delay” is defined in the USMCA to include at least a delay in the issuance of a patent of more than five years from the date of filing of the application, or three years after a request for examination of the application has been made, whichever is later. This brings Canada in-line with the U.S. system of compensating patentees for both regulatory delays and for prosecution delays.

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

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

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

The USMCA requires the term of copyright protection to extend from life of the author plus 50 years to life of the author plus 70 years. Canada will have 2.5 years to fully implement this requirement.

Industrial Designs

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

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

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



registration for the design (which would provide indefinite protection if there is continued use of the design).

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

Domain Names

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

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

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

In Canada, some trademark owners have successfully used the doctrine of “passing off” in combating so-called “cybersquatters.” In other cases, they have argued trademark infringement under the *Trademarks Act*. To gain control of a domain name, it might also be possible to argue “depreciation of goodwill” under s.22 of the *Trademarks Act* as well as misappropriation of personality rights.

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

Other Intellectual Property

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

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By Lisa Melanson and Young-mi Lee



PACKAGING AND LABELLING

Products sold in Canada are subject to a wide range of packaging and labelling requirements. In the context of a retail operation, these requirements serve a unique and important consumer-protection function. Consistent labelling permits consumers quickly and easily to locate pertinent information when considering purchases. Retailers, manufacturers, and distributors must pay close attention to the labelling on their products, as a deficient label creates a risk that a product will have to be pulled from the shelves and re-labelled — a time-consuming and expensive process. Even worse, an organization with defective product labelling could face the more serious risk of a fine or a product-liability lawsuit. For further details on post-marketing compliance issues, see [Product Liability and Regulatory Compliance](#).

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

Consumer Packaging and Labelling

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

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

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

Health Canada and its food-safety branch, the Canadian Food Inspection Agency (CFIA), are responsible for administering and enforcing regulations relating to food 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 from 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 panel¹ in both English and French.
- The "net quantity" declaration must be expressed in metric units using metric symbols (g, kg, cm, etc.) on the principal display panel in both English and French. A valid metric symbol is deemed to be bilingual.
- The dealer identification, represented by the name and mailing address of the place of business of the person (individual, corporation, business, head office, distributor, importer) by or for whom the product was manufactured or produced, is required and must be shown in either English or French. If the address of a Canadian dealer is shown on the package of an imported product, it must be preceded by the words "imported by" ("*importé par*") or "imported for" ("*importé pour*") in both English and French or be immediately adjacent to the geographic origin of the product. This information can be included anywhere on the package except the bottom.²

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 popular classes of products.

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1. 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.
 2. The bottom is considered to be that part of a container which may reasonably be expected to be the surface on which the container rests when displayed for purchase. If a container is labelled or printed in such a way that it may reasonably rest on any of the sides, then there is no bottom.



Toys and Baby Products

In accordance with the *Toys Regulations* of 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. Recent amendments to the *Toys Regulations*³ include provisions specific to magnetic toys, with requirements for warnings on the containers and instructions of kits containing magnetic components. Toys that include chemicals may require specific labelling per the *Science Education Sets Regulations* of the CCPSA. With respect to electric toys, labelling must meet standards set by the Canadian Standards Association (CSA).

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

Electronics

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

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

3. The *Toys Regulations* amendments relating to magnets were registered on June 25, 2018.

Radio apparatus, interference-causing equipment, and radio-sensitive equipment are regulated by the RA and RR. The RA and RR require labelling on radio products to show that government standards are met, and provide for technical acceptance certificates in certain cases. The federal government's Spectrum Management program has overall responsibility for enforcing the RA and RR.

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

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

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

Jewelry

If a dealer chooses to mark jewelry products with representations relating to the quality of precious metals, such as silver, gold, platinum, and palladium, the *Precious Metals Marking Act* and *Precious Metals Marking Regulations* will govern. The quality mark must be true and accurate and conform with the standards and tolerances provided in the regulations, and must be supported by a Canadian trademark application or registration.

Textile Articles

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



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

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

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

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

Food

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

Health Canada and the CFIA share responsibility for food labelling. Health Canada administers regulations and standards relating to the health, safety, and nutritional quality of food under the FDA (e.g., nutrition facts table, claims about nutrients, presence of food allergens, safety-related

expiration dates). The CFIA administers regulations under both the FDA and the SFCA relating to misrepresentation, labelling, advertising, and standards of identity of food products. The CFIA alone is responsible for enforcing all regulations governing food labelling.

In accordance with the FDR and SFCR, a prepackaged food product for human consumption⁴ 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) a list of ingredients, including a declaration concerning the presence of food allergens or gluten; (v) a nutrition facts table; and (vi) a "best before" date and storage instructions. The requirement for an allergen declaration only applies to food allergens added to prepackaged food — not to allergens that result from cross-contamination. With respect to incidental allergen contamination, precautionary declarations, like the familiar "may contain peanuts" warning, are not mandated by any legislation and are considered voluntary. However, 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 *Safe Food for Canadians Regulations* also provide 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.

Amendments to the FDR relating to nutrition labelling, ingredient lists, and food colouring took effect on December 14, 2016. The food industry has been given a five-year transition period (until December 14, 2021)⁶ to meet most of the new requirements, other than those relating to food colour. The amendments are intended to introduce more uniform standards for food labelling by improving the requisite nutrition facts

4. Food products intended for animal consumption are not governed by the FDA and FDR. Labelling of feeds for livestock is regulated by the CFIA under the *Feeds Act* and *Feeds Regulations*, while labelling of foods for pet animals is regulated by the Competition Bureau under the CPLA and CPLR.

5. The dealer's name and address may be in either English or French.

6. Health Canada recently proposed that this transition period be extended to December 14, 2022.

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

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

Health Products / Self-Care Products

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

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

Health Canada is responsible for administering and enforcing these regulations.

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

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

Cosmetics

Cosmetics are defined under the FDA as "any substance or mixture of substances manufactured, sold or represented for use in cleansing,



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

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

Natural Health Products

Natural health products (NHPs) include vitamins and minerals, herbal remedies, homeopathic medicines, traditional medicines (such as traditional Chinese medicines), probiotics, and other products, like amino acids and essential fatty acids, intended for human use. 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 provided in the NHPR.⁸

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

NHPs require outer and inner labels. The principal display panel of both the inner and the outer label must bear the following: (i) a brand name; (ii) the product identification number assigned by Health Canada; (iii)

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7. Each ingredient must be listed using the name assigned by the *International Cosmetic Ingredient Dictionary and Handbook*. This is commonly referred to as the “INCI name” of the ingredient.
 8. Similar products intended for animal use, so-called veterinary health products (VHPs), are not subject to the NHPR and must follow the labelling rules of the FDR.

the dosage form; (iv) the words “sterile” and “stérile” (where applicable); and (v) the net amount in the immediate container, represented by weight, measure, or number. In addition, the outer label must list all non-medicinal ingredients by common name, under the heading “non-medicinal ingredients.” Other information, such as the name and address of the product licence holder, the common name of each medicinal ingredient, the recommended use or purpose, the recommended dose, the recommended storage conditions, and the expiry date, can be listed on any panel.

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

Cannabis

The *Cannabis Act* (CA) came into force on October 17, 2018, along with two sets of supporting regulations: the *Cannabis Regulations* and the *Industrial Hemp Regulations*. The new 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 prohibitions in the CA (e.g., cannot appeal to young persons, child-resistant packaging, etc.) still apply to cannabis-containing prescription drugs.

The legal sale of three new classes of cannabis products — cannabis edibles, cannabis extracts, and cannabis topicals — will be authorized under the CA as of October 17, 2019. The *Cannabis Regulations* have been amended to account for the new cannabis classes, which will be subject to the core plain packaging and labelling requirements that currently apply to regulated cannabis products. The amended regulations also include provisions specific to the new classes, in order to address such risks as accidental consumption, overconsumption, and foodborne illnesses. Under the new provisions, product claims for health benefits (e.g., “oat 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 edibles require the packaging and labelling to show a list of ingredients, the common name of the edible product, identification of certain allergens, a best-before date where applicable, and a cannabis-specific nutrition facts table.

Tobacco and Vaping Products

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

The *Tobacco Products Regulations (Plain and Standardized Appearance)* were registered on April 24, 2019 and will come into force on November 9, 2019. These regulations include measures that standardize the appearance of, and information on, tobacco products and their packaging. Brand colours, logos, and other images are no longer permitted; rather, a plain brown colour must be used for product packaging. Manufacturers must comply with the new labelling rules as of November 9, 2019, while retailers can sell products with both old and new types of labelling until February 7, 2020.

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 4 grams of fibre per serving, according to the FDR. Similar restrictions exist for claims concerning the composition and quality of a product, the method of production, and the use of pictures on product labels.

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

Environmentally Friendly and Green

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

When an environmental claim is made on a product label, it must be specific as to the environmental aspect or environmental improvement that is claimed, and must be substantiated and verified. By way of example, a statement that “this product uses 20% less electricity in normal use than our previous model” is recommended over a statement that “this new and improved product is better for the environment” or “this product uses green electricity.”

Free

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

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

Pure and 100% Pure

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

Natural

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

Organic

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



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, the products cannot carry the Canada Organic Logo or an organic claim unless their organic content is 95% or higher. Products with less than 70% organic content are ineligible for an organic-ingredients claim, and can only identify which ingredients are organic in the ingredients list.

Local

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

Product of Canada and Made in Canada⁹

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

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

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

Promotional Contests on Product Labels

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

Two pieces of legislation regulate on-pack contest advertising. Under the *Competition Act*, there are minimum disclosure requirements for contests; under the *Criminal Code*, it is an offence to conduct an “illegal lottery.” In order to comply with the disclosure requirements and to avoid classification as an “illegal lottery,” a contest’s on-pack advertisement must, at a minimum: (i) indicate “No purchase necessary;” and (ii) disclose the number and approximate value of prizes, the areas to which the prizes relate, and any important information relating to the chances or odds of winning. The information should be provided in a reasonably conspicuous manner before the potential entrant is inconvenienced in some way or becomes committed to the advertiser’s product or to the contest.

Imported Goods

The Canada Border Services Agency administers the *Marking of Imported Goods Order*. The purpose of the order is to communicate



to consumers that certain products are not made in Canada. This protectionist scheme, administered under the *Customs Act* and the *Customs Tariff*, requires a permanent “country-of-origin” statement to appear on 60 different categories of non-food goods that are imported into Canada. The categories are quite varied and include such items as bicycles, sink strainers, watch bracelets, and gift wrap. The “country-of-origin” statement must be legible and will normally take the form of “Made in X.”

Under the *Customs Tariff*, there are different sets of regulations for the goods of NAFTA and non-NAFTA 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

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.

Québec has extensive French language requirements for all packaging and labelling under the province’s *Charter of the French Language (Charter de la Langue Française)*. Under this Charter, “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 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. Québec’s *Act Respecting Lotteries, Alcohol, Publicity Contests and Amusement Machines* impacts how a contest can be run in that province.

Upcoming Changes

The Canadian regulatory landscape has undergone sweeping changes with cannabis legalization and the new Safe Food for Canadians regime, both of which impact labelling requirements for food and health products. Further changes to packaging and labelling requirements can be expected as Health Canada and the CFIA continue their modernization of Canada’s regulatory frameworks.



Food Labelling Modernization

The CFIA launched its Food Labelling Modernization (FLM) initiative in 2013. Under this initiative, the CFIA has proposed food labelling changes in the FDR and the SFCR¹⁰ that will impact: (i) date marking; (ii) company contact information; (iii) identification of the origin of imported products; (iv) legibility and location of label information; (v) percentage declaration of characterizing ingredients; (vi) test market foods; (vii) standard container sizes; (viii) class names; and (ix) commodity-specific labelling requirements. The CFIA intends to implement these changes on a rolling timeline, starting in the summer of 2020 and ending in 2026.

Front-of-Package Nutrition Labelling

As part of its Healthy Eating Strategy, Health Canada has proposed amendments to the FDR relating to front-of-package nutrition labelling.¹¹ These amendments target prepackaged food products containing nutrients of public health concern (sodium, saturated fats, and/or sugars) at or above certain thresholds, requiring warning symbols on their front packaging.

Key Date of December 14, 2022

The Government of Canada is proposing to align various labelling changes so that they all take effect on December 14, 2022. All transition periods that have been granted to industry for compliance with the new rules relating to nutrition facts tables and ingredient lists,¹² and with the labelling changes for beer and vodka,^{13, 14} would expire together on December 14, 2022. Similarly, the FLM initiative proposes a transition period for a significant portion of labelling amendments to continue until December 14, 2022, to align the timeline with that of other labelling changes.

Food Labelling Claims: Product of Canada and Made in Canada

The CFIA is in the process of amending its guidelines for “Product of Canada” and “Made in Canada” food labelling claims. The public

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

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

12. The transition period is currently set to expire on December 14, 2021, with the possibility of an extension to December 14, 2022.

13. The amendments to the FDR (Beer) took effect on April 15, 2019; industry has been given a transition period until December 14, 2022 to comply.

14. The amendments to the FDR (Vodka) took effect on June 17, 2019; industry has been given a transition period until December 14, 2022 to comply.



consultation ended on June 23, 2019. The proposed changes are intended to help Canada's food industry better promote Canadian products domestically, with the revised guidelines appearing less restrictive than the current guidelines.

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

Self-Care Framework

Health Canada is planning to update the regulation of so-called self-care products — NHPs, cosmetics, and non-prescription drugs — to bring their distinct regulatory regimes into alignment. Health Canada has been conducting public consultations in connection with the proposed updates. The revised regulatory framework is intended to improve labelling for NHPs, to align with the requirements for non-prescription drugs, and will roll out in phases over the coming years.

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By John Boscariol



SUPPLY CHAIN, TRADE & CUSTOMS

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

Understanding the rules that apply to the import and export of retail 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 into the retail space, some of whom may be importing for the first time, Canadian customs law can come nearly as an afterthought. Even experienced retailers can have issues stemming from incorrect customs declarations, using the wrong methods for determining valuation of the products being imported, or failing to properly account for special duties imposed as a result of Canada's trade-remedy process. Attending to these issues at the early stages of the design and implementation of the supply chain will help ensure that goods, services and technology in the retail sector 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 *North American Free Trade Agreement* (NAFTA), the *Comprehensive Economic and Trade Agreement* (CETA) with the EU, the *Comprehensive and Progressive Trans-Pacific Partnership* (CPTPP), the *Canada-Korea Free Trade Agreement* (CKFTA), and numerous other regional trade and investment protection agreements.

Duties and Taxes on the Importation of Goods

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

As importers, they are required to declare imported goods upon entry into Canada and to pay customs duties and excise taxes, if applicable, to Canada's customs authority, the Canada Border Services Agency (CBSA). Goods are subject to varying rates of duties depending upon the type of



commodity and its country of origin. As a member of NAFTA, Canada accords preferential tariff treatment to goods of U.S. and Mexican origin as determined under NAFTA Rules of Origin; in most cases, these goods may be imported duty-free.

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

Classification

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

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

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

Origin and Preferential Tariff Treatment

Once the proper 10-digit tariff item code has been identified, the importer must determine whether a preferential tariff treatment applies.



For a preferential treatment to apply, the good must be determined to be “originating” under the rules of origin of the applicable trade agreement. Importers should obtain a “Certificate of Origin” from either the vendor or manufacturer of the goods they intend to import. The Certificate of Origin is confirmation from the manufacturer that the goods meet the technical rules of origin for a particular good. Without the Certificate of Origin, an importer cannot claim the preferential tariff rate.

Valuation

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

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

Verification

As mentioned above, customs declarations are self-assessed in a manner similar to other taxes. However, as with other taxes the tax authority (in this case the CBSA) maintains the right to verify and audit importers to ensure goods have been properly declared, customs duties properly assessed, and, if necessary, the proper permits have been obtained.

In the ordinary course, imports are subject to verification any time in the

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

Importers are required under Canadian law to correct any errors in classification, origin or valuation within 90 days of having reason to believe such declarations are incorrect if the correction of the error results in either duties being owed or if the change is revenue neutral. If correcting the error would result in a refund of duties, the importer is not under an obligation to correct. In addition, if the refund is to be paid as a result of the application of a preferential tariff rate (for example, a good was later discovered to be U.S.-origin under NAFTA), the adjustment must be brought no later than one year after importation.

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

Other Requirements for Imported Goods

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

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

There are also significant legislative requirements relating to the

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

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

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

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 retailers. 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.

The North American Free Trade Agreement

NAFTA came into effect on January 1, 1994, and provided for the elimination of trade barriers among Canada, the United States and Mexico. Between Canada and the United States, the process of tariff elimination initiated pursuant to the *Canada-United States Free Trade Agreement* that came into effect on January 1, 1989 was continued

under NAFTA. On January 1, 1998, customs duties were completely eliminated with respect to U.S.-origin products imported into Canada, with the exception of certain supply managed goods (including dairy and poultry products). Effective January 1, 2003, virtually all customs tariffs were eliminated on trade in originating goods between Canada and Mexico.

In November of 2018, Canada, the United States and Mexico concluded negotiations on the modernization of NAFTA and signed the *Agreement between Canada, the United States of America, and the United Mexican States* (CUSMA). It is expected that Canada will implement CUSMA in the winter of 2019. However, while Mexico has already fully ratified CUSMA, it is unknown at this time whether there will be sufficient support in the U.S. Congress for it to be implemented in the United States. Pending ratification by all three parties to CUSMA, NAFTA remains in force. Although CUSMA does not propose radical changes to NAFTA, importers of U.S.-origin goods should be carefully reviewing the new arrangement, and in particular its strengthened rules of origin, to ensure they can address any necessary impact and changes to their supply chains.

While NAFTA eliminates tariff barriers among Canada, Mexico, and the United States, each country continues to maintain its own tariff system for non-NAFTA countries. In this respect, NAFTA differs from a customs union arrangement of the kind that exists in the European Union, whereby the participating countries maintain a common external tariff with the rest of the world. A system of rules of origin has been implemented to define those goods entitled to preferential duty treatment under NAFTA. Goods wholly produced or obtained in Canada, Mexico or the United States, or all three countries, will qualify for preferential tariff treatment, as will goods incorporating non-NAFTA components that undergo a prescribed change in tariff classification, and that in some cases satisfy prescribed value-added tests. Provided NAFTA rules of origin are satisfied, investors from non-NAFTA countries may establish manufacturing plants in Canada through which non-NAFTA products and components may be further processed and exported duty-free to the United States or Mexico.

NAFTA Chapter 11 imposes obligations on Canada concerning its treatment of investors of other NAFTA countries. It also contains an



investor-state dispute settlement (ISDS) mechanism, which permits a private investor of one NAFTA country to sue the government of another NAFTA country for loss or damage arising out of that government's breach of its investment obligations. Under NAFTA Chapter 11, the federal government can be sued for damages arising out of provincial government measures that are inconsistent with NAFTA's investment obligations. It is important to note that CUSMA proposes to eliminate Chapter 11 as between Canada and the United States and to significantly narrow its scope as between the United States and Mexico.

While NAFTA 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. NAFTA also establishes special arrangements for automotive trade, trade in textile and apparel goods, and agriculture.

The Canada-European Union Comprehensive Economic and Trade Agreement

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

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

On the day CETA entered into force, 98% of all EU tariff lines became duty-free for Canada. Canadian exporters also benefit from clear rules of origin that take into consideration Canada's supply chains to determine which goods are considered "made in Canada" and eligible for preferential

tariff treatment. Similar to NAFTA, CETA also aims to foster regulatory unification, co-operation, and information sharing between Canadian and EU authorities in order to put in place more compatible regulatory regimes. This includes co-operation on sanitary and phytosanitary measures for food safety, animal and plant life, and health. CETA also includes some sector-targeted provisions that recognize specific interests related to wines and spirits, biotechnology, forestry, raw materials, science, technology, and innovation. Underscoring the agreement's co-operative objectives, CETA also promises to implement greater transparency and information sharing with respect to subsidies and trade remedies provided by governments to their respective countries' industries.

Where a dispute arises under CETA, the parties have agreed to establish a permanent tribunal that utilizes the ISDS arbitration mechanism. The tribunal is to be comprised of 15 members: five nationals of Canada, five nationals of EU members states, and five nationals of third countries — each of which must be a jurist in their home jurisdiction. Cases will be heard by panels of three tribunal members (one for each party's state, and the third selected from a list of neutral members). CETA also establishes an appellate tribunal that may uphold, reverse, or modify a tribunal's award based on errors of law, manifest errors of fact, or on the basis that it has exceeded its jurisdiction. Because of objections of the Wallonia region of Belgium, this portion of CETA is not yet in force. However, the recent opinion of the European Court of Justice that CETA's ISDS arbitration mechanism is not incompatible with EU law, is a major step towards full and final implementation.

The Comprehensive and Progressive Trans-Pacific Partnership Agreement

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

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



The CPTPP, is a broad and comprehensive agreement, in the mould of CETA. The CPTPP reduces trade barriers across a range of goods and services, which will, in turn, create new opportunities for businesses and consumers. The CPTPP addresses new trade issues and other contemporary challenges, such as labour and environmental issues. It reflects both tariff and non-tariff barriers to trade and investment, with the goal of facilitating the movement of people, goods, services, capital, and data across borders. The agreement also includes ISDS provisions to resolve disputes between parties and investors.

Other Free Trade Agreements

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

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

Canadian Free Trade Agreement

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

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

Economic Sanctions

Because many retail and consumer product companies sell and source

goods and technology to and from customers and suppliers around the world, they need to be cognizant of Canada's economic sanctions laws. A number of nations, entities and individuals are subject to Canadian trade embargoes under the *United Nations Act*, the *Special Economic Measures Act*, the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*, the *Freezing Assets of Corrupt Foreign Officials Act*, and the *Criminal Code of Canada*. Canadian sanctions of varying scope apply to activities involving the following countries or regions: Burma (Myanmar), Central African Republic, the Crimea Region of Ukraine, the Democratic Republic of the Congo, Eritrea, Iran, Iraq, Lebanon, Liberia, Libya, Mali, Nicaragua, North Korea, 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.

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 and Import 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. Retailers must be careful that any





goods they import that fall within this scheme are properly permitted for import.

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

In addition to the EIPA, other Canadian legislation regulates import and export activity, including in respect of rough diamonds, nuclear-related goods and technology, cultural property, wildlife, food and drugs, hazardous products and environmentally sensitive items. Retailers 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.

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By Trevor Lawson and Justine Lindner



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 retail sector are covered by provincial legislation.

To avoid attracting unnecessary workplace liability, retail 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, personal emergency leave, family responsibility leave and crime-related death and disappearance leave.



Important Minimum Standards Considerations for Retailers:

- overtime and hours of work;
- public holidays and retail business hours; 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.

Public Holidays and Retail Business Hours

Employment standards legislation provides for a number of paid statutory public holidays. The number of paid public holidays varies by jurisdiction. On public holidays, employees typically receive a paid day off from work, or, if the employee works on the public holiday, the employee will be entitled to premium pay for hours worked or may be entitled, instead, to take a substitute day off from work with pay at a later time.

In some jurisdictions, there is specific legislation or local by-laws or rules dealing with retail business hours, for example, Ontario's *Retail*



Business Holidays Act. While the legislation in some provinces may allow for retailers to open on public holidays provided that retailers comply with applicable employment standards legislation, many provinces have legislation which explicitly prohibits retailers from opening at all or only for limited hours on public holidays.

Retail employers in certain provinces or municipalities may also be subject to restrictions regarding whether they can be open on a Sunday and/or the hours that they can be open on a Sunday.

Retail employers should be aware that there are provisions in some jurisdictions requiring an employee's agreement to work on a public holiday or on Sundays, which protect employees against reprisal if they refuse to work those shifts. Depending on the circumstances, it may be appropriate to address an employee's agreement to work certain shifts in writing as part of a contract of employment or early in the employment relationship, particularly if the employee is hired to provide seasonal or occasional coverage.

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 retailers looking to hire seasonal, occasional or short-term employees consider limiting their liability upon termination in written contracts. The manner in which an employer treats an employee at the time of dismissal is also important, because an employer may be liable to compensate an employee for any actual damages caused by tortious conduct.

In Québec, an employee with at least two years of uninterrupted service



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

Labour Relations

Legislation governs the formation and selection of unions and their collective bargaining procedures in each Canadian jurisdiction. In general, where a majority of workers in an appropriate bargaining unit is in favour of a union, that union will be certified as the representative of that unit of employees. An employer must negotiate in good faith with a certified union to reach a collective agreement. Failure to do so may result in penalties being imposed. Most workers are entitled to strike if collective bargaining negotiations between the union and the employer do not result in an agreement; however, workers may not strike during the term of a collective agreement.

Remaining Union-Free

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

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

In Canada, the certification process is designed to move quickly. This reduces the time that either party could engage in prohibited activities. In



most jurisdictions, there is a very brief window between an application for certification and a secret ballot representation vote. Thus, it is imperative that an employer: (i) adopt proactive and progressive human resources policies before any situation arises; and (ii) manage its “employer free speech” rights aggressively and appropriately during a union certification campaign.

Human Rights

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

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

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



Recruitment

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

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

Complaints of a Human Rights Violation

An employee who believes that he or she has been a victim of discrimination or harassment must first demonstrate that the alleged discrimination or harassment occurred or that he or she has been treated differently in a term or condition of employment on the basis of one of the enumerated grounds. Once the employee or former employee has demonstrated that the discrimination occurred, the employer has the burden of proof to establish that the offending term or condition of employment is a BFOR.

Duty to Accommodate

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

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



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

Accessibility Standards

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

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

- Develop, adopt and maintain an accessible employment policy statement.
- Provide disability awareness training (for employers with more than five employees) 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 information on how to request accommodation.
- Provide AODA mandated policies and/or materials to inspectors as requested.



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

The AODA is the first of its kind in Canada. Manitoba and Nova Scotia have since passed similar legislation. The Canadian federal government tabled a bill setting out similar accessibility requirements in June 2018. After it is passed and becomes law, the *Accessible Canada Act* will apply to federally regulated entities, including private sector employers, and it is reasonable to expect that other 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 employees as well as the safety, health and welfare of non-employees 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 the situation to 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 employees for complying with or seeking enforcement of occupational health and safety legislation. An employee who believes that he or she has been the subject of reprisal has remedial measures under the applicable legislation.



Workplace Violence and Harassment

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

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

Privacy

Employers in Canada must be aware that Canada has privacy laws governing the collection, use, disclosure, storage and retention of personal employee information, as well as an employee's right of access to such information. This is especially important in Québec, Alberta and British Columbia, which have enacted privacy legislation separate from the federal legislation.

Recruitment

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

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



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

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

Video Surveillance of Employees

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

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

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

Employee Bag Checks or Searches

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

See [Privacy Laws](#) 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.

Worker's 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.

Misclassification of Contractors

Businesses that regularly use contractors should consider whether there is any risk that a contractor has been misclassified and would be found at law to be an employee. A court or adjudicator will consider the totality of the relationship between the business and the individual to determine whether the individual is self-employed or whether there is an employment relationship. The focus of the analysis is on the extent of the control that is exercised by the business over the performance of the contractor's work and also involves the consideration of factors such as which party provides the tools for the performance of the work, the individual's chance of profit and risk of loss and whether the individual can hire their own employees or contractors.

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

Unique Aspects in Québec – French Language Requirements

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

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

Québec's Charter of the French Language affirms French as the province's official language, and grants French-language rights to everyone in Québec, both as workers and as consumers. Anyone who does business in Québec — anyone with an address in Québec, and anyone who distributes, retails or otherwise makes a product available in



Québec — is therefore subject to rules about how they interact with the public and how they operate internally inside the province.

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

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

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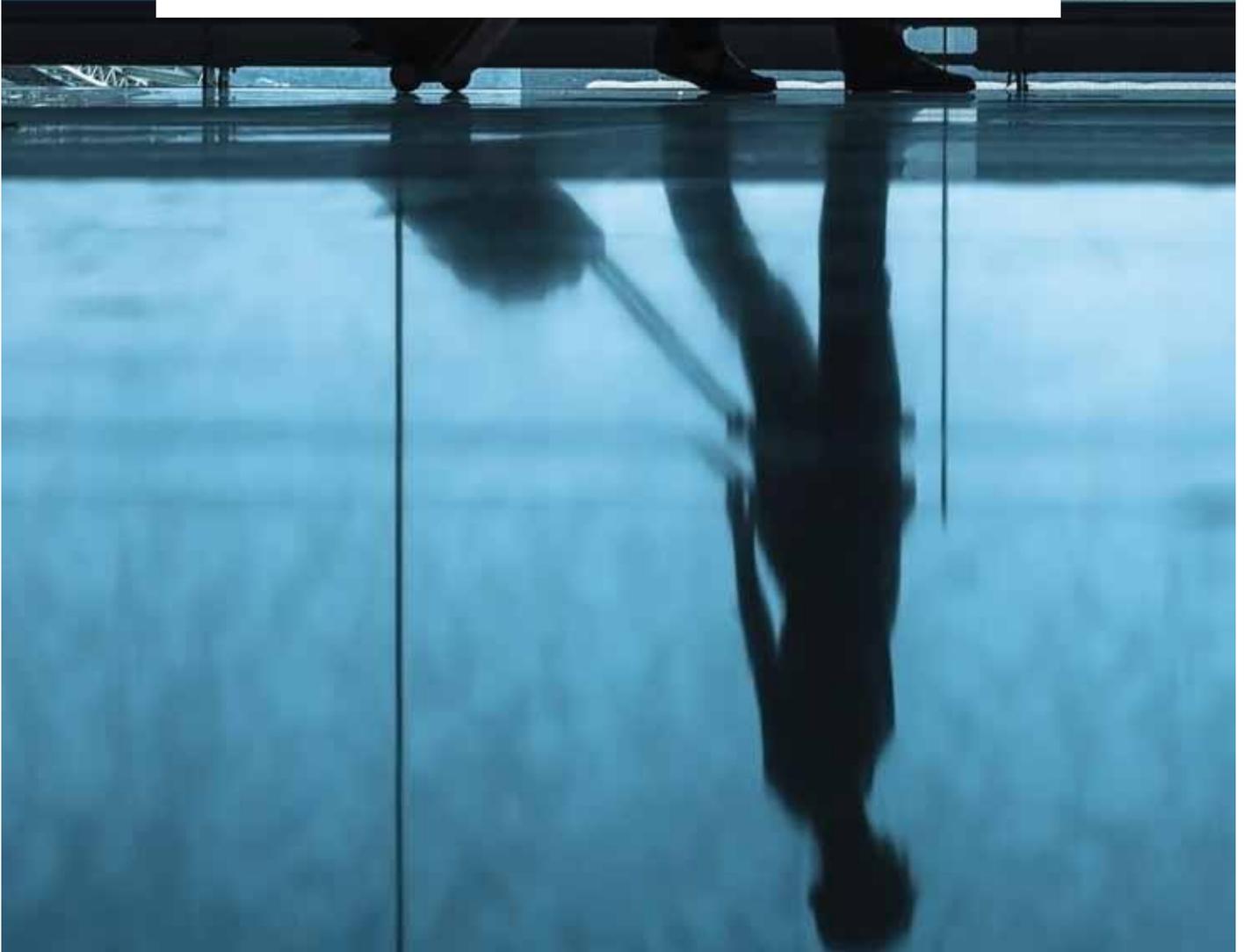
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By Stéphane Duval



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 365,000 in recent years, and is still growing.

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

In addition, the *Immigration and Refugee Protection Act* (Act) was recently amended and imposes a rigorous compliance regime, which is designed to ensure that Canadian employers consistently respect the wage and working conditions of foreign nationals, and imposes serious penalties (including a period of ineligibility for hiring foreign nationals and penal charges) for non-compliance. 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 *giving rise to the payment of a salary or commission, or that competes directly with activities of Canadian citizens or permanent residents in the Canadian labour market.*¹

1. *Immigration of Refugee Protection Regulation (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 *foreign nationals who intend to enter Canada to engage in business or trade activities*.

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, that is, no gainful employment in Canada;
- The activity of the foreign worker must be international in scope, that is there must be a presumption of an underlying cross-border business activity. This presumption will be implied if:
 - the primary source of the worker’s remuneration remains outside Canada;
 - the principal place of the worker’s employer is located outside Canada; and
 - the accrual of profits of the worker’s employer is located outside Canada.²

In other words, and by way of example, IRCC offers the following extended definition to “Business Visitor:”³

2. *Immigration of Refugee Protection Regulation (SOR /2002-227), s. 187.*

3. *Immigration, Refugees and Citizenship Canada, Immigration Guidelines*



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

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

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

In addition, Canadian immigration authorities⁴ 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.
- **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.
- **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

4. *Immigration, Refugees and Citizenship Canada, Immigration Guidelines.*



considered to be business visitors. The same prohibition against hands-on building and construction work as for after-sales service applies.

- **Board of Directors' meetings:** Foreign nationals attending a meeting as a member of a board of directors may enter as a business visitor.
- **Short-term work visits for highly skilled workers:** Foreign nationals who are highly skilled and whose occupation falls within Canada's national occupation code levels 0 or A may undertake work in Canada for 15 days once every six months or 30 days once every 12 months without a work permit.
- **Researchers:** Foreign nationals coming to perform research at the invitation of a publicly funded degree granting Canadian post-secondary institution or affiliated research institution will be able to come to Canada to work on that project for 120 days, once a year, without a work permit.
- **Foreign students studying in Canada:** Foreign nationals with valid study permits who are full-time students at a designated learning institution, have started studying, are in a program of a duration of at least six months that leads to a degree, diploma or certificate, can work without a work permit for up to 20 hours per week during regular school sessions. They can work full-time during scheduled breaks such as the winter and summer holidays or spring break.

Work That Requires a Work Permit

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

TFWP

Regular Program

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



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

- the employment of a foreign worker is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
- the employment of a foreign worker is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
- the employment of a foreign worker is likely to fill a labour shortage;
- the wages offered to a foreign worker are consistent with the prevailing wage rate for the occupation and region(s) where the worker will be employed and the working conditions offered to a foreign worker meet generally accepted Canadian standards;
- the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and
- the employment of the foreign worker is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.⁵

If all the conditions are met, a positive LMIA would be issued and the foreign national will then be able to apply for a work permit either at the port of entry upon arrival, if he/she is a visa-exempt country, or at the Canadian visa office in their country of citizenship or legal residence (see below, [Applying For A Work Permit](#)).

Global Talent Stream

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

5. *Immigration of Refugee Protection Regulation (SOR /2002-227), s. 187.*



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 see their LMIA request processed within 15 days. To benefit from the GTS, the employer must work with ESDC to develop a Labour Market Benefits Plan that demonstrates its commitment to activities that will have lasting, positive impacts on the Canadian labour market (e.g. job creation, skills and training investments, growth of revenue, etc.). The GTS has no minimal recruitment requirement, but the employer will be asked to describe any efforts to recruit Canadians and permanent residents. The GTS is divided in two categories:

- **Category A:** Meant for employers who will be referred by a designated referral partner and who seek to hire unique and specialized talent in an area of specialization, which is of interest to the employer;
- **Category B:** Meant for employers who seek to hire highly skilled workers with specific work experience at positions above a varying minimum wage in one of the 13 listed occupations, most of which are in the IT industry.

Simplified Process for Certain Occupations in Québec

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

IMP

The IMP allows employers to hire a foreign worker without an LMIA. It is divided in various categories. Some of them are based on the Regulations, on International agreements (e.g. NAFTA, CETA, GATS, etc.), on Canadian interests, humanitarian reasons, etc.

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

- **Intra-company transferees:** This category was created to permit multinational companies with operations in Canada to temporarily transfer qualified employees to Canada for the purpose of improving



management effectiveness, expanding Canadian activities, and enhancing the competitiveness of Canadian entities. Eligible foreign nationals must be currently employed outside of Canada (by a related enterprise), have been employed with them for at least 12 months in the past three years and be seeking entry to work at a Canadian *parent, subsidiary, branch, or affiliate of that enterprise in an executive, senior managerial, functionally 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 NAFTA, 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, Chile, Columbia, Peru, South Korea, to name a few.
- **Spouses of skilled work permit holders:** Spouses/common-law partners of individuals who hold Canadian work permits that were issued for more than six months in a high-skilled occupation can obtain open work permits with concurrent validity to their spouse's permit.
- **Emergency repairs or repair personnel for out-of-warranty equipment:** In situations where a repair, for which there is no Canadian commercial presence by the company that manufactured the equipment being serviced, must be completed urgently, absence of which Canadian jobs would be greatly affected, a short-term work permit can be obtained (usually 30 days or less).
- **Francophone mobility:** French-speaking foreign nationals that have been recruited for a high-skilled position outside of Québec can obtain work permits.
- **Bridging open work permit:** Foreign nationals currently in Canada with a valid status as a worker set to expire within four months and who have submitted permanent resident applications may be eligible for bridging open work permits.
- **Québec selection certificate holders currently in Québec:** Foreign nationals who are currently in Québec with a valid status as a worker



may obtain a work permit for up to two years with a Québec-based employer, on the basis of their Québec selection certificate obtained through a permanent skilled worker program.

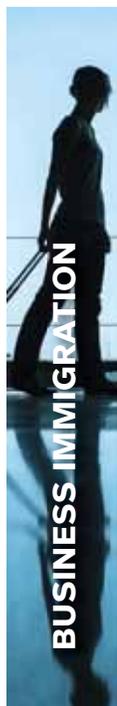
- **Post-doctoral Ph.D. fellows and award recipients:** Foreign nationals appointed to a time-limited position granting a stipend or a salary to compensate for periods of teaching, advanced study and/or research may be issued temporary work permits. Applicants must have completed, or be expecting to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

Applying For A Work Permit

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

Foreign Nationals Who do not Require Visas

A foreign national can apply for their work permit at the port of entry (Canadian land border or airport) if they are a citizen of a visa-exempt



country. All visa-free applicants (except certain people, including U.S. citizens) will still require an Electronic Travel Authorization (eTA) in order to travel to Canada by air.

Foreign Nationals Who Require Visas

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

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

International Mobility Workers Unit

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

Employer Obligations Toward Foreign Nationals

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

- **Ensure ongoing compliance with the foreign national's original terms of employment:** When hiring a foreign worker, Canadian employers set out the terms of employment both to the foreign worker and to the government of Canada. These must be respected in precisely the same way as they would for a Canadian employee. However, in cases of foreign workers, any changes to the terms of employment — including minor changes such as an increase in salary or a change in the number of hours worked — may need to be reported to Canadian authorities prior to this change taking place (depending upon the work permit category). Audits of employers that currently



have or have had (audits can be retroactive six years) foreign workers in their employ are routine occurrences.

- **Hire a foreign worker with the requisite authorization:** The law prohibits any employer from hiring a foreign national who does not possess the requisite work authorization. It also places the onus on the employer to verify the status of every foreign national that it employs. In other words, should the employer fail to exercise due diligence in determining whether employment is authorized, the employer will be deemed to have known that it is not authorized. It is critical to verify the status of any foreign worker before making an offer of employment.
- **Avoid any form of misrepresentation:** Canadian law prohibits any person, including an employer, from communicating either directly or indirectly, information that is false or misleading, or making any erroneous representation that could lead to Canadian immigration law or regulations being administered incorrectly. Therefore, it is important that any statement, form, or document produced by an employer is accurate and true, including but not limited to the offer of employment, any forms, or communications exchanged with officers.

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

- warnings;
- administrative monetary penalties ranging from C\$500 to C\$100,000 per violation, up to a maximum of C\$1 million over one year, per employer;
- a ban of one, two, five or 10 years, or permanent bans for the most serious violations from all forms of foreign worker programs;
- the publication of the employer's name and address on a public website with details of the violation(s) and/or consequence(s); and/or
- the revocation of previously issued LMIAs.

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



Permanent Residents

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

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

Inadmissibility

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

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

Conclusion

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

The rules and regulations governing both permanent and temporary entry to Canada are complex and ever changing. It is therefore prudent



for any company having or wishing to establish a commercial presence in Canada to become familiar with Canadian immigration laws.

FOR MORE INFORMATION, PLEASE CONTACT:

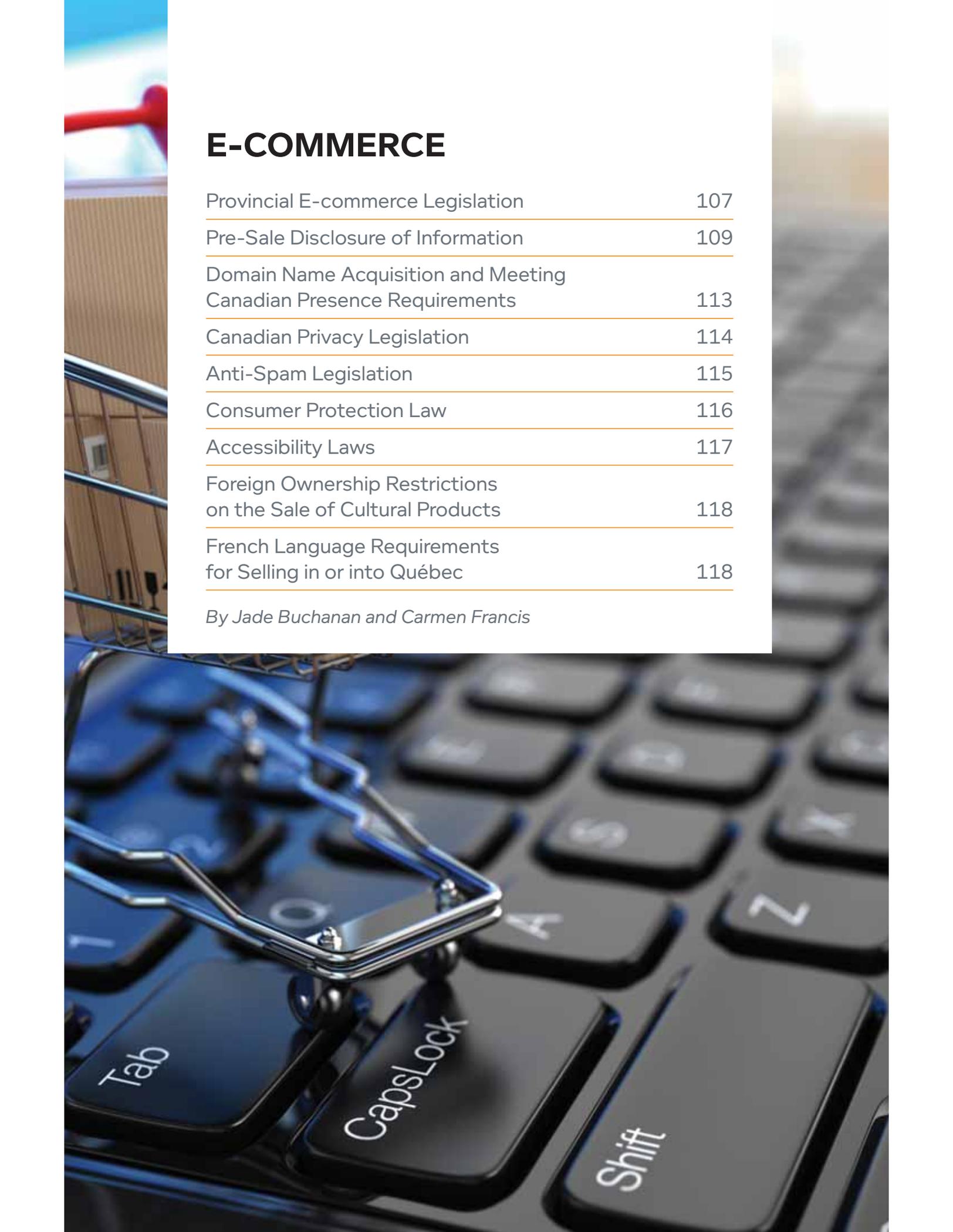
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E-COMMERCE

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By Jade Buchanan and Carmen Francis

E-COMMERCE

This chapter addresses the special issues e-commerce retailers face that traditional brick and mortar retailers may not.

In Canada, various federal and provincial statutes govern the buying and selling of goods and services over the internet. These statutes contain discrete considerations that require specific legal attention of e-commerce retailers.

This chapter is divided into eight aspects of e-commerce regulation: Provincial e-commerce legislation; Domain name acquisition and meeting Canadian presence requirements; Canadian privacy law; Anti-spam law; Consumer protection law; Accessibility law; Foreign ownerships restrictions on the sale of "cultural products;" and French language requirements for selling in or into Quebec.

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

1. Office of Consumer Affairs, "Internet Sales Contract Harmonization Template" (25 May 2001), online: <<https://ic.gc.ca/eic/site/oaca-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, sections 37 – 40 of the *Consumer Protection Act* and sections 31 – 33 of the *General Regulations* enacted thereunder;⁶
- In Québec, Title I, Chapter III, Division I.3 of the *Consumer Protection Act*;⁷
- In Nova Scotia, sections 21V – 21AF of the *Consumer Protection Act* and the *Internet Sales Contract Regulation* enacted thereunder;⁸
- In Newfoundland, Part V, Division 2 of the *Consumer Protection and Business Practices Act*.⁹

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

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

The main challenge in ensuring compliance with provincial e-commerce legislation will come from a website architecture and content perspective — not simply from compliant terms of use of the website. In other words, it is relatively straightforward to revise terms of use and to draft or revise a website privacy policy; however, compliance with provincial e-commerce legislation requires foresight and will likely require at least some structural and content changes to a retailer’s 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 retailers’ online sales contracts, including: (i) choice of law; (ii) arbitration; (iii) unilateral amendment; and (iv) exclusions of certain warranties. See **Consumer Protection Laws**.

6. *Consumer Protection Act*, SO 2002, c 30; General, O Reg 17/05.

7. *Consumer Protection Act*, CQLR c P-40.1.

8. *Consumer Protection Act*, RSNS 1989, c 92; *Internet Sales Contract Regulation*, NS Reg 91/2002.

9. *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1.

Pre-Sale Disclosure of Information

Retailers 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. Retailers 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 retailers' contact information, as summarized below:

- Alberta, BC, Manitoba and Nova Scotia:
 - **Name:** Legal name and, if different, name for carrying on business
 - **Address:** Business address and, if different, mailing address
 - **Contact:** Telephone, fax, and email
- Ontario and Saskatchewan:
 - **Name:** Legal name and, if different, name for carrying on business
 - **Address:** Address from which business is conducted with consumer
 - **Contact:** Telephone, fax, email, and technological addresses
- Québec:
 - **Name:** Legal name and, if different, name for carrying on business
 - **Address:** Business address
 - **Contact:** Telephone, fax, and technological addresses





- Newfoundland:
 - **Name:** Legal name
 - **Address:** Business address
 - **Contact:** Telephone, fax, and email
 - **Miscellaneous:** Salesperson's name (if applicable), consumer's name and address, date and place of the contract, and signatures of both parties

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

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

The retailer's telephone and facsimile numbers are universally required as a pre-sale disclosure. All provinces except Québec also require the retailer's email address, if available. Additionally, Ontario, Saskatchewan, and Québec require disclosure of the retailer's technological addresses (such as Facebook, Twitter or Instagram feeds), if available. Newfoundland requires disclosure of the salesperson's name, where applicable, and other items including the consumer's name and address, the date and place of the contract, and both parties' signatures.

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

Description of Goods and Services

Retailers are required to disclose, at least, a fair and accurate description of the goods and services they will provide to consumers through their



e-commerce platform. In British Columbia, Québec, and Newfoundland, this requirement is heightened — retailers 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.

Retailers 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 vendors to provide product descriptions, consideration of indemnification and auditing mechanisms is recommended as 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 retailer's delivery arrangements, including the identity of the shipper, mode of transportation, and place of delivery, is universally required by provincial e-commerce 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 retailer's method of providing them (including the name of any person who is to provide the services on the retailer'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 labelled 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

Retailers' cancellation, return, exchange, and refund policies, if any,



are universally required to be disclosed under provincial e-commerce legislation. In addition, Manitoba requires the details of any applicable warranties or guarantees. Newfoundland requires a statement of cancellation rights.

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

Price

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

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

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

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

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



Other Pre-Sale Disclosures

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

Also of note, though not a pre-sale disclosure, is a requirement regarding distance contracts in Québec. Per section 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 retailer to deliver a copy of the agreement to the consumer within 15 days after the consumer enters the agreement. The mandatory pre-sale disclosure information discussed above must be included in the copy of the agreement delivered to the consumer. The copy must also include the consumer's name and the effective date of the contract.

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

Domain Name Acquisition and Meeting Canadian Presence Requirements

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

CIRA requires registrants to meet Canadian presence requirements, which are designed to ensure that the .ca domain remains a "key public



resource for the social and economic development of all Canadians”.¹⁰ Retailers typically meet the Canadian presence requirements by creating a Canadian corporation or registering a trademark in Canada that corresponds to the desired domain name, both of which will satisfy the requirements.

Retailers 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 retailers to fight back against cybersquatters, including a variety of “carrot-and-stick” strategies, such as filing a cybersquatting complaint under the CIRA domain name dispute resolution policy, initiating a trademark infringement action, and approaching the current registrant with an offer to acquire the domain name at cost (namely the cost of acquiring and maintaining the registration).

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

Canadian Privacy Legislation

Canada has strict private sector privacy legislation, both at the federal and provincial levels. 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

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

Payment Card Industry Data Security Standard (PCI-DSS) and ensure the terms of those standards bind their service providers or their service providers are PCI-DSS certified.

Anti-Spam Legislation

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

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

CASL is widely considered to be vague and a legislative overreach. A committee of Canada's Parliament has released a report called "Canada's Anti-Spam Legislation: Clarifications are in Order."¹² Organizations should be mindful of forthcoming changes when implementing or updating their anti-spam compliance plan.

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

12. Parliament of Canada, "Canada's Anti-Spam Legislation: Clarifications are in Order" (12 December 2017), online: <<https://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=9659639>>.





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

Consumer Protection Law

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

The provincial consumer protection statutes also prohibit unfair selling practices, which include the making of false or misleading statements.¹⁴

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

14. For example, see ss 14(1),(2), 17(1) of the *Ontario Consumer Protection Act*, supra note vi.

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) 2.0 is an internationally accepted standard for web accessibility developed by the World Wide Web Consortium, an international team of experts. WCAG 2.0 explains how to make web content more accessible to people with disabilities, which include visual, auditory, physical, speech, cognitive, language, learning, and neurological disabilities.¹⁵

E-commerce retailers need to take notice of WCAG 2.0. The Ontario *Integrated Accessibility Standards* require private sector organizations with 50 or more employees as well as designated public sector organizations to conform to WCAG 2.0, initially at Level A and increasing to Level AA.¹⁶ As of January 1, 2014, new public websites, significantly refreshed websites, and any web content posted after January 1, 2012 must meet WCAG 2.0 Level A. On January 1, 2021, all public websites and web content posted after January 1, 2012 will have to meet WCAG 2.0 Level AA, other than live captions and pre-recorded audio descriptions.

The Ontario government has provided a useful guide for companies to follow to ensure compliance with WCAG 2.0 standards.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.

15. World Wide Web Consortium, "Web Content Accessibility Guidelines (WCAG) 2.0" (11 December 2008), online: <<https://www.w3.org/TR/WCAG20/>>.

16. *Integrated Accessibility Standards*, O Reg 191/11, s 14(2).

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





In the coming years, other jurisdictions may adopt similar legal requirements. Manitoba and Nova Scotia have passed accessibility legislation that contemplates the development of website accessibility standards.¹⁸ The federal *Accessible Canada Act*, which received royal assent on June 21, 2019 but has not yet been proclaimed into force, also contemplates such standards.¹⁹ While website accessibility standards have not yet been enacted under these laws, it is expected that they will adopt WCAG criteria.

On June 5, 2018, WCAG 2.1 was published.²⁰ WCAG 2.1 adds criteria to WCAG 2.0, such that compliance with WCAG 2.1 necessarily means compliance with WCAG 2.0. Though both versions are existing standards, e-commerce retailers should be mindful of WCAG 2.1, especially considering several jurisdictions are expected to pass website accessibility regulations that may conform to this higher standard in the near future.

Foreign Ownership Restrictions on the Sale of Cultural Products

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

In recent years, the implementation of this policy has been relaxed (for example, Amazon.ca sells books from a U.S. location and Netflix.ca streams television and films from the U.S.), but compliance still requires some attention. Any retailer selling cultural products will need to undertake a specific program for compliance.

French Language Requirements for Selling in or into Québec

To the extent that e-commerce retailers have 50 or more employees in Québec, they must comply with certain French language requirements under Québec’s *Charter of the French Language*.²¹ These requirements give effect to two fundamental principles of Québec law:

- consumers of goods and services have a right to be informed and served in French; and

18. *Accessibility for Manitobans Act*, CCSM c A1.7, ss 3(2)(c), 5(1)(c); *Accessibility Act*, SNS 2017, c 2, ss 2(a)(ii), 7(1)(c).

19. SC 2019, c 10, ss 5(c), 18(a).

20. World Wide Web Consortium, “Web Content Accessibility Guidelines (WCAG) 2.1” (5 June 2018), online: <<https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21/>>.

21. CQLR c C-11.

- workers have a right to carry on their activities in French.

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

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By Christopher Hubbard and Katherine Booth

PRODUCT LIABILITY AND REGULATORY COMPLIANCE

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

Retailers operating in Canada should be familiar with the legal and regulatory regimes applicable to their retail operations, which are addressed in this chapter:

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

This chapter will focus primarily on the regulatory regime applicable to consumer products and food. A comprehensive review of the legislation and regulations applicable to all categories of products is beyond the scope of this Guidebook, so retailers of other products should familiarize themselves with the statutes and regulations applicable to the particular products they 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 retailers, as well as manufacturers, importers and distributors. 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 that the goods are of merchantable quality, where the goods are purchased by description. Similar provisions are contained in the Québec Civil Code. Contracts also exist between retailers 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 retailer 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.

Retailers may 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 retailer to warn or take remedial action are fact specific enquiries and depend on the circumstances of the case.

Retailers who are also the manufacturer of a product may also 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, 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 retailer is not the manufacturer, the retailer can still be exposed to a claim in breach of contract in relation to a product defect based on sale of goods legislation.

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 retailer or manufacturer, Canadian courts will assess the reasonableness of the defendant's conduct with regard to industry 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. Retailers who are named as defendants in a class action should seek counsel who have specialized product liability and class actions expertise.

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

The *Canada Consumer Product Safety Act* (CCPSA) came into force in 2011. This federal legislation applies to "consumer products" and prohibits the manufacture, importation or sale of consumer products that pose a danger to human health or safety. It also grants the federal government powers to regulate, inspect, test and recall consumer products and creates a wide array of related offences and penalties. Manufacturers, importers, distributors and retailers need to comply with stringent requirements to maintain certain records concerning their products and report "incidents" within short timeframes.

“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.

Retailers may learn of events regarding products they sell from a variety of sources. One common source is complaints received from customers. Other sources include product returns, information received from others in the supply chain (such as the manufacturer), 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. Retailers 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 information in [the retailer'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 retailer 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 retailers, 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. Retailers must maintain the required records at the company's 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 retailers to keep documentation of every consumer transaction or every consumer's personal information, although Health Canada states 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 the retailer's place of business and documents for these purposes.

With respect to audits dealing with reporting obligations, Health Canada may ask a retailer 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 retailers, documentation of the events that come to the company's attention, the company's assessment of the events, and reasons for deciding whether there was or was not a reportable "incident" can be helpful to establish compliance and increase the likelihood of successfully completing any inspection or audit undertaken by Health Canada.

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

Food: Obligations Under the Food and Drugs Act and Safe Food for Canadians Act

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

scope of this chapter. Retailers 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 retailer 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 retailer’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 retailer is required to provide reasonable assistance to furnish any information that the inspector may require.

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

it at the company's expense if removal is unavailable.

CFIA Food Safety Investigations

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

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

Recalls of Consumer Products and Food

Consumer Products

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

Food

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



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

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

Additional Regulations Applicable to Specific Products

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

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

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

requirements applicable to various advertising claims, such as claims of “no added sugar,” “local” food claims, composition and quality claims, allergen- and gluten-free statements, health claims, “organic” claims, origin claims, and nutrient content claims. Retailers should be aware of the legislation applicable to the products they intend to sell.

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

New Compliance Requirements Under the SFCA

The *Safe Food for Canadians Regulations* (SFCR) finally came into force on January 15, 2019, years after its enabling statute, the SFCA, was enacted on November 22, 2012. The SFCR generally applies to foods for human consumption (including ingredients) that are imported, exported, or inter-provincially traded for commercial purposes. It also applies to the slaughter of food animals from which meat products destined for export or inter-provincial 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 license 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 imposes various compliance obligations for food manufacturers, retailers, distributors and importers, a number of which will come into effect in accordance with rolling implementation timelines. The most significant upcoming compliance deadlines include the following:

- Certain preventive control and traceability requirements come into effect on January 15, 2020 with respect to fresh fruits or vegetables;
- Certain traceability requirements come into effect on July 15, 2020, with respect to food additives and alcoholic beverages;

- Certain preventive control and traceability requirements come into effect on July 15, 2020, with respect to the import, export and interprovincial trade of unprocessed food used as grain, oil, pulse, sugar or beverage;
- Certain licensing, preventive control, and traceability requirements come into effect on July 15, 2020, with respect to processed grain-based foods (baked goods, cereals, pasta), snack foods, confectionary, beverages, oils, dried herbs and spices, nuts and seeds, and coffee and tea.

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 at a retail level in Canada. Examples include:

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

Retailers should consult the legislation applicable to the products they intend to sell to ensure compliance with all regulations and requirements.

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By Michael Scherman and Jade Buchanan

CYBERSECURITY, PRIVACY AND DATA PROTECTION

With limited exceptions, all businesses engaged in commercial, for-profit activity in Canada are subject to privacy legislation that regulates the collection, use and disclosure of personal information. Data will constitute “personal information” when it can be used to identify an individual, whether on its own or in combination with other pieces of data. Personal information can include “indirect” or “inferred” information, such as a customer’s spending patterns or shopping habits, and can be in any format, including voice recordings and video surveillance records.

A Patchwork of Legislation

There are several laws in Canada that relate to privacy rights and the collection, use, and disclosure of personal information. By default the handling of personal information by retailers is governed by the *Personal Information Protection and Electronic Documents Act*¹ (PIPEDA), a federal act enforced by the Office of the Privacy Commissioner of Canada (OPC). However, PIPEDA will not apply where a province has enacted privacy legislation that is deemed substantially similar to PIPEDA, in which case the province’s legislation will apply instead of PIPEDA for actions that take place entirely within its borders (with some exceptions). This is the case in British Columbia, Alberta, and Québec.

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

Privacy Principles

PIPEDA includes 10 principles that establish obligations for organizations and more broadly drive interpretation of privacy law and policy in Canada. Retailers operating in Canada should consider their business activities and privacy procedures from the perspective of these ten principles:

- **Accountability:** Retailers are responsible for personal information under their custody or control. In certain circumstances or jurisdictions, they are also responsible for the privacy compliance of a business with which they share personal information. An important consequence of

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

accountability is that organizations remain responsible for personal information in their control, even when their service providers process it.

- **Identifying Purposes:** Retailers must explain to customers why they are collecting their personal information and how they will use it or disclose it to other organizations (unless the purpose of collection, use or disclosure would be obvious to a “reasonable” person and the customer voluntarily provides the information for that purpose).

Retailers cannot collect personal information for one purpose and then use it for another without obtaining new consent for the secondary use (unless an exception applies). For instance, retailers cannot tell customers they are collecting personal information to “track purchases” and then use it to market products to them.

- **Consent:** Consent should be obtained before or during the collection. Retailers should be aware that they cannot require a customer to provide personal information as a condition of sale, unless it is essential to conduct the sale.
- **Limiting Collection:** The collection of personal information is limited to what is necessary for the identified purposes and must be collected by fair and lawful means. This means retailers may only collect the personal information needed to complete the purchase. For instance, if a customer pays cash, there is no reason to ask for proof of identity.
- **Limiting Use, Disclosure and Retention:** Personal information must be used and disclosed only for the purpose(s) intended, except where consent of the individual is obtained or as required by law. This may pose a challenge for retailers who engage in data analytics or use artificial intelligence applications where large data sets collected over time are important to the generation of accurate insights.
- **Accuracy:** Retailers must make a reasonable effort to ensure that a customer’s personal information is accurate and complete.
- **Security Safeguards:** Retailers must protect all personal information in their custody or under their control by making reasonable security arrangements to prevent unauthorized access, collection, use, copying, modification or disposal or similar risks. The nature of the safeguards will vary depending on the sensitivity of the information, the amount, distribution, and format of the information, and the method of storage. Sensitive information needs a higher level of protection.

- **Openness:** Retailers must be open about their policies and practices with respect to personal information. Customers must be able to acquire information about an organization's policies and practices without unreasonable effort (typically in a public facing privacy policy, with the contact information of the privacy officer).
- **Individual Access:** If a customer requests, retailers must provide him or her with information about the existence, use, and disclosure of his or her personal information and must provide access to that information (with certain narrow exceptions). An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.
- **Challenging Compliance:** Retailers must have procedures in place to receive and respond to complaints or inquiries about their policies and practices regarding the handling of personal information.

Validity of Consent

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

Guidelines for Obtaining Meaningful Consent

In determining what constitutes meaningful consent, retailers can consult the "Guidelines for obtaining meaningful consent" (the Guidelines)²

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

jointly issued by the OPC and the Privacy Commissioners of British Columbia and Alberta.

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

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

The practical implications of the Guidelines include notifying individual of a particular risk associated with the processing of their personal information and weaving privacy notices throughout the user experience, as opposed to just in the privacy policy.

Breach Notification

When an organization experiences a breach of security safeguards involving personal information, PIPEDA requires organizations to take specific actions. All breaches will trigger the requirement to retain records of the breach for a period of 24 months. Breaches that create a real risk of significant harm will trigger obligations to report the breach to the Privacy Commissioner and notify the affected individual(s) and any organizations that "may be able to reduce the risk of harm that could result from [the breach] or mitigate that harm," which could include law enforcement. The definition of significant harm is broad and includes "bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property."

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

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

Breach notification obligations can make breaches even more costly for the affected organization. Retailers operating in Canada should develop an information security strategy that focuses on prevention. An incident response plan and regular testing of that plan are critical. If a breach does occur, an incident response plan can minimize the damage the retailer experiences.

Transfers

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

Federally, the OPC has previously treated transfer of personal information to service providers located outside Canada as use of personal information, not as disclosure of personal information. This has meant that separate consent for the transfer is not required, though the OPC has stated that under PIPEDA's "openness" principles notice of such transfers should be provided to affected individuals. As further discussed below in the "Policy Initiatives" section, the OPC is in the process of a public consultation on this issue and, as such, guidance in this area may soon be changing.

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

Employee Privacy

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

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

Components of a Privacy Program

Components of a retailer's privacy program include:

- an assessment of which laws apply and when;
- the adoption of a privacy policy, and personal information management practices, to ensure compliance with applicable privacy laws;
- the appointment of an individual (a "privacy officer") who will be responsible for the administration and oversight of the organization's personal information management practices and who will be prepared to implement any changes required by applicable legislation;
- a review of the current personal information practices of the organization outside Canada in order to align with how current personal information practices of the organization may need to be changed for the collection, use and disclosure of personal information in Canada. This will include:
 - determining what personal information is collected and from where;
 - assessing what consents are obtained and what purposes are identified when collecting personal information;
 - tracking where personal information is stored and how it is used, transferred and disclosed.

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

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

Corporate Transactions

Retailers that acquire or invest in other businesses, or that may be acquired or are seeking investments, have heightened need to consider privacy compliance. Prospective buyers and investors may scrutinize the privacy compliance policies and practices of the target organization, which increases the need for a robust compliance program. As a prospective buyer, an organization needs to ensure it is not acquiring an organization that has poor practices, an unknown data breach, or personal information that is unusable due to lack of consent.

The transaction itself may involve the disclosure of personal information

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

Personal Health Information

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

Penalties

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

In addition to regulatory enforcement, those affected by privacy breaches may be able to bring a lawsuit as individuals or as members of class actions. The cause of action available to aggrieved individuals will depend on the laws of the relevant province. British Columbia, for instance, has a statutory tort for invasion of privacy that requires willful intent but does not require proof of damage, while Ontario has a common-law tort of breach of privacy that applies to general personal information.

Several consumer class actions have been commenced in Canada in the

wake of a data incident. These actions have not yet been fully considered by Canadian courts and as a result, questions regarding the legal validity of the causes of action that were advanced, and the scope of possible damage awards, remain largely open. There is also the possibility that a data breach of an organization could lead to legal action from its shareholders with an allegation that the organization's continuous public disclosure as to the state of its cybersecurity systems was misleading. Such a shareholder class action has, as of yet, not been brought in Canada.

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

Canada's Anti-Spam Law⁴

Canada has legislation that specifically addresses the sending of commercial electronic messages. See [E-Commerce](#). For an in-depth explanation of CASL, please see our Anti-Spam Toolkit available on our website.

Policy Initiatives in Canada

On May 19, 2019 Canada's Minister of Innovation, Science and Economic Development introduced a new "Digital Charter." The Digital Charter is not official law but lists 10 principles against which all future government policies, programs, and legislation will be tested. Alongside the Digital Charter, the government also released a proposal for substantial reforms to PIPEDA, which includes adding "next generation" privacy rights (such as data mobility, de-indexing and source takedown) and redrafting the

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

law to make it easier for all to understand. Canadian privacy law could thus be entering a period of significant transition, though the extent of the impact of the Digital Charter and the proposals to reform PIPEDA will depend on the results of the federal election occurring in Fall 2019.

In addition to the federal government's initiatives, the OPC is in a period of review. In 2019, the OPC launched a public consultation on the issue of transfers of personal information for processing (including transborder transfers). Earlier guidelines from the OPC had stated that a transfer of personal information for processing is a use of the information and not a disclosure, and as such additional consent for the transfer is not required. This 2019 consultation proposes a significant shift from this position whereby transfers for processing (including transborder transfers) would constitute a *disclosure* which, absent an applicable exception, would require consent from the individual. While the OPC will likely provide revised guidance on this issue following the consultation process, this will also depend somewhat on the status of the proposed legislative changes to PIPEDA discussed above.

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

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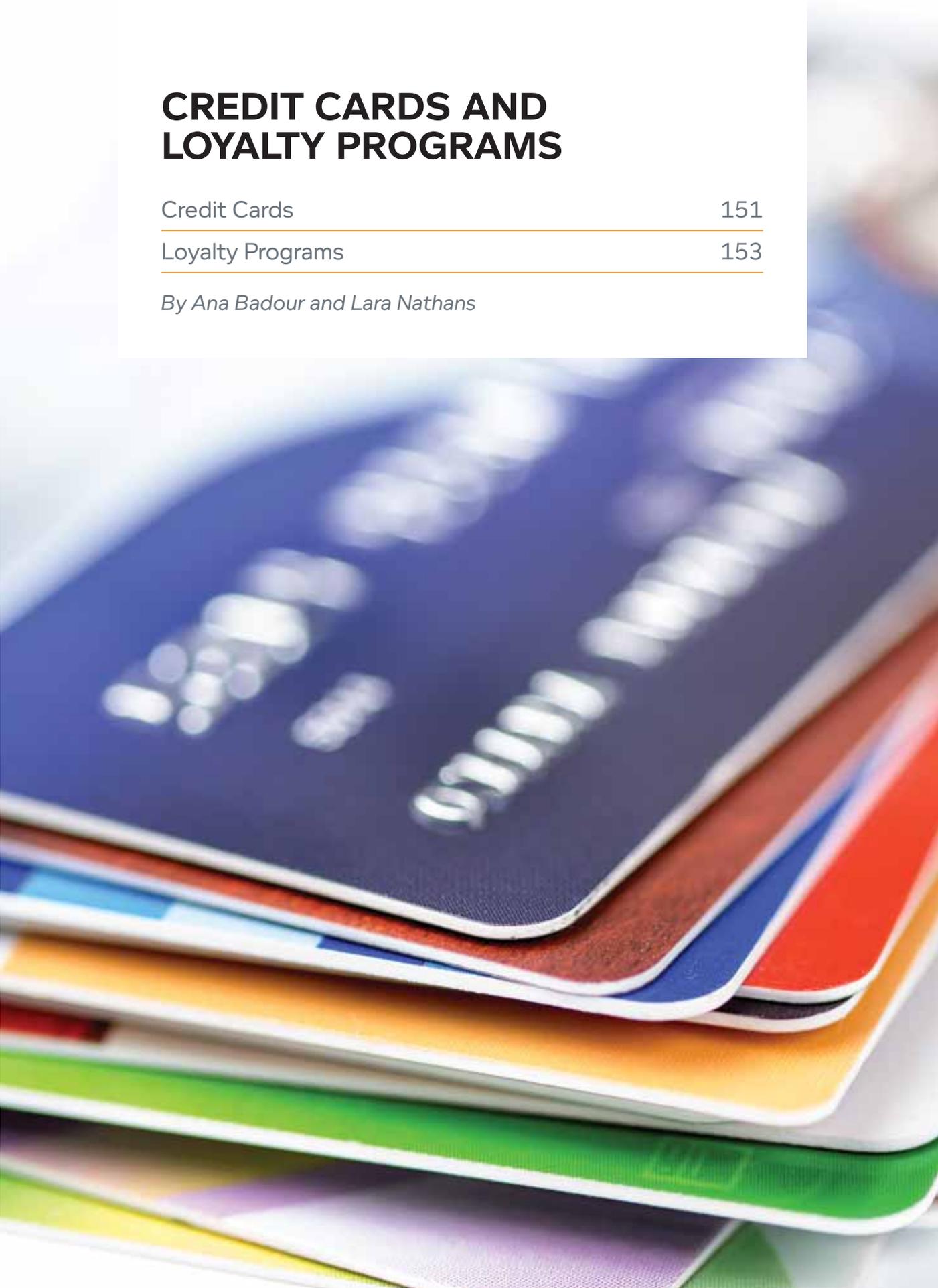


CREDIT CARDS AND LOYALTY PROGRAMS

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By Ana Badour and Lara Nathans



CREDIT CARDS AND LOYALTY PROGRAMS

Credit Cards

Credit cards in Canada can be subject to various legislation and regulations, including consumer protection and credit reporting legislation. In addition, the Code of Conduct for the Credit and Debit Card Industry (the Code) has been adopted by all payment card networks operating in Canada.

On July 7, 2017, the Department of Finance issued a consultation paper *A New Retail Payments Oversight Framework* (the Consultation Paper) proposing a federal oversight framework for retail payments. For a summary of the Consultation Paper, please see our publication *Department of Finance Releases Consultation Paper on New Retail Payments Oversight Framework Providing for Functional Regulation of Payment Service Providers*.

In the 2019 federal budget, the federal government announced plans to introduce legislation to implement the new retail payments oversight framework (the Framework). The Bank of Canada will be the regulator charged with oversight of the Framework.

Future editions of this Guidebook will address further applicable developments related to the Framework.

Code of Conduct for the Credit and Debit Card Industry in Canada

The Code is a voluntary code of conduct that applies to credit and debit card networks and their participants (e.g. card issuers and acquirers). While it is voluntary, the Code has been adopted by all payment card networks operating in Canada.

The purpose of the Code is: (i) to ensure that merchants are fully aware of the costs associated with accepting credit and debit card payments, thereby allowing merchants to reasonably forecast their monthly costs related to accepting such payments, (ii) to provide merchants with increased pricing flexibility to encourage consumers to choose the lowest-cost payment option, and (iii) to allow merchants to freely choose which payment options they will accept. The Code was recently amended to, among other things, address contactless payments. The Code prescribes certain disclosure requirements that apply to

merchant-acquirer agreements and regulates fees that may be charged to merchants. In addition, the Code requires that merchants have access to a clear dispute resolution process that provides for an investigation and timely response of complaints pertaining to the Code.

The Code also requires that networks that adopt the Code ensure that their participants (card issuers, acquirers, intermediaries and merchants) comply with the Code. In order to do so, payment card networks have incorporated the Code into their governing rules and regulations.

The full text of the Code is available at: <https://www.canada.ca/en/financial-consumer-agency/services/industry/laws-regulations/credit-debit-code-conduct.html>.

Consumer Protection

A number of requirements apply to credit cards offered in Canada. To begin with, certain provinces require a lender providing credit to persons located in such provinces to obtain a licence. In addition, provincial consumer protection laws apply to any credit cards offered to consumers in the particular province — although, with the exception of Québec, these requirements are fairly consistent.

Provincial consumer protection laws require that certain information be provided with a credit card application and cardholder agreement (in particular with respect to cost of borrowing), and also require subsequent disclosure (monthly statements, disclosures relating to changes in previously disclosed information when a cardholder agreement is amended, etc.). In addition, these laws include requirements with respect to the advertising of credit, and restrictions on business practices related to the credit extended (such as a prohibition on unsolicited credit cards or unsolicited credit limit increases). Non-compliance by lenders with cost of borrowing requirements in particular has in the past attracted regulatory scrutiny as well as a number of class actions.

In addition to the provincial requirements described above, some federal requirements apply. The amount of interest that can be charged under a credit card (all finance fees being charged would need to be included in the calculation of such interest rate) must not exceed 60% in order not to contravene the federal *Criminal Code*. Interest must also always be expressed on an annual basis to comply with the federal *Interest Act*. Co-

branded credit cards issued by a bank, require compliance with a separate set of consumer protection requirements under the federal *Bank Act*, although they are generally aligned with provincial requirements.

Credit Reporting

A lender obtaining information about an individual borrower from a credit reporting agency (sometimes referred to as a credit bureau) must obtain the borrower's consent to access such information. Consent is required for two reasons: (i) to protect the borrower's privacy; and (ii) because such an inquiry will be recorded on the borrower's credit file and, particularly if the borrower is denied credit, could have an adverse effect on the borrower's credit score.

In addition, if a borrower is denied credit outright or is not given a requested increase or denied any other benefit or the cost of credit is increased either wholly or in part because of information received from a credit reporting agency, then in most provinces the borrower must be given written notice of that fact within 30 days — commonly referred to as an "adverse action letter." Borrowers have a right to access information in their credit file to ensure its accuracy.

Debt Collection

Debt collection activity is highly regulated under provincial collections legislation and requires any third party engaging in such activity to be registered as a collection agency in the applicable province. In addition, debt collection legislation has detailed provisions relating to prohibited practices, such as restrictions on the hours and frequency with which a debtor may be contacted by telephone.

Loyalty Programs

With the exception of Ontario's recently enacted *Protecting Rewards Points Act* and Québec's recently enacted amendments to the Québec *Consumer Protection Act*, loyalty programs are not specifically regulated in Canada, although aspects of such programs may be subject to certain protections in provincial consumer protection legislation.

Ontario

The Ontario legislation prohibits the expiry of rewards points due to the passage of time. Any provision to the contrary is void, with retroactive

effect to October 1, 2016, such that all points purporting to expire after October 1, 2016, will need to be reinstated. However, a rewards program may still be terminated and accumulated rewards may expire in some cases, including where the agreement so provides.

Québec

In Québec, Bill 134 (*An Act mainly to modernize rules relating to consumer credit and to regulate debt settlement service contracts, high-cost credit contracts and loyalty programs* (Bill 134)), which was enacted on November 15, 2017, 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.

Under Bill 134, 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.”

Bill 134 and the amended *Regulations respecting the application of the Consumer Protection Act* (enacted on July 3, 2018) further provide that the expiry of exchange units on a set date or by the lapse of time is prohibited, unless the provision providing for the expiry of exchange units meets all of the following conditions: (a) 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); (b) the “inactivity period” is not less than a year; (c) the loyalty program merchant must send a notice of inactivity to the consumer; and (d) 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.

As of August 1, 2019, merchants are also required to provide the following

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

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

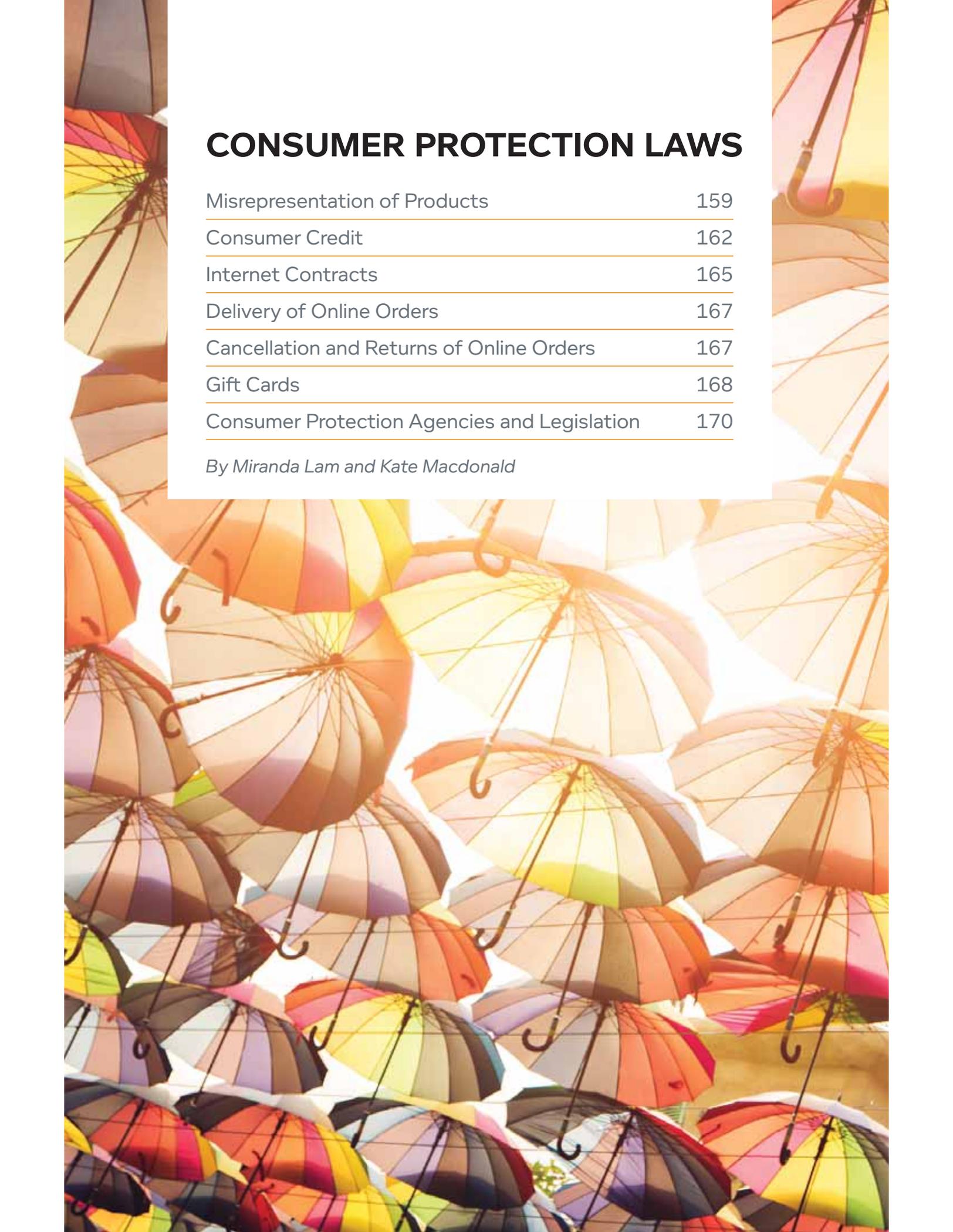
However, any provision that allows the loyalty program merchant to unilaterally modify to the detriment of the consumer the following element of a loyalty program is prohibited: (i) the number of exchange units received by the consumer; and (ii) the conversion factor used to convert exchange units into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

No other provinces or territories have announced intentions to enact similar legislation.

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By Miranda Lam and Kate Macdonald

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. This chapter provides an overview of consumer protection laws in Canada, while highlighting some differences among the provinces.

Misrepresentation of Products

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.

Sale of Goods Acts

Under the provincial sale of goods acts, there are implied warranties that apply to goods. These include that the 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 to formalize these statutorily implied warranties by way of express warranties. In practice, many retailers do so in any case 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.

Consumer Protection Legislation

Provincial consumer protection legislation prohibits retailers 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, for example 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 retailer has a sponsorship, approval, status, qualification, affiliation or connection which they do not have;
- goods or services are of a particular standard, quality, grade, style or model if they are not; and
- goods are new if they are used, deteriorated, altered or reconditioned.

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

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

Liability in Tort

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

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

If consumers are injured using good sold to them by retailers, the sellers, distributors or dealers may be liable for a breach of their duty to inspect, and their duty to warn. In most cases, consumers cannot sue in tort when goods are not dangerous, but are simply of bad quality and cause purely economic losses.



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

Québec

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

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

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

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

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

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

As to the warranties respecting goods or services offered by a retailer, exclusions are prohibited unless they are clearly indicated. The duration of a warranty mentioned in a contract or in an advertisement must



be determined precisely. No retailer may make false representations concerning the existence, the scope or the duration of a warranty.

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

The Federal Competition Act

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

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

Consumer Credit

Consumer credit, or consumer debt, is debt incurred when purchasing a good or service. Such purchases include those made with credit cards, lines of credit and certain other types of small loans.

In the retail context, the type of credit is most often instalment credit, which is credit used for a specific purpose, amount and time period. Payments are usually made monthly and are the same from month to month. Common examples of purchases made on instalment credit include large appliances, automobiles and furniture.



Canadian provinces have enacted legislation imposing stringent requirements on those who extend credit in an effort to protect consumers.

Ontario

Retailers in Ontario should understand their rights and restrictions placed on them under the *Consumer Protection Act* when granting instalment loans.

Ontario has recently developed a body of resources and legislation that aims to protect consumers by levelling the playing field with respect to payday loans and rent-to-own contracts. This body of legislation includes the *Consumer Protection Act*, the *Putting Consumers First Act, 2017* the *Payday Loans Act, 2008*, and the *Collection and Debt Settlement Services Act*. This legislation is designed to address the high-risk nature of these types of credit arrangements with consumers, which are unsecured and so often involve high interest rates and harsh penalties for things like missed payments.

The legislation gives consumers a grace period if they miss a payment on a rent-to-own contract, limits the cost of cheque-cashing services, implements a waiting period between loans for payday lenders, and prohibits lenders from entering into more than the prescribed number of payday loans with the same borrower in a one-year period. It also restricts certain debt collection practices, such as retailers' rights to utilize collection agencies to call on unpaid customer instalment credit.

British Columbia

In British Columbia, the provision of consumer credit is governed by the *Business Practices and Consumer Protection Act* and the corresponding *Disclosure of the Costs of Consumer Credit Regulation*. This legislation applies to individuals who enter into a credit agreement for primarily personal, family or household purposes, with a credit grantor, loan broker, or through a prescribed credit agreement, including with a retailer.

This legislation provides for robust disclosure requirements designed to allow customers to compare costs when making purchases. Among other things, it outlines the information that must be included in any advertisement for credit (such as the interest rate) and in any statements of account. It also sets out the information that must be disclosed for open credit, as well as the rights and obligations of borrowers and credit grantors.



In the first half of 2019, the provincial government amended the *Business Practices and Consumer Protection Act* to impose stringent requirements on lenders who offer high-cost credit products. The amendments include a cooling-off period, robust cancellation rights, a licence requirement, and extensive disclosure obligations. Retailers should watch for the coming into force of the substantive amendments and regulation, which will provide details of the high-cost credit products regime including the maximum interest rate.

The *Business Practices and Consumer Protection Act* also sets out requirements for credit cards issued through credit agreements. Certain information must be disclosed to the cardholder on the application for the credit card, including the interest rate and the amount of any non-interest charges. There are also requirements for information that must be disclosed to the cardholder on the first statement.

Alberta

Consumer credit agreements in Alberta are governed by the *Consumer Protection Act* and the *Cost of Credit Disclosure Regulation*. The legislation applies to consumers entering into credit agreements for personal, family, household or farming purposes where the credit grantor (the retailer) is entering into the agreement in the course of business.

When entering into consumer credit agreements, retailers must be aware of the robust disclosure requirements outlined in sections 8, 13 and 14 of the *Cost of Credit Disclosure Regulation*. Retailers must ensure these requirements are provided to the consumer in a statement that is clear, concise, logical and in writing. In general, these requirements are aimed at expressly informing the consumer of the total cost of the credit agreement.

On January 1, 2019, Alberta's high-cost credit requirements came into force, governing credit agreements that provide for an interest rate at or above 32%. Unless otherwise exempt by the legislation, businesses offering high-cost credit must obtain a license at a fee starting at C\$1,000 per year, plus a security deposit of C\$10,000. In addition, high-cost credit business must maintain documents and records, and disclose to the government the total value and number of high-cost credit agreements they enter into.

In addition, the *Consumer Protection Act* governs credit card agreements. Where a retailer enters into a credit card agreement with a consumer, the



retailer must prominently disclose to the consumer the annual interest rate (or the index and the relationship between the index and the annual interest rate, if the interest rate is a floating rate), the grace period, if any, and the amount of any non-interest finance charges. This information must be disclosed to the consumer at the time that the consumer applies for the credit card. As outlined in s. 88 of the *Consumer Protection Act*, any changes to this information requires 30 days' notice to the consumer.

Québec

In the province of Québec, consumer credit contracts are governed by the *Consumer Protection Act* and the *Regulation respecting the application of the Consumer Protection Act*.

Under this Act, retailers may not issue or send a credit card to a consumer unless the consumer has applied for it in writing, or if the credit card is being renewed or an existing card replaced. Retailers also cannot issue more than one credit card bearing the same number except on the written request of the consumer.

With respect to any lines of variable credit offered by a retailer, the retailer must clearly state the dollar amounts of any credit charges the consumer must pay in addition to the net capital of the amount loaned. These credit charges include interest, administration charges, brokerage fees, appraiser's fees, contract fees, the cost incurred for obtaining a credit report, and membership or renewal fees. Further, the credit rate must be computed and disclosed in the manner prescribed by the Regulation respecting the application of the *Consumer Protection Act*.

Consumers in Québec also have the right to cancel any credit card contracts or contracts involving credit, at their discretion, within two days following that on which each of the parties is in possession of a duplicate of the contract.

Internet Contracts

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

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 within 15 days after its formation. Provincial consumer protection legislation imposes strict requirements regarding what information must be included in the contracts. While this information varies in each province, it generally includes the name of the customer, the date of the contract and the terms and conditions, which must be either linked or referenced. The information must be presented in a clear, prominent and comprehensible manner, and the customer must be able to easily retain and print the information. The customer must also be provided with an express opportunity to correct errors in the contract or accept or decline the contract.

The practical effect of the legislation is that an internet contract only comes into effect once the retailer sends the customer confirmation of the purchase (along with all the other disclosure required) via email. In many provinces, if a customer is not provided with this disclosure within the required period of time, or if the disclosure they are provided with is deficient, they will be permitted to cancel the contract. Disclosure requirements and timelines vary by province.

In 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 retailers is whether to include a clause selecting the governing law or forum for any dispute. With the exception of Québec, an online contract may include a forum selection clause and governing law clause, selecting the law and forum of another jurisdiction. However, recent jurisprudence from the Supreme Court of Canada casts doubt on the enforceability of such clauses. In Québec, it is expressly prohibited to include any stipulation that a contract be governed by law other than Québec's consumer protection legislation.

In general, whether the terms of a consumer contract can be found online or are in hard copy written form presented to a consumer, provisions mandating arbitration or waivers of class action proceedings are not enforceable.



Delivery of Online Orders

Consumers may cancel internet contracts if a retailer 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 retailer 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 retailer 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, retailers must accept returns.

In certain provinces (in particular, British Columbia and Alberta), upon receipt of a request to cancel an online order, the retailer 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 retailer will be responsible for the reasonable costs associated with returning the goods.

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

Gift Cards

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

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

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

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



including a description of how a customer can check the balance of the card.

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

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

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

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



Consumer Protection Agencies and Legislation

Federal

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

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

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

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

Ontario

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

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

British Columbia

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



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

Alberta

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

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

Québec

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

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

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By Charlene Schafer and Paul Galbraith

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*. 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.

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

Planning Legislation

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

At the provincial level, the subdivision of land is restricted by statute in a number of Canadian provinces. In Ontario, the *Planning Act* is the main statute that controls subdivision. In British Columbia and many other provinces, the *Land Title Act* of that province is the main statute that controls subdivision. In addition, most provinces have legislation granting power to municipalities to regulate the subdivision and servicing of lands. In most cases, instruments such as transfers, subdivision plans or

separation of title, which result in the issuance of separate titles, and instruments such as leases, mortgages or discharges, which deal with part of a parcel, require subdivision approval.

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

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

Title Opinions and Title Insurance

Rights in land are not required to be registered. That said, registration in the appropriate land registry office is essential to protect an owner's priority over subsequent registered interests and to protect an owner against loss

from a bona fide third party. On an acquisition, in addition to registering a deed in the appropriate land registry office, a lawyer's opinion on title is typically issued to the purchaser of real property following closing.

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 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

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

assessment of a property before the advance of funds. This will also be an important due diligence consideration for those operating in the consumer products space who may be leasing or purchasing industrial buildings in support of their manufacturing and distribution processes where the likelihood of prior contamination may be higher.

Non-Resident Ownership

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

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

Some Taxes on the Transfer of Real Property in Canada

Withholding Obligations

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

Unless (i) the purchaser has no reason to believe, after making reasonable inquiries, that the vendor is not a non-resident of Canada; (ii) the purchaser concludes after reasonable inquiry that the non-resident person is resident in a country with which Canada has a tax treaty, the property disposed of would be "treaty-protected property" if the non-resident were resident in such country, and the purchaser provides the Canada Revenue Agency with a required notice; or (iii) the purchaser is provided with an appropriate certificate in respect of the disposition issued by the Canada Revenue Agency, the purchaser will be liable to pay as tax on behalf of the non-resident up to 25% of the purchase price of land situate in Canada that is capital property and up to 50% of the purchase price of land inventory

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

Land Transfer Tax

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

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

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

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

QST

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

Common Investment Vehicles for Real Property

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

Financing

Real estate financing for 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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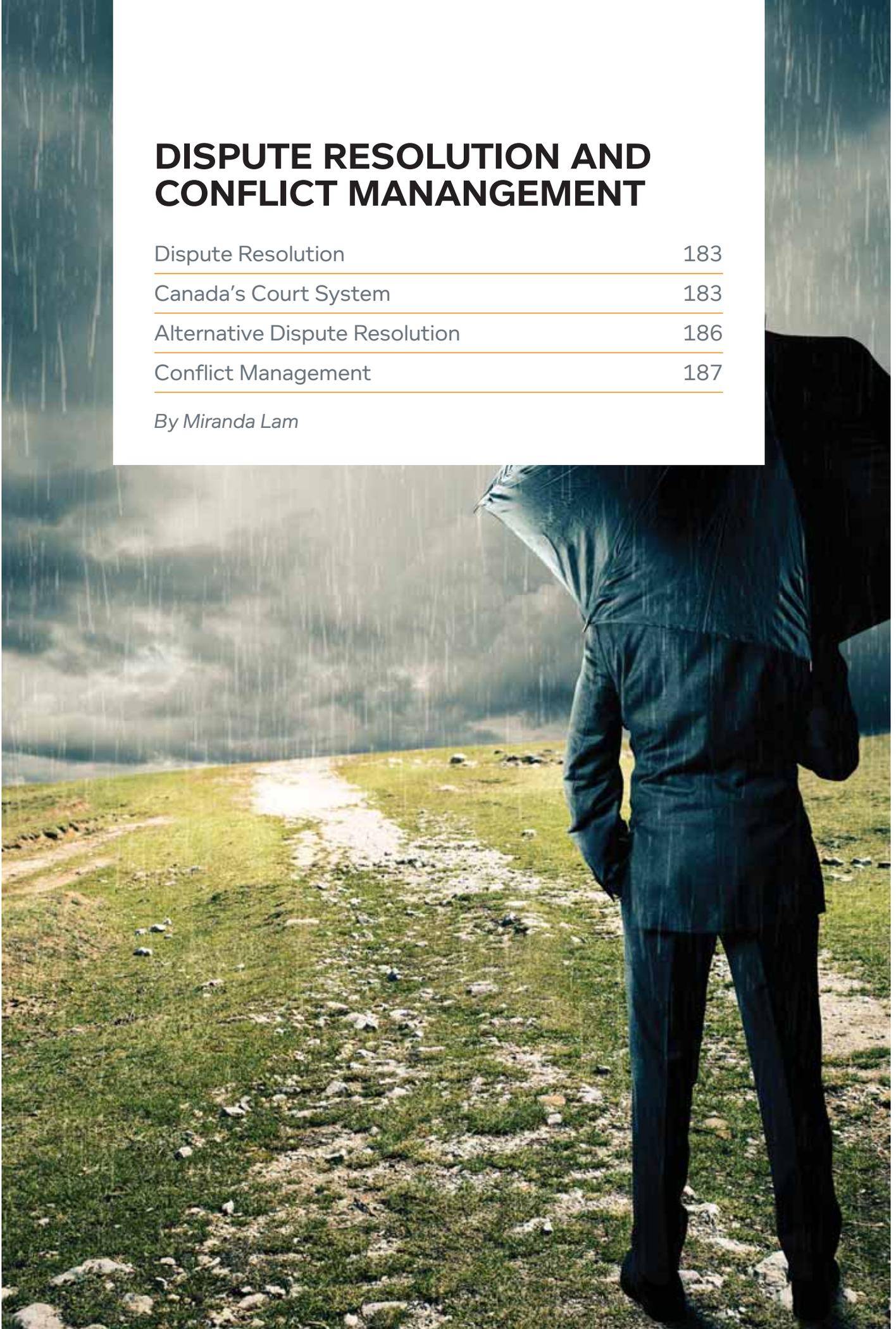
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DISPUTE RESOLUTION AND CONFLICT MANAGEMENT

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By Miranda Lam



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 retailers may face in bricks-and-mortar stores.

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\$25,000, while the ceiling in British Columbia is C\$35,000. The ceiling in Alberta is currently C\$50,000 and in Québec is C\$15,000.

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

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



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

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

Special Adjudication Processes in Ontario and British Columbia

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

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

British Columbia has recently 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. Almost all Canadian provinces have class proceedings legislation. 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." In provinces without such legislation, representative actions may be brought at common law.

The Province of Québec has a unique process where a class action must be "authorized" by a judge of the Superior Court of Québec instead of "certified" in order to go forward. The difference is more than semantic, as the threshold for authorization of a class action is even lower than the bar for certification in the rest of Canada.

In Canada, common targets of class actions include retailers, product manufacturers, insurers, employers, companies in the investment and financial industries and governments. Class actions may involve allegations of product liability, misrepresentation, breaches of consumer and employment laws, competition law (e.g. anti-trust) breaches, securities fraud and breaches of public law.

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

Electronic Discovery

The discovery and production of electronically stored information, commonly called e-discovery, has become an increasingly significant issue in litigation across Canada. A national committee has produced the

Sedona Canada Principles to establish national guidelines for electronic discovery. These guidelines are thought to be compatible with the rules of procedure in each of the Canadian territories and provinces. Upon becoming aware of litigation or the prospect of litigation, it is best to implement a litigation hold procedure and ensure documents and records are preserved.

Alternative Dispute Resolution

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

Mediation

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

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

Arbitration

Arbitration may be pursued on an *ad hoc* basis under a structure provided for in the local jurisdiction or under local statutory provisions. Alternatively, arbitration may be conducted under the administrative and supervisory powers of one of the recognized international arbitration institutes, such as the International Court of Arbitration of the International Chamber of Commerce in Paris, the London Court of International Arbitration or the American Arbitration Association. These bodies do not themselves render arbitration awards, but they do provide a measure of neutrality and an internationally recognized system of procedural rules.

One advantage of arbitration compared to domestic court procedure is

the confidentiality of arbitration proceedings. The arbitration process is normally private; hearings are not public and written transcripts of proceedings are not generally available to the public. In addition, the arbitration process may be faster than the court system, and there is generally no right of appeal from an arbitration award. This may lead to disputes being resolved more quickly.

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

Conflict Management

Loss Prevention

Retailers doing business in Canada may retain the services of security personnel to prevent crime and loss and maintain order inside their premises. In limited circumstances, a retailer may briefly detain an individual for an “investigative detention.” This is a form of citizen’s arrest. Clear guidelines for this process are essential for retailers in establishing strong loss-prevention programs against shoplifting.

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.

For example, Canadian courts are generally reluctant to permit private security to handcuff individuals for shoplifting offences. As such, handcuffing should not be used as a means to detain or arrest a shoplifter; it should only be used when it is required for safety, and even then, only as long as is required for safety.

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. Retailers are accordingly best advised to consult legal counsel in developing specific citizen's arrest protocols in each region where they operate.

Retailers 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, retailers should be aware of the scope of actions they can lawfully take to deal with protest activity.

Protest activity may take place inside a store or outside the store property, interfering with the entry and egress of visitors, guests or employees to the store. In both cases, a staff member may approach the protestors to request that they co-operate by leaving or ceasing interference with the entry to the store.

Protestors Inside

If protestors are in the store, the retailer can respond in a number of ways. Before using any force, protestors in the store 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, staff should call the local police department.

If police intervention does not resolve the situation and the protestors do not leave, staff may hand out trespass notices. 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 retailers to take action in respect of protestors outside the store 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 citizens' arrest. If the protest continues over a prolonged period, it may be necessary to seek an injunction in court restraining the protestors.

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

Loitering and Public Access

While loitering or causing a disturbance in a public place are offences under the *Criminal Code* in Canada, they are not offences that alone can ground a citizen's arrest.

Where a person is merely causing a disturbance without any physical altercation, or is merely loitering on the property, they should be asked to leave the property and clearly notified that they are now trespassing because their presence on the property is no longer authorized. They should be given an opportunity to leave. It is only after the foregoing steps are taken and they do not leave, that they may be removed from the property. As described in the foregoing section regarding "Loss Prevention" and "Protests," force should be a last resort and any force used should be reasonable. Merely loitering or causing a disturbance without violence is unlikely to justify any form of detention.

As with protestors outside of the store, if a person is loitering outside of a store and interfering with the entry and exit of visitors, guests, or employees, a retailer can advise the individuals that they are interfering with access to and from the property and request that the individual allow customers, employees and other visitors to come and go freely. In such circumstances, unless the individual is within the retailer's property, staff may not attempt to effect an arrest or to physically move the individual out of the way. If the individual refuses to leave, the local police department should be contacted. Local municipalities often have bylaws that address concerns about loitering on public property.

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ADVERTISING, MARKETING AND CONTESTS

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By Dominic Thérien and Karina Gagnon



ADVERTISING, MARKETING AND CONTESTS

Advertising and Marketing

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

Of core concern to retailers 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:

- 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;
- 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 (and as discussed in more detail later in this chapter);
- in electronic messages that are false or misleading (and as discussed in more detail later in this chapter);

- respecting testimonials with respect to a product;
- that advertise a product at a bargain price when there are not reasonable quantities of that product (“bait and switch”); and
- that advertise a price that is below the price that the product is actually sold for.

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

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

In addition to the Act, there are provincial consumer protection and business practice laws that apply to deceptive business practices, as well as to gift cards, coupons, rebates and warranties. For example, Québec’s *Consumer Protection Act*, subject to certain exceptions, prohibits commercial advertising directed at children under 13 years of age, regardless of the advertising medium or formats used by retailers (radio, television, website, mobile phone, etc.). 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. Retailers should obtain specific advice on these and other regulated sectors.

While it is outside of the scope of this overview, retailers 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.

Ordinary Price Claims

As an example of the specific types of representations referred to earlier in this chapter, there are comprehensive restrictions in the Act for the making of ordinary price claims in support of discounts. The Competition Bureau has taken a keen interest in ordinary price claims in recent years, and penalties under consent agreements in respect of alleged breaches of these provisions have ranged from C\$1 million to C\$4 million, plus costs.

Ordinary price representations are statements that represent the regular, or ordinary, price, typically as a comparison to a promotional price. Ordinary price representations can be expressed in different ways, including as a discount or percentage off a particular product or all products sold by a supplier (i.e., “Save 50% off all children’s shoes” or “Save 30% off our regular prices”), as a “buy-one-get-one-free” offer (i.e., “BOGO” or “2for”) or as a specified mark-down (i.e., “Our Regular Price: \$19.99 Sale Price: \$14.99”).

It is reviewable conduct under the Act for a person to make a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied where either the person making the representation or suppliers generally in the relevant geographic area, as applicable:

- have not sold a **substantial volume** of the product at the advertised regular price or a higher price within a reasonable period of time before or immediately after the making of the representation, as applicable (the “volume test”); or

- have not offered the product at the advertised regular price or a higher price **in good faith for a substantial period of time** recently before or immediately after the making of the representation, as applicable (the “time test”).

Where a supplier does not clearly specify that the price representations are with respect to the supplier’s own pricing (i.e., “15% off” versus “15% off our regular price”), the Competition Bureau will consider the advertised regular price(s) as a reference to the pricing of suppliers generally in the relevant market.

If a price representation does not meet either of the volume test or time test under the Act (as further outlined in the Competition Bureau’s published enforcement guidelines), that price representation constitutes reviewable conduct under the Act, unless the supplier can establish that the representation was not otherwise false or misleading in a material respect.

The consequences for breaches of the ordinary price provisions of the Act are significant. A corporation may be assessed an administrative penalty of up to C\$10 million for a first offence and up to C\$15 million for subsequent offences. The Competition Bureau has entered into a number of consent agreements with retailers operating in Canada in recent years in respect of alleged breaches of the ordinary price provisions and otherwise false and misleading price advertising. Consent agreements have the force of a court order and include conduct requirements intended to ensure compliance with the Act, typically for a period of 10 years.

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 retailer 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. Similar to the consequences for breaches of the ordinary price provisions of the Act, significant administrative penalties may be imposed upon a corporation for such conduct (up to C\$10 million for a first offence and up to C\$15 million for subsequent offences).

These electronic message provisions also are significant as they may become enforceable by way of a private right of action under CASL (i.e. Canada's Anti-Spam Legislation) — see [E-commerce](#). 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 a 2019 speech, the Commissioner of Competition, who heads the Competition Bureau, stated that the Competition Bureau “will continue to prioritize investigating misleading representations made online.” Further, the Competition Bureau created the Chief Digital Enforcement Officer position in 2019. Accordingly, it is crucial to consider the general impression of advertisements when viewed online, including on mobile devices. This can create unique challenges, such as ensuring the proper placement and layout of online disclaimers.

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

The proliferation of advertising by social media influencers has also led

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

Contests and Promotions

Contests and promotions are highly valued marketing tools for retailers in Canada, but retailers should pay close attention to how their contests and promotions are structured in order to comply with the restrictions under the *Criminal Code* and the requirements of the Act. A retailer that runs a contest or promotion that contravenes these restrictions and requirements risks both criminal and civil liability.

A typical contest involves a retailer offering its 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 retailers 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. Retailers rely on a number of other features to ensure that any given contest or promotion falls

outside the second category above, such as including a “no purchase necessary” entry option. This usually manifests as an “alternative mode of entry” where an entrant does not need to purchase a product, but can simply mail in an entry instead.

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

Requirements Under the Competition Act

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

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

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

Retailers should also be aware that Québec law and regulations impose additional requirements on retailers that conduct contests open to Québec residents. For example, retailers must file a notice of contest, as well as the contest rules and contest advertisements, with the *Régie des alcools, des courses et de jeux* (the Régie) within a certain time frame before the contest launch and pay to the Régie a contest fee based on the aggregate value of the contest prize(s). The contest rules and contest advertisements must also include specific information (value of the prize(s), how the prize(s) will be awarded and other details). The Régie may

may also require security from the company for which a publicity contest is carried on under certain circumstances, such as where the retailer has no declared head office or establishment in Québec, where value of a prize offered to Québec residents is more than C\$5,000 or where the aggregate value of prizes offered to Québec residents is C\$20,000 or more.

Depending on the structure of a contest or promotion, there are a number of other contest conditions and disclosures that could be appropriate to manage risk and ensure compliance. One of our contests lawyers in the Retail and Consumer Markets 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

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By Adam Ship



FRANCHISING

Overview

The franchise business model is commonly used in Canada and has experienced significant growth over the last decade. According to the Canadian Franchise Association, the leading national franchise industry group, approximately 1,300 franchised brands operate in Canada through 75,000 franchised units, employing more than one million Canadians and generating approximately C\$96 billion in annual revenue. Franchising is common across many industries in Canada, including quick service restaurants, hospitality, home care, automotive retailing, telecommunications retailing, education and beauty/cosmetics.

Foreign franchisors can expand into Canada with or without opening a brand 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.

Franchise-Specific Legislation in Canada

The jurisdiction to regulate franchising is held by Canada's provinces. To date, six provinces have enacted franchise-specific legislation: Ontario, British Columbia, Alberta, Manitoba, New Brunswick and Prince Edward Island (Statutory Provinces).



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

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

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

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

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

A number of court decisions have interpreted Canadian franchise legislation as requiring an FDD to include facts and information that are material to the individual location being granted to a franchisee, for example: (i) an FDD must include any head-lease entered into between the franchisor and the third-party landlord, where the franchisor requires the franchisee to be responsible for the head-lease through a mandatory



sublease; and (ii) one court has found an FDD to be deficient where it failed to disclose that the previous owner of the franchise seriously mismanaged the location.

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

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

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

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

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

Statutory rescission is the primary remedy to a franchisee who fails to receive an FDD or who receives a deficient FDD. Statutory rescission gives the franchisee the right to both terminate all franchise and ancillary agreements with the franchisor without penalty or further obligation and substantial financial compensation to put the franchisee back into its pre-sale position.



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

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

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

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

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

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LANGUAGE

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Inside Québec 209

By Charles Morgan



LANGUAGE

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

Outside Québec

Outside Québec, the main exception to this focus on the public sector is consumer packaging. Regulations under the federal *Consumer Packaging and Labelling Act* identify specific information with which 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, other governments in Canada may apply their own language policies to matters within their jurisdiction. New Brunswick and the three northern territories are officially bilingual. Several provinces have adopted legislation to ensure that public services are available in French where warranted; but only Québec's language legislation regulates how businesses operate.

Inside Québec

Québec's *Charter of the French Language* (Charter) affirms French as that province's official language. The Charter 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.

CANADA'S
CONSTITUTION
GRANTS ENGLISH
AND FRENCH EQUAL
STATUS IN CANADA'S
PARLIAMENT AND
FEDERAL COURTS.





In the Workplace

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

Businesses that employ at least 50 people within Québec for at least six months must register with a provincial regulator (the Québec French Language Office or OQLF) to obtain a francization certificate by demonstrating that the use of French is generalized at all levels of the business (including in relation to the use of information technology and in communications with clients, employees and investors). Businesses where the use of French is not generalized at all levels may be subject to a francization program in order to achieve this goal over time. In addition, businesses with at least 100 employees must establish an internal francization committee that monitors the use of French in the workplace.

In the Marketplace

Rules about how businesses communicate in Québec's marketplace differ according to whether the communication is in a public or private place. Billboards and signs visible from a public highway, on a public transport vehicle or in a bus shelter must be exclusively in French. Public signs, posters and commercial advertising located elsewhere may include other languages, but the French text must predominate. Non-French business names must be accompanied by a French version appearing no less prominently, unless the non-French name has been trademarked and a French version has not. Moreover, anyone carrying on business at a Québec location must register a French language business name.

RULES ABOUT HOW BUSINESSES COMMUNICATE IN QUÉBEC'S MARKETPLACE DIFFER ACCORDING TO WHETHER THE COMMUNICATION IS IN A PUBLIC OR PRIVATE PLACE.

With respect to the trademark exception for public signs, pursuant to regulations adopted in 2016, any person having as part of its public signage a trademark that is only in English will have to add one of the

following three elements in French: (i) a generic term or a description of the products or services concerned; (ii) a slogan; or (iii) any other term or indication, favouring the display of information pertaining to the products or services to the benefit of consumers or persons frequenting the site. This new requirement is intended to address concerns expressed by certain francophone consumers in Québec to the effect that English-language trademarks were dominating the urban commercial landscape in some cities.

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

Québec courts have held that certain provisions of the Charter apply to websites. For example, product and service descriptions on websites may be subject to French-language requirements since they are akin to a commercial catalogue. Similarly, standard form contracts (such as website terms of use and privacy policies) as well as order forms must be drafted in French according to the Charter. In general, if a company has a physical address in Québec and its website advertises products or services sold in Québec, then the above-mentioned aspects of the website may be subject to French language requirements.

FOR MORE INFORMATION, PLEASE CONTACT:

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MCCARTHY TÉTRAULT PROFILE

Our Retail and Consumer Markets Group

McCarthy Tétrault's Retail and Consumer Markets Group is an established market leader with significant experience in the Consumer Products, Food, Beverage & Agribusiness, Franchise & Distribution, Hospitality and Retail sectors. 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.

Our team is embedded in the industry and is led by retail and consumer market-focused lawyers who also 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 firm's seamless 'one-stop-shop' approach means clients only need to call once to solve a problem or seize an opportunity.

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.

Retail and Consumer Markets Sectors

Our Retail and Consumer Markets Group includes the following sectors:

Consumer Products: Our integrated multi-disciplinary consumer products team works with clients across a range of industry segments, from clothing and household goods to personal care, cosmetics, luxury goods and electrical products. We partner with leading companies in Canada, the U.S. and internationally on issues including packaging and labelling, M&A and product recalls.





Food, Beverage & Agribusiness: Our comprehensive understanding of the role of the food chain — and its impact on food availability, accessibility and security — is unsurpassed. Our clients include all of the participants in the chain, such as multinational growers and producers; food processors and distributors; manufacturers of agricultural and food processing industrial equipment; fertilizer and agro-chemical producers; and lenders and investors, including private equity and venture capital firms.

Franchise & Distribution: Our Franchise & Distribution team advises franchisors on all aspects of Canadian franchise and distribution law, across diverse industries and sectors. We advise clients on day-to-day issues and strategic changes for clients with sophisticated distribution or franchise networks, and our experience includes advising on disclosure documents; distribution and franchise agreements; litigation and class actions; intellectual property protection; and network operations and strategy.

Hospitality: In addition to being a trusted day-to-day advisor across practice areas, we have sat at the table with national and international hotel owners, management companies, franchisors, developers and investors for some of the highest-profile hospitality deals in North America and around the world. Our clients do business in all areas of the hospitality, leisure and resort industry. We represent hotels and resorts, airlines, casinos and gaming businesses, restaurants and food service providers, stadiums and other sports facilities, timeshare companies and retirement communities.

Retail: Our Retail sector team brings together lawyers from multiple disciplines that work with clients across a range of industry segments, from clothing and household goods to grocery, personal care, cosmetics, luxury goods and electrical products. We partner with leading online and bricks and mortar retailers in Canada, the U.S. and internationally, offering a 'one-stop-shop' to advise on day to day and game-changing issues.

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, Food and Consumer Products of Canada and our own Consumer Products & Retail Summit.

With offices in Canada’s major commercial centres as well as in New York City and London, U.K., McCarthy Tétrault delivers integrated business law, litigation, tax law, real property law, and labour and employment law services nationally and globally.

Please contact any of the lawyers listed below to assist you in providing a detailed analysis of the issues relevant to your business.

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