Expanding into Canada

FASKEN

Own tomorrow

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1. The Canadian Business and Investment Environment

The laws and political climate of a country work in tandem to create the environment within which business enterprises operate. Both Canada's federal and provincial governments have created an atmosphere where international businesses can flourish.

Canada has an open, fair, and efficient system of making and administering its laws. Grounded in parliamentary democracy at both federal and provincial levels, the formation of Canada's commercial and common law has been greatly influenced by England and the United States. Canadian common law – both contract and tort – is administered through a civil court system. There are many specific mechanisms that have been put in place to encourage the early and efficient settlement of disputes.

The Canadian legal system offers fast and predictable outcomes, providing a reassuring environment for business transactions. These advantages apply equally under the distinct civil law system of Québec and the common law system in the rest of Canada.

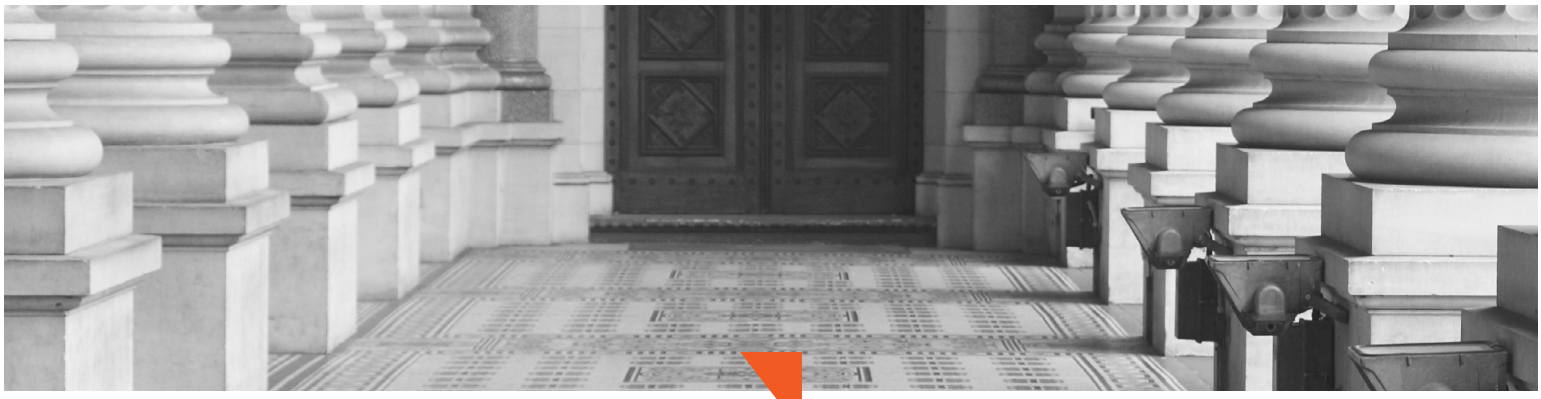
Like all advanced countries, Canada has laws to protect consumers, investors, workers, brand owners, inventors, and the environment. Canada's federal and provincial governments have moved to reduce their size and to use alternative systems – like public-private partnerships – to deliver public services. In addition, both levels of government have found more efficient ways to accomplish regulatory objectives. The business tax system is competitive and conducive to expansion. Key sectors – such as transportation, energy, communications, and financial services – have been deregulated and many government-owned corporations have been privatized.

Canada has become a global leader in technology and innovation, seeing significant domestic growth and foreign investment in recent years.

Canada has adapted the vast majority of government activities to respect the concerns of business and respond to market forces. The result is a business and investment environment that many foreign companies consider among the most hospitable in the world.

Canada is frequently recognized as having one of the most resilient economies in the world, largely because of its regulatory banking framework. As a result, Canada's strong banking and financial services sector is a welcoming environment for foreign expansion, particularly during uncertain economic times.

This guide provides an overview, based on our cross-Canada and leading expertise in all relevant areas of business law, for those looking to expand their business into Canada from abroad.



2. Government Relations

Every enterprise operating in Canada should consider the strategic benefits of understanding Canada's system of government.

Canada's System of Government

Canada is a federation divided into ten provinces and three territories. The Constitution of Canada divides powers between the federal parliament and the provincial legislatures.

Areas within the jurisdiction of the federal parliament include defence, foreign policy, trade and commerce, transportation, communications, criminal law, banking, patents, copyright, and unemployment insurance.

The provincial legislatures have jurisdiction over areas such as education, hospitals, property and civil rights, welfare, local works and undertakings, natural resources, and "generally all matters of a local or private nature in the province."

Jurisdiction over certain areas, such as agriculture and immigration, are divided between the federal parliament and provincial legislatures.

It is important to note that the Canadian provinces are generally not subordinate to the federal government. The provincial legislatures are autonomous within their constitutional jurisdiction, while the federal parliament is autonomous within its jurisdiction. Only in exceedingly rare cases – such as where provincial laws abut federal jurisdiction – will federal laws render provincial laws inoperative.

Executive

The head of Canada's government is the Prime Minister. In most provinces, the head of the provincial government is the Premier.

Canada's head of state is His Majesty King Charles III, the King of Canada, represented in Canada by the Governor General. The Governor General plays a largely ceremonial and constitutional role and is entirely removed from the running of government. In each province, there is a Lieutenant Governor who has an equivalent role to the Governor General yet for the purposes of the particular province.

The Cabinet is composed of the Prime Minister (at the provincial level, the Premier) and as many members as he or she chooses. Cabinet members are called "ministers". The formal title of most ministers is "[Portfolio] Minister," though some ministers have different titles (e.g. "Attorney General" or "Treasury Board President").

Legislative

The federal Parliament is bicameral, divided into an elected House of Commons and an unelected Senate.

Members of the Senate are called “senators”, while members of the House of Commons are called “members of Parliament“ (or MPs).

All provinces have unicameral legislatures. Members of provincial legislatures are usually called “members of the legislative assembly” (MLAs). However, in Ontario, they are called “members of provincial parliament”(MPPs); in Newfoundland and Labrador, they are called “members of the house of assembly” (MHAs); and in Québec, they are called (in English) “members of the national assembly” (MNAs).

Canada is currently divided into 338 electoral districts, each represented by one member of the House of Commons.

Elections

The call of a general election involves dissolving Parliament or the legislature and then calling an individual election in each electoral district of the country or province. What Canadians refer to as a general election is actually a simultaneous series of district elections.

Federal general elections, as well as almost all provincial general elections, now occur on a fixed date, four years after the last election. Previously, the dates of elections were determined by the Governor General or lieutenant-governor. However, since these positions are largely ceremonial and the lieutenant-governor merely acts on the advice of the Prime Minister (or the Premier, as the case may be), in practice, it is the Prime Minister (or the Premier) who decides when to dissolve Parliament or the legislature and trigger a general election.

Structure of Government

The federal government is organized into units called departments. The number and structure of departments is determined from time to time by the Prime Minister.

The senior civil servant in charge of each ministry is the deputy minister. All deputy ministers are appointed by Cabinet and serve at the pleasure of the Prime Minister. In practice, they report to the Prime Minister’s deputy minister (the clerk of the Privy Council), who is head of the civil service.

The entire civil service, from the rank of deputy minister downward, is non-partisan and expected to serve the government of the day. Even the Privy Council Office (the Prime Minister’s department) consists of non-partisan civil servants. While a newly elected government might shuffle deputy ministers or replace a few who are not well-suited to implement its agenda, the civil service largely remains intact, even following a change of the governing political party.

In addition to non-partisan civil servants, the Prime Minister, ministers, and members of the House of Commons are supported by political staff members who serve at their pleasure and as long as their employer holds office. Ministers’ staffs usually range in size from ten to twenty-five individuals, while a backbench member of the Commons might have two to four assistants divided between the parliamentary office in Ottawa and the constituency office(s) in his or her district.

Government Relations

Companies considering investing in the Canadian business environment should explore applicable government regulations that may greatly impact their business' potential. Conversely, certain industry services that are in heavy demand by the government are worthy business opportunities to be developed (notably, defence and information technology).

Government relations-driven business is often prompted by the lobbying of senior bureaucrats, ministers, and similar officials who are in a position to consider investing in a company or to approve a company's involvement in a government-funded project. Such efforts should not be limited to the political party that forms the majority in Parliament, as lobbying the minority parties can be useful as well.

A healthy relationship with the applicable level of government becomes crucial when a business is faced with specific issues that are within governmental control. For example, a corporation that produces as well as operates carbon dioxide capture and storage mechanisms would benefit from a comprehensive understanding of the current regulatory environment and funding opportunities pertaining to natural resources and the environment. Further, the production of a natural gas pipeline can involve provincial ministries of energy, lands, and environment, in addition to the federal ministries of fisheries and oceans. In such situations, it is crucial to engage the appropriate elected officials to assist with initiating change, investment, and encouraging business development.

There are currently several key areas of government relations. Among the most important are the areas of aboriginal law and environmental law.

Aboriginal Law

The area of aboriginal law is important to any forestry, energy, mining, or transportation business operating on lands subject to aboriginal land claims and land treaties.

Environmental Law

Environmental law is emerging as a legal mainstay in real estate development, natural resource extraction, and industrial development, among other fields. Not only must the current regulations be understood and applied, but the associated risks must also be mitigated and the potential liability lessened. Few businesses are free of environmental concerns. A succinct and cohesive understanding of Canadian environmental law will not only minimize legal risk, but may also provide previously unforeseen benefits.

3. International Trade Law

When a business is entering the Canadian economy, there are a number of international trade considerations it should be aware of, such as the duties, taxes, and/or surtaxes that may apply to the importation of products and the trade agreements that apply to reduce those border costs. Canada's international trade rules can have a significant impact on a business' success in entering and operating in Canada. A selection of those rules are examined below, including:

- International trade agreements
- Government procurement
- Investment treaties
- Export and import controls
- Sanctions
- Customs and border administration
- Trade remedies
- Anti-corruption laws

International Trade Agreements

Canada is a trading nation that is heavily committed to a multilateral rules-based system and is an active promoter of plurilateral and bilateral trade agreements. It is a founding member of the World Trade Organization (WTO) and is party to dozens of other trade agreements, including the Comprehensive Economic and Trade Agreement (CETA), the Canada-United States-Mexico Agreement (CUSMA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the Canadian Free Trade Agreement (CFTA).

WTO

The WTO was established in 1995 to create a rules-based trading system. It accomplished that through a number of agreements covering: trade in goods, services, and intellectual property; dispute resolution; public procurement; and government trade policy. The core principles of these agreements are (i) the reduction of tariffs and (ii) non-discrimination through obligations to provide national treatment and most-favoured-nation treatment of the goods, services, and investors of the member states.

CUSMA

CUSMA entered into force between Canada, the United States (US), and Mexico on July 1, 2020. CUSMA replaced the North American Free Trade Agreement (NAFTA), which governed trade between the three countries since 1994.

NAFTA integrated North American economic space for trade in goods and many services. The agreement eliminated most tariff barriers and provided investment protection, enhanced access to government procurement, and effective dispute resolution among parties.

With some notable exceptions, the scope and content of CUSMA reflects that of NAFTA. The exceptions include significant changes for (i) the automotive and dairy sectors, (ii) government procurement, (iii) investor protection, and (iv) data transfers.

For example, Greater North American content in automotives and automotive parts is now required, including a requirement that certain content be produced by workers earning at least US$16 an hour. Additionally, American dairy producers have now been granted increased access to Canada's lucrative dairy sector.

The NAFTA rules governing government procurement have been eliminated and suppliers in each of the three countries will lose the privileged access that they enjoyed under NAFTA to the procurement markets in the other two countries.

The sweeping investor protection measures found in NAFTA have also been eliminated, so US and Mexican investors in Canada will lose their right to use international arbitration to challenge Canadian measures. They will, however, retain their right to challenge Canadian measures in Canadian courts.

Finally, the new agreement bans restrictions on data transfers across borders, meaning that Canada cannot require companies based in the United States or Mexico to store data within Canada.

CETA

CETA is a comprehensive trade agreement between Canada and the European Union (EU) and covers virtually all sectors of trade between Canada and the EU. It came into force provisionally on September 21, 2017, and immediately eliminated 98% of customs tariffs. Within seven years, 99% of customs tariffs on qualifying goods will be duty-free. In addition, CETA's government procurement chapter gives Canadian suppliers privileged access to the huge EU public procurement market, from the EU institutional level, down through national and provincial governments to public institutions at the municipal, academic, school board, and health sector levels.

Given CETA's massive scope as well as coverage, and given enough time for its full benefits to be realized, CETA may prove to be the most significant trade agreement Canada has signed since NAFTA.

Since the United Kingdom (UK) left the EU on January 31, 2020, the Canada-UK trade relationship is no longer governed by CETA. As of April 1, 2021, Canada and the UK have signed and ratified the Canada-United Kingdom Trade Continuity Agreement (Canada-UK TCA). The Canada-UK TCA preserves the main benefits of CETA, including the elimination of tariffs on 98% of Canadian products exported to the UK.

Canada and the UK plan to engage in negotiations within a year of the ratification of the Canada-UK TCA, with the goal of producing a final and comprehensive bilateral agreement within three years.

CPTPP

The CPTPP came into force on December 30, 2018, and governs trade between Canada and ten countries (Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam). Privileged access to the Japanese market will be the most important gain for Canada in the short term, especially for Canada's agricultural industry. The member countries' obligations include (i) reducing tariffs and technical barriers and (ii) providing investment protection, temporary entry for certain business persons, and access to government procurement. To ensure compliance, there is a dispute settlement process available to the member countries.

Canadian Free Trade Agreement (CFTA)

Building on the Agreement on Internal Trade, the Canadian federal government and the governments of the provinces and territories negotiated the CFTA with the aim of improving trade in goods and services within Canada. It came into force on July 1, 2017.

Government Procurement

The WTO Agreement on Government Procurement, CETA, and the CFTA each contain a chapter on government procurement that is aimed at increasing access to procurement opportunities and imposing rules on procuring entities to ensure fair and open procurement. When suppliers believe that the Canadian procurement entity has not complied with its procurement obligations under the trade agreements, they may challenge the contract award before the Canadian International Trade Tribunal (CITT). If the CITT determines that the complaint is valid, it may recommend that a new solicitation be issued, the bids be re-evaluated, the existing contract be terminated, the contract be awarded to the complainant, and/or the complainant be compensated for its loss of the contract.

Investment Treaties

Investment treaties, which can be stand-alone agreements or contained in a comprehensive free-trade agreement, seek to ensure that foreign investors are treated in a non-discriminatory way, both compared to domestic investors and to other foreign investors.

Such treaties also require that foreign investors be given fair and equitable treatment and prohibit expropriation without compensation. Virtually all of Canada's investment treaties provide a dispute settlement process that allows the foreign investor to challenge a government measure before arbitration panels appointed by both the investor and the defending government. If the arbitral tribunal finds that the Canadian measure did not comply with Canada's obligations under the treaty, it may order that damage be paid to the investor. Such awards are enforceable against Canada under international law.

As noted above, the investor protection provisions of NAFTA were eliminated in CUSMA. In 2023, three years after the date CUSMA came into force, the investor-state dispute resolution process established under NAFTA will be eliminated. Entities from the United States and Mexico doing business in Canada will no longer have access to dispute settlement procedures. Recourse under domestic law will, however, remain an option.

Import and Export Controls

Global Affairs Canada administers Canada's export controls pursuant to the *Export and Import Permits Act* (EIPA).

Import Controls

Import controls are governed by the Import Control List, which sets out a list of goods that are subject to import permit requirements. The list includes firearms, certain chemicals, and certain agricultural products, such as meat and dairy. In some cases (e.g. firearms), a permit is required before the goods can be imported into Canada. In other cases (such as agricultural goods subject to a tariff rate quota), the products may be imported without a permit, but will be subject to a prohibitive tariff that can be as high as 270%.

Export Controls

The following lists govern the exportation of goods and technology from Canada: the Export Control List, the Brokering Control List, the Area Control List, and the Automatic Firearms Country Control List.

The Export Control List identifies goods and technology that require an export permit in order to be exported or transferred from Canada. The list is categorized into the following groups: dual-use items (items that have both a civilian and military purpose, such as computers), munitions, nuclear non-proliferation items, nuclear-related dual-

use goods, missile equipment and technology, chemical and biological weapons, and miscellaneous goods and technology (including all US-origin goods and technology as well as certain medical products, agricultural products, forest products, and strategic items). When exporting goods from Canada, it is important to first determine whether or not it is included on the Export Control List.

The Brokering Control List identifies goods and technology for which a brokering permit is required. Brokering entails arranging or negotiating a transaction that would result in the movement of controlled items from one foreign country to another foreign country. Items controlled under this list include full-system conventional arms and other items under the Export Control List, including munitions and any other controlled item that is likely to be used to produce or develop a weapon of mass destruction. The Minister of Foreign Affairs must apply the assessment criteria required by the Arms Trade Treaty when considering the granting of export and brokering permits for these items.

The Area Control List is a list of countries to which Canada maintains a virtual prohibition of any exportation of goods, technology, and services. Currently, the Democratic People's Republic of Korea (North Korea) is the only country on the List. That said, Canada does maintain sanctions against a number of other countries where the exportation of goods, technology, and services is severely limited. Canada's sanctions regime is discussed below.

The Automatic Firearms Country Control List restricts the export of firearms, weapons, as well as devices, and identifies countries for which Global Affairs Canada might issue an export permit. In terms of the type of permit, exporters have three options: an Individual Export Permit, a Multiple Destination Permit, or a General Export Permit. An Individual Export Permit allows the export of controlled goods or technology to specific recipients in a specific country. A Multiple Destination Permit allows the export of most dual-use items to twenty-six countries, including the United Kingdom and South Korea. A General Export Permit is granted to all residents of Canada and allows the export to certain specified destinations under certain conditions. Only two such permits have been issued by the Minister of Foreign Affairs, both of which were related to cryptography technology.

Controlled Goods Program

The Controlled Goods Program is designed for companies in the defence industry. Companies and individuals dealing with goods or technology that are subject to the *Defence Production Act* must register under the Controlled Goods Program prior to possessing or transferring controlled goods. The goods listed in the Controlled Goods Regulations are generally ones of strategic significance or that have national security implications for Canada. A business involved in the export of controlled goods from Canada should be aware that registration with the Controlled Goods Program is a prerequisite to receiving an export permit from Global Affairs Canada.

Nuclear Products

One final control to be aware of when transporting goods to or from Canada is the Nuclear Non-proliferation Import and Export Control Regulations. In order to import or export a controlled nuclear substance, nuclear equipment, controlled nuclear information, risk-significant radioactive source, or any product designed or modified for a nuclear end use, a licence must be obtained from the Canadian Nuclear Safety Commission. Businesses entering the Canadian market through a merger or an acquisition, or businesses that are simply changing their corporate name, should know that such licences may generally be transferred to another licensee or licence applicant so long as there is no significant change in the licensed activity.

Sanctions

Canada has five statutes that authorize the imposition of trade and economic sanctions: the *United Nations Act*, the *Special Economic Measures Act*, the *Freezing Assets of Corrupt Foreign Officials Act*, the *Criminal Code*, and the *Justice for Victims of Corrupt Foreign Officials Act*.

Global Affairs Canada is responsible for administering Canada's economic sanctions on a number of countries. Sanctions giving effect to United Nations Security Council resolutions are imposed under the authority of the *United Nations Act*. Sanctions imposed unilaterally by Canada are found under the *Special Economic Measures Act*. Depending on the country and the sanctions imposed, the sanctions may prohibit activities such as conducting transactions with certain individuals or entities, exporting certain products to a certain country, or transferring technical data to a person or an entity of a sanctioned country. The sanctions may also allow the Canadian government to seize or freeze assets located in Canada. This is a complex and constantly changing area involving multiple legislative schemes, including sanctions imposed by Canada, measures imposed by any other countries a business operates in, and US sanctions that apply extraterritorially. Therefore, it is important for a business to screen the companies it does business with and the individuals who own or control them. Many businesses engage a third-party screening company to conduct this due diligence.

Customs and Border Administration

The Canada Border Services Agency (CBSA) administers customs laws, along with a myriad of other laws that regulate how goods may be sold in the Canadian market.

The *Customs Act* imposes a general duty to report the importation of all goods into Canada, specifies how goods are valued for duty purposes, provides the tariff preferences granted under free-trade agreements, and regulates the authority of the CBSA.

The Schedule to the Customs Tariff lists the customs duty for each item in accordance with its classification under the harmonized classification system, and importers are required to correctly classify their goods and pay the appropriate duties and taxes. In addition to levying duties, the CBSA also administers duty-relief programs and the collection of several other taxes as required, such as the GST/HST, excise taxes, and surtaxes.

If an importer makes a mistake in its declaration, the CBSA generally has four years from the date of the importation to force the importer to correct the declaration and pay any additional duties and/or taxes that may result from the correction.

The CBSA's decisions on most issues – such as valuations, classifications, or tariff preference eligibility – may be appealed both within the CBSA and, eventually, to the CITT.

Trade Remedies

The *Special Import Measures Act* protects Canadian producers from the injurious effects of dumped or subsidized imports by providing rules and procedures for investigations into complaints of dumping and subsidies (and the imposition of duties in response). Dumping occurs when a product is imported into Canada at a price that is lower than the profitable selling price of the product in the exporting country or at a price that is lower than the cost of producing the product. A subsidy is a financial or other benefit granted to the manufacturer of the exported goods by the government of the exporting country. Final anti-dumping and counter vailing duties will only be imposed where the CBSA has determined that the goods have been dumped and/or subsidized and the CITT has determined that the dumping and subsidization caused, or threatened to cause, material injury to the Canadian industry. While a full investigation may take up to a year to complete, the CBSA usually imposes provisional duties within ninety days of launching an investigation.

Canada also has a domestic safeguards regime in place to protect domestic producers in cases where no dumping or subsidization is occurring, but where increased volumes of imports into Canada are causing, or threatening to cause, serious injury to Canadian producers.

Anti-Corruption Laws

Canada has a number of laws to combat corruption. The *Corruption of Foreign Public Officials Act* prohibits the payment of bribes to foreign public officials for the purpose of obtaining a business advantage. Within Canada, the Act applies to both Canadians and non-Canadians. It also applies to Canadian citizens, permanent residents, and Canadian corporations in their activities outside of Canada. It applies to non-Canadians only if the offence is committed, at least in part, in Canada. The *Criminal Code* prohibits bribes to Canadian officials, including judges, members of Parliament, police officers, and government officials. This prohibition applies to both Canadians and non-Canadians.

4. Information and Communications Technology

Companies wishing to conduct business in the Canadian information and communications technology sector will face a myriad of considerations. Although these are similar to those found in the United States, there are certain key distinctions that parties should be aware of.

Internet and E-commerce

In order to manage the dynamic commercial nature of the Internet, federal and provincial governments have responded by:

- Implementing e-commerce legislation to facilitate the flow of online transactions and ensure that adequate safeguards are in place to protect parties from fraudulent activity
- Introducing legislation regulating the sending of e-mails, text messages, and other forms of electronic messaging, as well as the use of certain applications for marketing purposes
- Introducing legislation regulating the installation of computer programs and the "pushing" of software updates on a person's computer
- Enacting electronic evidence legislation to ensure that electronic records can be tendered as evidence in legal proceedings
- Updating consumer protection legislation in order to reflect the new realities of e-commerce
- Regulating the use of web addresses ending in ".ca" (Canada's top-level domain name)

E-commerce Legislation

The central component of e-commerce legislation across Canada is the issue of functional equivalency. Essentially, this means that e-commerce legislation is intended to achieve two objectives: first, to ensure that contracts formed online should be treated in largely the same manner as contracts formed in the traditional tangible format, provided certain criteria are met (some contracts, such as wills or contracts involving the sale of real estate, cannot be formed online); and second, to ensure that electronic documents will meet any statutory requirements for a document to be provided in writing.

Anti-Spam Legislation

On July 1, 2014, key portions of Canada's anti-spam law *(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)*, informally and better known as "CASL", came into force.

CASL addresses the problem of unsolicited electronic communications (i.e. spam) by focusing on commercial electronic messages (CEMs). Additionally, CASL introduces rules to address the problem of unsolicited installed software programs (UIPs), such as cookies. CASL creates a set of rules to follow to obtain appropriate consent to send out CEMs and install software programs. It also sets out specific procedural and content requirements for consent as well as provisions and exceptions to certain requirements. CASL does not distinguish between messages sent for legitimate versus malicious purposes, nor between messages sent to an individual and those sent in bulk. All CEMs require the appropriate consent of the recipient. Moreover, CASL sets out a framework that is significantly broader in coverage than its American or European counterparts.

CASL came into force over a period of three years, with an intended staged rollout as follows: (i) the anti-spam provisions coming into force on July 1, 2014, and (ii) the provisions regarding UIPs coming into force on January 15, 2015. However, the provisions providing for a private right of action that were to come into force on July 1, 2017, have been suspended indefinitely, but are still under consideration by the Canadian government.

The CASL legislation has a significant impact on the business of all individuals using electronic messages to promote their activities or enter into contact with past or prospective clients.

Seeking to comply with CASL:

- **Application outside of Canada:** In order for the CASL anti-spam requirements to apply, a computer system located in Canada needs to have been used to send or access the electronic message; accordingly, foreign senders of CEMs are caught by this legislation. For the UIP provisions to apply, either the computer system, the person, or the person directing a person must have been in Canada at the relevant time.
- **Low threshold for application:** A CEM that is subject to the CASL anti-spam rules is defined as any electronic message that "it would be reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a commercial activity". This is a broad definition that includes more than what would be traditionally defined as electronic spam. Accordingly, to the extent that a CEM has the encouragement of participation in a "commercial activity" as at least one of its purposes – even if not as its sole purpose – the CASL anti-spam rules will apply.

- **More than just e-mail:** While CASL is colloquially referred to as an "anti-spam law", it applies to any transmission of an electronic message, including text, sound, voice, or image messages, to (i) an e-mail address, (ii) an instant messaging account, (iii) a telephone account, or (iv), somewhat ambiguously, "any similar account".
- **Importance of relationship with recipient:** Depending upon the sender's relationship with the recipient, the CEM may be (i) exempt from both the consent and message content requirements, (ii) exempt from the consent requirements, or (iii) subject to deemed, rather than express, consent. For example, there are exceptions for prescribed pre-existing business and pre-existing non-business relationships as well as for employees of an organization sending CEMs to one another internally and to employees of other organizations if they have a relationship and the message concerns the activities of the recipient organization. Understanding when such exceptions might apply, however, is challenging.
- **Deemed express consent for certain UIPs:** In addition to anti-spam rules, CASL sets out rules concerning the express consent that must be obtained when software is installed on a person's computer system. This requires that certain disclosures be made to the recipient and that an appropriate acceptance mechanism be put in place. However, deemed consent is said to have occurred in the installation of certain prescribed UIPs – such as where the program is a cookie, an operating system, or a network update or upgrade – where the person's conduct is such that it is reasonable to believe that they consent to the program's installation. Unfortunately, it is not clear what "conduct" will be sufficient to meet the threshold of evidencing a "reasonable belief" that the person consents to the installation of such a program.
- **Express consent must be opt-in and unbundled:** The base consent principle of CASL is that express consent is required from a recipient in order to send CEMs and install UIPs. For example, CASL requires that express consent must be opt-in (i.e. the recipient must give an explicit indication of consent) and that each request for consent must be separate and cannot be bundled together with other requests for consent for different purposes, such as consent requests for general terms and conditions. Businesses need to ensure that their requests for consent are designed in such a way that they comply with CASL.

The consequences of violating CASL rules are significant. There are various provisions that set out the enforcement framework for CASL. They include (a) the application of an administrative monetary penalty, where the maximum penalty is $1,000,000 in the case of an individual and $10,000,000 in the case of any other person, (b) the entry into an undertaking by the offending party, (c) the issuance of a notice of violation against the offending party, (d) injunctive relief, and (e) a private right of action (currently not yet in force) that, if successful, could result in a court order requiring the offending person(s) to pay the applicant (i) compensation in an amount equal to the actual loss or damage suffered or expenses incurred and (ii) in the case of a breach of (A) the anti-spam provisions a maximum of $200 for each breach, not to exceed $1,000,000 for each day on which a breach occurred, and of (B) the UIP provisions $1,000,000 for each day on which a breach occurred.

In addition, any officer, director, or agent of a corporation that commits a violation can be liable for the violation if they directed, authorized, assented to, acquiesced in, or participated in the commission of the violation, whether or not the corporation is proceeded against.

In the seven years since CASL came into effect, enforcement efforts have resulted in over $1,400,000 payable in penalties, including $805,000 from administrative monetary penalties and $668,000 from negotiated undertakings. As part of such enforcement efforts, monetary payments as part of negotiated undertakings entered into by businesses for non-compliance have ranged from $10,000 to $200,000; there has been one notice of violation with an accompanying administrative monetary penalty of $200,000; and other compliance and enforcement decisions have imposed administrative monetary penalties ranging from $15,000 to $200,000.

Given the potential for personal liability for CASL breaches, it is important that businesses ensure that they develop and implement CASL compliance programs, including the development of anti-spam, as well as UIP policies, and any necessary amendments to their existing privacy policies.

A Canadian Radio-television and Telecommunications Commission bulletin on November 5, 2018 (CRTC 2018-415) provided general compliance guidelines and best practices for stakeholders with respect to the prohibition, under section 9 of CASL, to aid, induce, procure, or cause to be procured the doing of any act contrary to any part of sections 6 to 8. While untested, it appears that section 9 may apply to individuals and organizations who are (i) intermediaries that provide enabling services that allow someone else to violate sections 6 to 8 or (ii) receiving a direct or indirect financial benefit from such violations. Advertising brokers, electronic marketers, software and application developers, software and application distributors, telecommunications and Internet service providers, and payment processing system operators may be at risk, depending on certain factors, which include the following:

- The level of control over the activity that violates sections 6 to 8 of CASL and the ability to prevent or stop that activity
- The degree of connection between the actions that violate section 9 and those that contravene sections 6 to 8 of CASL
- Evidence of reasonable steps taken to prevent or stop violations from occurring

E-evidence Legislation

Canadian electronic evidence legislation aims to set out the conditions under which electronic evidence will be accepted as the "best evidence" available in a legal proceeding. The federal law, and most of the provincial evidence laws, have now been amended to address this issue.

To summarize, an organization wanting to ensure that its electronic records will be accepted in court must ensure that there is reliable assurance as to the integrity of the information contained in an e-document since the time the document was first created in its final form (that the information has remained complete and not been altered) and must establish the integrity of the system used to produce the e-document, specifically when the e-document was initially recorded.

Such an organization must also establish that the system was operating properly at all material times or that, if it was not operating properly, the failure did not affect the integrity of the e-document and there are no other reasonable grounds to doubt the integrity of the system or the e-document (*R v Hirsch*, 2017 SKCA 14). The way in which the electronic record has been stored, and the manner in which it is copied, transmitted, or reproduced, may also affect the admissibility of the electronic record.

The Québec legislative initiative in this area is the *Act to Establish a Legal Framework for Information Technology*, which came into force on November 1, 2001. Until recently, it has received little attention from courts and legal practitioners due to its complexity.

Consumer Protection Legislation

Unlike the American system of federal consumer protection, the Canadian consumer protection regime varies in each province and territory, with different rules and regulations to consider for each of these jurisdictions. For that reason, where an electronic contract is intended to be executed by a "consumer" (as defined in each jurisdiction's regulations), the contract must meet both general consumer protection requirements (e.g. prohibiting unfair practices) and e-commerce-specific formality requirements (e.g. that certain disclosures be made at certain times during the electronic contracting process). Both sets of requirements can differ significantly among the provinces and territories.

The consumer protection regime in Canada can be complex for other reasons as well. Online contracts often fall into multiple categories of regulations with overlapping requirements. For example, in Ontario, an online contract could constitute an "Internet agreement," a "future performance agreement," and/or a "remote agreement." In British Columbia, an online contract could be a "distance sales contract" and/or a "future performance contract." In Québec, following the amendments made to the *Consumer Protection Act* in 2006 (sections 54.1 to 54.16), an online contract can be qualified as a "distance contract" and must also fulfill the requirements of the *Civil Code of Québec*. Further provisions in some provinces and territories aim to reconcile the different requirements.

Additionally, some of these requirements are not necessarily intuitive. They include requirements that: (i) certain disclosures be made to, and also included in, an online contract with the consumer; (ii) the contract be in writing; and (iii), particularly odd in the context of an online contract, a copy of the contract be provided to the consumer. The *Ontario Consumer Protection Act*, for example, requires each supplier to deliver a copy of the Internet agreement in writing to the consumer within fifteen days after the consumer enters into the agreement.

Failure to properly follow these requirements can be costly, forcing a merchant to accept returned goods, provide refunds, or pay fines for a violation. For example, Saskatchewan's *Consumer Protection and Business Practices Act* imposes a $100,000 fine for contravening any of its Internet sales contract provisions; this is followed by up to $500,000 in fines for subsequent violations. Directors of corporations found to have violated Saskatchewan's rules can also be held liable, whether or not the corporation has been prosecuted or convicted.

In addition, a company may find itself "named and shamed" by the applicable regulatory authority. For example, Ontario's Ministry of Government and Consumer Services maintains a searchable "Consumer Beware List", which lists the company and the nature of the offence, and can be readily accessed and consulted by consumers to determine the nature of the complaint.

Software Licensing and Commercialization

Companies seeking to license and commercialize information technologies in Canada should familiarize themselves with the Canadian intellectual property regime.

Following the introduction of the Canada-United States-Mexico Agreement (which replaced the North American Free Trade Agreement), significant changes were made to both the *Copyright Act* and the *Trademark Act* effective as of July 1, 2020.

Regarding shrink-wrap licences, purchasers need to be aware of the terms at the time of sale in order for such licences to be enforceable in Canadian courts. In addition, sale-of-goods legislation is generally inapplicable to prepackaged software sold to a customer under a licence as there is no transfer of property.

ISPs and Telecommunications

Foreign ownership restrictions apply to telecommunications common carriers who are owners of telecommunications transmission facilities. Parties seeking an alternative may wish to consider becoming simple telecommunications service providers by leasing their facilities and equipment from an authorized common carrier.

With this in mind, a company could become an Internet service provider (ISP) in Canada without being subject to the foreign ownership restrictions. ISPs will not be held liable for copyright infringement perpetrated by their subscribers, provided the ISPs are acting in a passive manner as a conduit for the exchange of information. Furthermore, ISPs will not incur liability for caching (the act of temporarily storing a copy of a website or content), since this is a protected process under the *Copyright Act*.

5. Taxation

All foreign businesses that are considering entering into Canada should consider the federal and provincial tax issues that could arise from doing business in Canada.

The federal income tax legislation is the *Income Tax Act* (ITA), which sets out rules for individuals, corporations, and other entities. The provinces have their own personal and corporate income tax statutes. Income tax is generally administered by the federal Canada Revenue Agency (CRA) on behalf of the provinces, except for Québec and Alberta in the case of corporate income tax.

While Canadian residents are subject to income tax on worldwide income, non-residents of Canada are generally taxed on employment income in Canada, carrying on business in Canada, and dispositions of "taxable Canadian property". Non-residents may also be subject to non-resident withholding taxes under Part XIII of the ITA.

The federal *Excise Tax Act* (ETA) imposes excise taxes in connection with the sale or production for sale of certain goods. In addition to excise taxes specific to petroleum products, cigarettes, and other products, Part IX of the ETA sets out Canada's goods and services tax (GST). GST is a value added tax that is charged on taxable supplies in Canada. In many provinces, the GST has been "harmonized" with the provincial sales tax (PST) to become a harmonized sales tax (HST). However, British Columbia, Saskatchewan, and Manitoba each impose their own form of PST and each of the aforementioned provinces has a slightly different set of PST exemptions. Lastly, Québec imposes a Québec sales tax (QST), which is administered by a separate tax authority under legislation distinct from GST/HST.

Canada is a signatory to a number of international tax treaties, one purpose of which is to mitigate double taxation. Tax treaties are generally bilateral agreements between countries, except for certain multilateral instruments that have been entered into by Canada, including the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (MLI).

The remainder of this chapter discusses certain Canadian tax consequences for corporations that are not resident in Canada and that may have employees in Canada or are doing business in Canada without incorporating a Canadian subsidiary. This chapter does not discuss the consequences of a non-resident disposing of taxable Canadian property or who may be subject to non-resident withholding tax pursuant to Part XIII of the ITA.

Employees in Canada

An employee that is resident in Canada is taxed on his or her worldwide income, including income from employment in Canada. An employee that is a non-resident of Canada is subject to Canadian income tax on remuneration from employment in Canada subject to the availability of a tax treaty exemption.

For example, remuneration paid to an employee who is a resident of the United States, and is entitled to benefits under the Canada-United States Tax Treaty (US Tax Treaty), is generally exempt from Canadian tax under the US Tax Treaty if either: (a) the amount paid in respect of Canadian employment is less than CDN $10,000 in the year; or (b) the employee was present in Canada for less than 183 days in any twelve-month period that includes the year, and the amount was not paid or, on behalf of, a Canadian resident person or borne by a permanent establishment in Canada. Other tax treaties have similar provisions.

All employers, both resident and non-resident of Canada, are required to withhold Canadian tax from remuneration paid to employees working in Canada, including, for non-resident employees, amounts that may be exempt under a tax treaty, unless a waiver is obtained from the CRA.

For non-resident employees, one available waiver is a "Regulation 102" waiver based on an applicable tax treaty exemption. Certain non-resident employers can also apply for a "Qualified Non-Resident Employer Certification", which is generally applicable for all non-resident employees of such employers who work in Canada less than forty-five days in the calendar year or is present in Canada for less than ninety days in any twelve-month period that includes the relevant time.

Regulation 105 Withholding

Pursuant to section 105 of the Income Tax Regulations, every person paying a non-resident in respect of services rendered in Canada must withhold and remit 15% of the payment (Regulation 105) absent a waiver. The non-resident can file an income tax return to apply the withheld amount to its corporate tax liability or obtain a refund if there is an excess.

A Regulation 105 withholding issue can arise, for example, if the non-resident corporation charges its clients or customers for services that are performed by the employee in Canada. In such circumstances, the clients or customers would have the obligation to withhold and remit the 15% withholding tax, which could be inconvenient in many situations.

Corporate Residency in Canada

A foreign corporation that was not incorporated in Canada, and that has activities in Canada, should be mindful of the risk that it could be considered to be a resident in Canada. A corporation that is resident in Canada is taxed on its worldwide income. A non-resident corporation is taxed in Canada, in the first instance, on income from carrying on business in Canada and on dispositions of taxable Canadian property.

The main test of whether a non-resident corporation is considered to be resident in Canada is whether its central management and control is in Canada. The meaning of central management and control is from common law jurisprudence and generally refers to where corporate directors exercise their management and control responsibilities. Usually, central management and control is where the members of the board of directors meet and hold their meetings. However, it is possible that if the functions of the corporate directors are usurped,

and management and control is exercised in fact by a person who is not a director, the corporation may be found to be resident where such person resides or operates. In general, a foreign corporation can mitigate the risk of being treated as a resident of Canada by ensuring that its central management and control occurs outside of Canada, such as ensuring that the board of directors meets and makes its decisions outside of Canada.

A corporation that is resident in a country that has a tax treaty with Canada, and that is eligible for benefits under such tax treaty, may also rely on a "tie-breaker rule" to the extent that it is also found to be dual resident in Canada and another country. For example, in the US Tax Treaty, a corporation is deemed to be resident in the country in which it was incorporated.

Carrying on Business in Canada

For purposes of determining whether or not a non-resident corporation is carrying on business in Canada, both the common law test and the statutory test are relevant. The statutory test is relevant for determining a non-resident's Canadian income tax liability under the ITA. The question of whether a non-resident is required to register pursuant to Part IX of the ETA for GST/HST is also a common law "carrying on business" test interpreted for purposes of the relevant legislation.

Common Law Test

In determining where a business is carried on, courts have first looked at the place where contracts are concluded as the key factor and then considered all the factors that indicate where the operations take place from which the profits in substance arise, including the location of a bank account or directory listing, the place of payment, the place from which transactions are solicited, the place where inventory is stored, the place of delivery, the place where agents and employees are located, the place where goods are delivered or services performed, the place of soliciting, marketing or advertising, the place where equipment or business assets are located, etc.

Generally, only profit-making contracts are considered, and contracts that are preliminary or ancillary to the profit-making contracts, such as leases, purchase of supplies, or labour agreements, may not be determinative.

Accordingly, a non-resident who habitually negotiates profit-making purchase and sale agreements in Canada would be considered to be carrying on business in Canada. However, even if such contracts are not concluded in Canada, the non-resident could still be considered to be carrying on business in Canada, based on the significance of the business operations or activities that are exercised in Canada.

Statutory Test

In addition to the common law interpretation of carrying on business in Canada, a non-resident may be deemed to be carrying on business for purposes of income tax under section 253 of the ITA if it:

- Produces, grows, mines, creates, manufactures, fabricates, improves, packs, preserves or constructs anything in Canada;
- Solicits orders or offers anything for sale in Canada through an agent or employee, whether the contract or transaction is completed inside or outside of Canada; or
- Disposes of certain resource properties (other than depreciable property) or Canadian real estate (other than capital property – i.e. that is inventory).

Under this broad definition, projects undertaken in Canada and short-term employment assignments in Canada could result in non-resident entities being subject to Canadian income tax and filing obligations.

Although paragraph 253(b) can deem many non-residents to be carrying on business in Canada, such non-residents are often not required to pay Canadian income tax because they do not have a permanent establishment in Canada and are eligible for protection under a tax treaty.

Income Tax Consequences of Carrying on Business in Canada

A non-resident corporation is liable to pay Canadian income tax on income from carrying on business in Canada. If the non-resident corporation is resident in a country that has a tax treaty with Canada, and qualifies for benefits under that treaty, then it is taxed only to the extent that such income is attributable to a "permanent establishment", as defined in the applicable tax treaty, of the non-resident in Canada.

A non-resident that is carrying on business in Canada must file a Canadian income tax return regardless of whether it is exempt from Canadian income tax under a tax treaty.

GST/HST Consequences of Carrying on Business in Canada

All persons that carry on business in Canada, whether resident or non–resident, are required to register for and to collect GST/HST in respect of property and services rendered in Canada if it has exceeded the small supplier threshold as defined under subsection 148(1) of the ETA. Pursuant to section 143 of the ETA, where a non-resident of Canada is not registered for GST/HST and does not carry on business in Canada, all supplies made in Canada by the non-resident will be deemed to be made outside Canada and will not be subject to GST/HST.

Non-residents entering Canada should be aware that the threshold for carrying on business in Canada for GST/HST purposes is different from the threshold for corporate income tax purposes. As a result, a multinational could be subject to Canadian GST/HST obligations even if no Canadian income tax liabilities arise and vice versa, for example, if the non-resident is deemed to be carrying on business for income tax purposes due to the statutory deeming rule in the ITA.

In addition, effective as of July 1, 2021, certain non-residents who are not carrying on business in Canada for GST/HST purposes may still be required to register for a GST/HST account under the new Subdivision E of Division II of Part IX ETA. Types of non-resident businesses that could be subject to this new regime include cross-border digital products and services (non-resident vendors or non-resident distribution platform operator vendors who sell taxable digital products or services), supplies of qualifying goods in Canada (non-resident vendors or non-resident distribution platform operator vendors who make the supply of qualifying tangible personal property), and platform-based short-term accommodation in Canada.

Permanent Establishment

General Test Under Canadian Bilateral Tax Treaties

While the wording of tax treaties varies, a "permanent establishment" is generally defined as:

- A fixed place of business through which the business of the non-resident corporation is wholly or partly carried on
- A place of management, a branch, an office, a factory, and a workshop; a mine, an oil or gas well, a quarry, or any other place of extraction of natural resources; a building site, construction, or assembly project that exists for a specified period
- A dependent agent or employee who has and habitually exercises an authority to conclude contracts in the name of the non-resident corporation

Most treaties carve out specific exceptions for certain types of fixed places of businesses, including certain activities of a "preparatory or auxiliary character". The amendments to certain bilateral tax treaties due to the MLI should also be considered when determining if a permanent establishment exists in Canada.

The Canada-U.S. treaty also includes the concept of a "services permanent establishment", which provides that a non-resident corporation that does not otherwise have a permanent establishment in Canada is deemed to provide services through a permanent establishment in Canada if such services are performed in Canada for at least 183 days in a twelve-month period and certain other conditions are met.

In general, a foreign corporation can mitigate the risk of carrying on business in Canada, or having a permanent establishment in Canada, by minimizing the amount of business activities carried on in Canada by its employees or agents, not having any fixed places of business in Canada, as well as restricting the authority of its employees or agents to conclude contracts on its behalf while in Canada.

Tax Consequences of a Permanent Establishment in Canada

Part I: Corporate Tax

A non-resident that is resident in and eligible for benefits under a tax treaty that carries on business in Canada through a permanent establishment would be subject to Canadian income tax on all profits attributable to that permanent establishment. Profits should generally be attributed to a permanent establishment based on the "arm's length principle" and in accordance with guidance from the Organisation for Economic Co-operation and Development.

Although a foreign tax credit should presumably be claimed in the non-resident's home jurisdiction, the non-resident would generally remain liable to pay the higher of the two tax rates and would be required to file a Canadian income tax return.

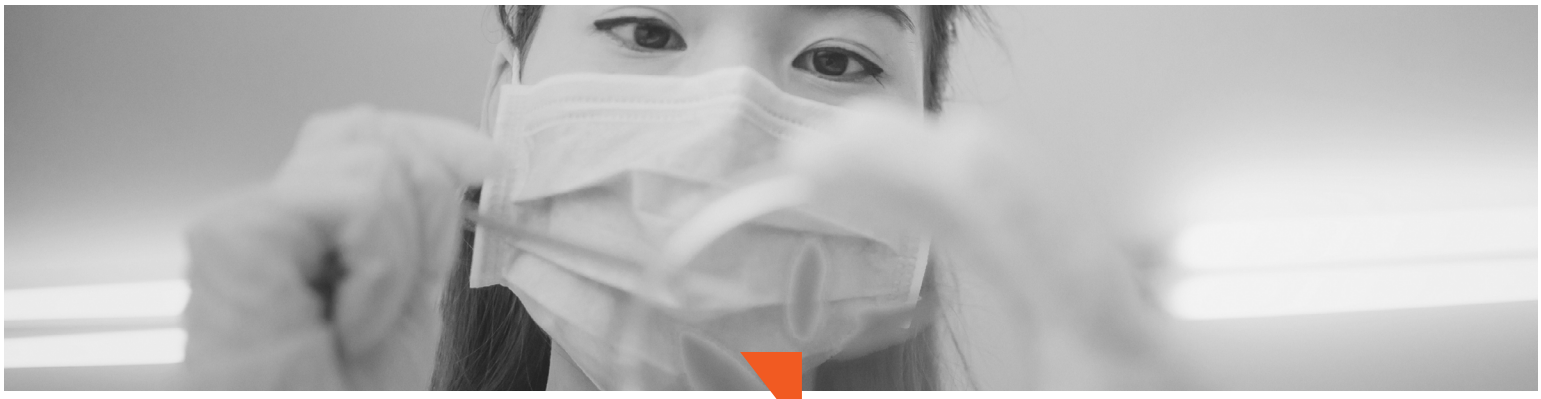
Part XIV: Branch Tax

A 25% tax is imposed on the after-tax income that non-resident corporations earn in Canada, to the extent that such earnings are not reinvested in the Canadian business. The 25% rate may be reduced under a tax treaty between Canada and the country of residence of the non-resident corporation. For example, under the Canada-U.S. tax treaty, the rate of branch profits tax is reduced to 5%.

A tax treaty may exempt the first $500,000 of a non-resident corporation's cumulative income from branch tax, providing some relief at the earlier stages of operations in Canada.

GST/HST

To the extent a non-resident has a permanent establishment in Canada, the non-resident is considered to be a resident in Canada for GST/HST purposes in respect of activities carried on through that permanent establishment. Therefore, if the non-resident is considered to have a permanent establishment in Canada, it must register for the GST/HST in respect of the activities carried on through that permanent establishment, unless the non-resident is a small supplier. As a result, the non-resident would need to charge and collect GST/HST on all taxable supplies it makes in Canada while carrying on a business in Canada through such permanent establishment.



6. Protection of Intellectual Property

The protection of intellectual property is primarily a federal responsibility and is the subject of four principal federal statutes: the *Patent Act*, *Trademarks Act*, *Copyright Act*, and *Industrial Design Act*.

The Canadian Intellectual Property Office of Industry Canada administers these statutes. However, matters like the unauthorized use of a trademark (known as "the law of passing off") or the misuse of a trade secret fall within provincial jurisdiction. In certain circumstances, the federal and provincial jurisdictions will overlap, as is the case with passing off, which is also covered in the *Trademarks Act*.

Patents

The *Patent Act* establishes what is known as a "first to file" system. In Canada, the first applicant to file a patent application for an invention will be entitled to obtain patent protection for that invention.

A Canadian patent grants its owner the exclusive rights to make, use, and sell an invention in Canada, as defined in the claims of the patent, for a period of twenty years from the date of the application. The term of protection may be extended in certain circumstances, including due to prosecution delay. A patent will only be granted for inventions that are new, inventive, and useful and may be obtained for devices, materials, processes, and uses. Patent protection is not available for scientific principles, abstract theorems, or ideas, nor is it available for higher life forms like genetically modified animals.

To be considered new or novel, the invention cannot have been disclosed in such a manner as to have become publicly available anywhere in the world. An exception to this is inventor-derived disclosures; a one-year grace period is provided for any such disclosures.

For the invention to be considered inventive, the differences between the state of the art and the inventive concept of the claims must involve steps that require ingenuity.

Finally, to meet the usefulness criterion, the invention must be functional and operative. In other words, the invention must have a practical purpose.

International Considerations

Canada, like the United States, is a signatory to many international agreements related to patents, including the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Patent Cooperation Treaty (PCT). The Paris Convention permits applicants to use the first filing date in one of the contracting states as the effective filing date in any other of the contracting states provided the application is filed within twelve months. The PCT, on the other hand, provides an international patent filing mechanism that facilitates the filing of patent applications in the contracting states.

Canada has also signed agreements with twenty-seven other patent offices in the world. This program, known as the Patent Prosecution Highway (PPH), allows an applicant to significantly fast-track the examination of a patent application provided there is a corresponding patent application with one of the other patent offices.

It is important to note that an invention patented several years ago in the United States, for example, will not be patentable in Canada as the invention will not be considered new. As a consequence, timing is a key issue with any new patent application for companies seeking to conduct business internationally.

Registering a Trademark in Canada

A trademark is a symbol (such as a word, logo, slogan, name, sound, hologram, moving image, three-dimensional shape of goods, or any combination thereof) adopted and used by a manufacturer or merchant to distinguish its goods and services from those of others.

Registration and Related Issues

A trademark can only be considered registered if it has been entered into the federal Trademarks Register; there are no provincial trademark registers. Registration provides a trademark owner with the exclusive right to use the registered trademark throughout Canada, in association with the goods and services for which it is registered, and prevents others from using marks that are confusingly similar. Registrations are valid for a period of ten years and are renewable indefinitely upon payment of the applicable administrative fees. There is currently no requirement to show use of the trademark at the time of renewal.

Although registration is not required to obtain legal protection – the use, advertising, or promotion of a trademark in a particular geographical area can establish rights in and to the trademark under common law for that specific area – it is always the preferred method of protection.

The main benefit to registration is the protection afforded to the owner of the trademark across every province and territory in Canada. The *Trademarks Act* provides a registry system for trademark owners that is based on a "first to use" principle. It should be noted, however, that five years after a registration is issued, it becomes incontestable on the basis of prior common law rights, unless it is demonstrated that the application was filed with the knowledge of such prior rights.

There is no requirement that a trademark be used prior to the issuance of a certificate of registration.

In addition, registration is evidence of ownership. As a result, in the case of a challenge to the ownership of a trademark, the onus to prove ownership rests on the challenger, not on the registered party. A registration may be cancelled in whole or in part by way of an administrative proceeding if there has been no use of the trademark (in association with the goods and services set out in the registration) for a period of three years, unless special circumstances justifying non-use can be shown.

International Considerations

On June 17, 2019, Canada joined the Madrid Protocol and changes were made to the *Trademarks Act*. The Madrid Protocol offers the possibility for trademark owners to file a single application for international registration with the World Intellectual Property Organization (WIPO) and subsequently designate the member countries where protection is requested. Each member country then applies its own laws to determine whether or not a trademark is registrable in its territory. An application for registration filed under the Madrid Protocol does not provide an international protection for a trademark, but facilitates the registration of that trademark in several jurisdictions.

A foreign party may register a trademark in Canada without designating a Canadian third-party representative to assist with the correspondences of the Trademarks Office.

Moreover, Canada is a party to the Paris Convention, which allows an applicant to use the date of filing for a registration application as a priority date to file a trademark registration application in other countries that are partie to the Paris Convention. An applicant can benefit from the priority date no later than six months from the filing date of the initial application.

Copyrights

A copyright gives the author of a literary, artistic, dramatic, or musical work a series of rights, including the exclusive rights to produce and reproduce the work. A copyright protects the expression of ideas but not the ideas themselves. It can be used to protect many types of works, including books, music, movies, and software.

Registration and Related Issues

Copyright registration in Canada is permitted, but is not mandatory. Copyright legislation establishes a rebuttable statutory presumption that a copyright subsists in the creator's work and belongs to the registered owner (similar to the trademark legislation discussed above).

Canada is a signatory to the Berne Convention; therefore, copyright protection in Canada is extended, for example, to works by American citizens or works first published in the United States.

A copyright in Canada typically subsists for the life of the author plus seventy years.

Authorship vs. Ownership

It is important to distinguish between authorship and ownership. According to the *Copyright Act*, the author of a work is, in principle, the first owner of that work. The first owner of a copyright created by an employee within the scope of his or her employment is the employer, unless there is an agreement to the contrary. Independent contractor relationships (as opposed to employment relations) can make the ownership of a work unclear. More specifically, the person who hires an independent contractor may not own copyright for the works created in the absence of a written assignment signed by the author or his or her representative.

If the author is the first owner of a copyright, this has important consequences on the ownership of the copyright in the long term – even in the presence of written assignments. A copyright will automatically revert to the heirs or successors of the author twenty-five years after his or her death to the extent that the author was the first owner of the copyright.

For more information on assignments and licences, see below.

Industrial Designs

An industrial design is composed of the shape, configuration, pattern, or ornament of an object or any combination thereof. The essence of an industrial design is its visual appeal along with its originality.

Registration and Related Issues

Unlike other forms of intellectual property, such as trademarks and copyrights, industrial designs must be registered to benefit from legal protection and ensure the exclusive rights to the design.

Applications to register an industrial design may be filed at any time provided the design has not been made public in any way. If such is the case, the application must be filed within twelve months of publication.

Industrial design protection affords the registered owner the exclusive rights to make, import, offer for sale, sell, or rent any article in respect of which the design has been applied.

The *Industrial Design Act* affords an applicant the right to the exclusive use thereof for a period of ten years from the date of registration or fifteen years from the date of application, whichever is later, subject to the payment of maintenance fees. To obtain an industrial design registration, there must be an original shape, pattern, or ornamentation applied to a manufactured article that is not a utilitarian function of the article.

Further Considerations

Assignments and Licences

Parties wishing to conduct business in Canada frequently partner with an existing Canadian business as a way of introducing themselves to the Canadian market. Often, these types of arrangements will require the use of the foreign party's intellectual property by the party in Canada. This can be accomplished by way of a licence to use the foreign party's intellectual property.

In addition, intellectual property can be sold or transferred. Where a transfer of ownership is required, the transferor of the intellectual property assigns it in writing and for consideration to the transferee, who becomes the new owner. The applicable offices of the Canadian Intellectual Property Office should be notified in these circumstances to ensure that the registration information is up to date and to avoid ownership disputes after the assignment has taken place.

Policing Your Intellectual Property

Just as a real estate owner would hire a security guard to protect his or her investment, the owners of intellectual property should always be on the lookout for potential infringements.

In cases where a party's intellectual property assets become too large or too complex, it is advisable to retain the services of an agent based in Canada who will perform the necessary intellectual property surveillance functions. Such a moderate investment can save considerable time and expense later on.

Enforcing Your Intellectual Property

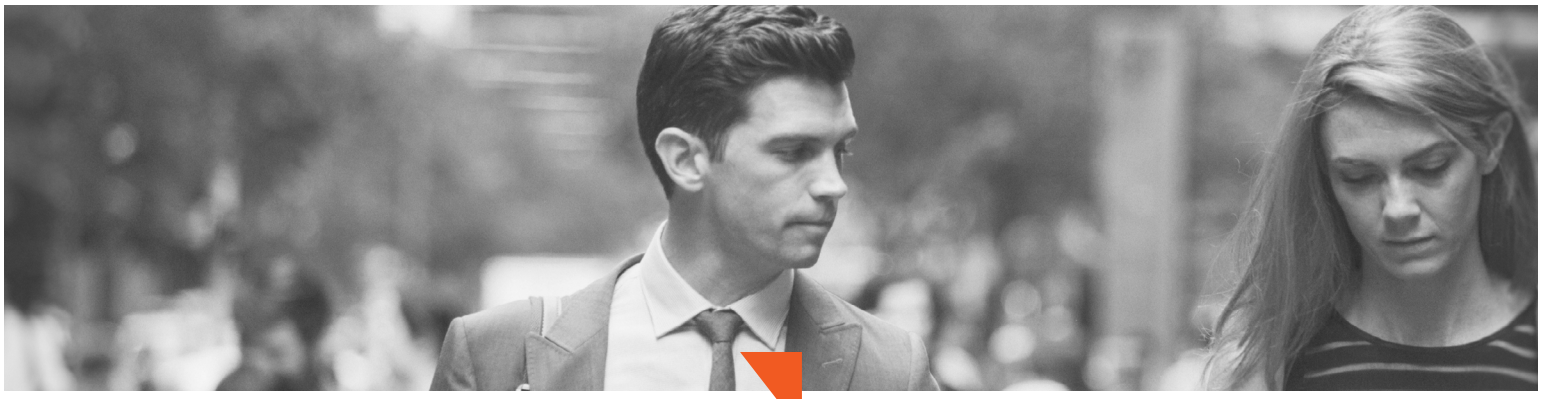
Intellectual property owners and licensees can sue to enforce their rights in Canadian courts. This includes infringement actions (patent, trademark, copyright), impeachment actions (patent), and actions under specific regulatory regimes, such as the Patented Medicines (Notice of Compliance) Regulations. There are no specialized intellectual property courts in Canada, although the Federal Court has developed expertise in such matters. Provincial courts have concurrent jurisdiction, except for declaratory relief in rem which may only be granted by the Federal Court. Intellectual property actions generally have five main stages: (i) pleadings; (ii) documentary discovery; (iii) oral discovery; (iv) expert reports; and (v) trial. Summary judgment motions and trials may be filed in certain circumstances. The remedies for intellectual property infringement are prescribed by federal statutes and common law, including: damages (patent, trademark, copyright), accounting of profits (patent), destruction of infringing goods (patent, trademark), injunctions (patent, trademark, copyright), and legal costs. Final judgments may be appealed to provincial or federal courts of appeal as of right, with appeals to the Supreme Court being available thereafter, with leave, in cases of national importance.

Trade Secrets

A trade secret is commercially valuable confidential information that retains its value as long as it remains secret. It is a subset of confidential information that is highly specific and generally understood to have an industrial or technical aspect about it. The legal protections available for trade secrets stand apart from the traditional intellectual property frameworks such as copyright, patents, and trademarks because trade secret protections promote economic activity by enabling persons to exploit their ideas and information in secrecy. On top of that, unlike the traditional frameworks, there is no uniform statutory regime for trade secrets. Instead, trade secret protection is achieved through a hodgepodge of statutory, common law, and equitable protections. Recognized civil causes of actions that protect trade secrets include:

- Breach of contract
- Breach of confidence
- Breach of a fiduciary duty
- Unjust enrichment
- Interference with contractual relations

Some statutes also provide trade secret protections, such as the *Criminal Code* and *Civil Code of Québec*.



7. Privacy and Anti-Spam Laws

Privacy Law

The protection of personal information in Canada is governed by the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and by substantially similar legislation in certain provincial jurisdictions.

PIPEDA

Defining Personal Information

Personal information is broadly defined in PIPEDA as "information about an identifiable individual." Such information can include, among other things, a person's name, address, phone number, age, sex, ethnicity, religion, education, and health and financial information. Certain government-provided information is also considered personal, such as a person's social insurance number, provincial health insurance plan number, driver's licence number, and passport number.

Application of PIPEDA

In general terms, PIPEDA applies to an organization's collection, use, or disclosure of personal information in the course of commercial activities. It also applies to the personal information of employees when it is collected, used, or disclosed in connection with the operation of a federal work, undertaking, or business.

PIPEDA does not apply to the collection, use, or disclosure of employees' personal information where individuals are employees of organizations under provincial jurisdiction (i.e. organizations that are not federal works, undertakings, or businesses). However, the private sector privacy legislation in British Columbia, Alberta, and Québec does apply to employees' personal information. Consideration must also be given to other statutory and common law sources of privacy law obligations in the workplace and in certain industry sectors (e.g. health care in respect of personal health information).

The general principles of PIPEDA are:

- Accountability
- Identifying purposes
- Consent
- Limiting collection
- Limiting use, disclosure, and retention
- Accuracy
- Safeguards
- Openness
- Individual access
- Challenging compliance

PIPEDA and Your Business

Knowledge and Consent

Informed consent is the guiding principle behind PIPEDA. Individuals should be made aware of the purposes for the collection, use, or disclosure of their personal information, and they should have the right to either consent to or refuse such action. Consent is valid only if it is reasonable to expect that the affected individual would understand the "nature, purpose, and consequences" of the collection, use, or disclosure of the personal information to which he or she is granting access.

There are certain exceptions to the consent requirement. For example, there is a consent exemption available for information collection where such collection is for the benefit of the individual in question and consent cannot be obtained in a timely way or where the information is "publicly available" (the scope of which is narrowly prescribed by the regulation).

Business Transactions

It is often necessary for organizations to collect, use, or disclose personal information, including employees' personal information, in relation to due diligence and closing a business transaction. PIPEDA permits these activities without consent, provided that the organization has entered into an agreement that requires the recipient to (i) use the information for the sole purpose of the transaction, (ii) protect the information, or (iii) return or destroy the information if the transaction does not proceed.

For completed transactions, the organization must enter into an agreement that requires it to (i) use and disclose the information for the sole purposes for which it was collected, used, or disclosed prior to the transaction; (ii) protect the information; and (iii) give effect to any withdrawal of consent.

The information must be necessary for carrying on the activity that was the object of the transaction, and one of the parties must notify the individuals within a reasonable time of the transaction and disclosure.

The above exemption does not apply if the transaction is for the primary purpose of, or results in, the purchase (or other acquisition), sale, disposition, or lease of personal information. The exemption codifies common practice and is modelled on similar provisions in British Columbia and Alberta privacy laws.

Outsourcing of Data Processing to the United States

Canadian corporations may outsource certain data processing activities, like client billing, to an American parent corporation or a third-party processing company located within the United States or another jurisdiction. Although PIPEDA does not prohibit the outsourcing of data processing activities, it does require that the Canadian organization continues to be accountable for the personal information even though such information has been transferred to a third party for processing.

In addition, the Canadian organization will have to comply with two requirements imposed by the Office of the Privacy Commissioner of Canada (the commissioner). First, as with all third-party processing (whether it takes place in or outside of Canada), the organization must protect the confidentiality and security of the personal information through either (i) implementing adequate contractual and other safeguards between the organization and the parent corporation (or third-party processor) or (ii) ensuring that the subsidiary and parent corporations are governed by the same privacy policy that imposes the same privacy requirements on both entities. Second, the Canadian subsidiary must notify the affected

individuals if their personal information will be stored, used, or disclosed in a jurisdiction outside of Canada and that the information may be accessible under the laws of the relevant jurisdiction. Additional requirements may be applicable in respect of certain types of information and pursuant to provincial privacy laws.

Breach Notification and Record Keeping

Pursuant to provisions that came into effect on November 1, 2018, PIPEDA includes a mandatory requirement for organizations to give notice to affected individuals and to the commissioner about data breaches under certain circumstances.

Section 10.1 of PIPEDA requires organizations to notify individuals about (unless prohibited by law), and to report to the commissioner, all breaches where it is reasonable to believe that the breach creates a "real risk of significant harm to an individual."

PIPEDA defines "significant harm" as including, among other harms, humiliation, damage to an individual's reputation or relationships, and identity theft. A "real risk" requires consideration of the sensitivity of the information, the probability of misuse, and any other prescribed factor.

The notice to individuals and the report to the commissioner must be given in the prescribed form "as soon as is feasible" after it is determined that a breach occurred. The commissioner may publish information about such notices if it determines that it would be in the public interest to do so.

Pursuant to the Breach of Security Safeguards Regulations under PIPEDA, the notice to an individual must contain certain information, including a description of (i) the circumstances of the breach, (ii) the personal information that is the subject of the breach, (iii) the steps taken by the organization to reduce the harm that could result, and (iv) the steps the individual can take to reduce or mitigate the harm. The notice must be conspicuous and given directly to the individual except in certain circumstances where indirect notice may be permitted (e.g. posting to a website).

The report to the commissioner must contain certain information, including the number of individuals affected, contact information for someone who can answer the commissioner's questions, and a description of (i) the circumstances of the breach, (ii) the personal information that is the subject of the breach, (iii) the steps taken by the organization to reduce the harm that could result, and (iv) the steps the organization has taken to notify the affected individuals. The report may be sent by "any secure means of communication" and may be updated with new information as the organization becomes aware of it.

Where notice is given to individuals, section 10.2 of PIPEDA requires organizations to notify other organizations (e.g. credit bureaus) and government agencies if such notice could reduce the risks or mitigate the harm. Consent is not required for such disclosures.

Section 10.3 of PIPEDA requires organizations, in accordance with the prescribed requirements, to keep and maintain a record of every breach of safeguards involving personal information under their control. Pursuant to section 6 of the Breach of Security Safeguards Regulations, these records must be maintained for twenty-four months after the day on which the organization determines the breach happened. The records must also contain the information necessary to allow the commissioner to verify compliance with the reporting and notification requirements under section 10.1 of PIPEDA.

In addition, upon request, organizations must provide the commissioner with such records. The commissioner may publish information from such records if it would be in the public interest.

There is no threshold associated with the record-keeping obligation; a record of all breaches of security safeguards must be kept, irrespective of whether or not they gave rise to a real risk of significant harm. Nor is there any threshold before an organization would be required to provide its "breach file" to the commissioner.

Provincial Legislation

The provinces of Québec, Alberta, and British Columbia have enacted privacy legislation that is substantially similar to PIPEDA, although it is not limited to organizations' commercial activities. As a result, the provincial legislation may apply to the collection, use, or disclosure of personal information within those jurisdictions.

Anti-Spam Law

Sending commercial electronic messages (CEMs) to and from Canada and installing computer programs on systems in Canada is primarily governed by a statute commonly known as Canada's Anti-Spam Law (CASL) and the regulations pursuant to it.

On July 1, 2014, most of CASL and its regulations came into force. The balance of the law came into force in January 2015 (with the exception of a section on the private right of action to sue for a violation of CASL, whose scheduled commencement in 2017 was suspended).

CEMs

A CEM is defined broadly in CASL as "an electronic message that, having regard to the content of the message, the hyperlinks in the message to content on a website or other database, or the contact information contained in the message, it would be reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a commercial activity, including an electronic message that (a) offers to purchase, sell, barter, or lease a product, goods, a service, land, or an interest or right in land; (b) offers to provide a business, investment, or gaming opportunity; (c) advertises or promotes anything referred to in paragraph (a) or (b); or (d) promotes a person, including the public image of a person, as being a person who does anything referred to in any of paragraphs (a) to (c) or who intends to do so."

Requests for permission to send CEMs are also deemed to be CEMs, so organizations must carefully consider CASL requirements before sending a message to request consent to send CEMs.

Unlike other anti-spam laws, including the *US CAN-SPAM Act*, CASL is an opt-in regime. With limited exceptions, CASL prohibits the sending of a CEM unless prior express or implied consent exists. In addition, prescribed contact information and an unsubscribe mechanism must be included in each CEM.

Express consent must be obtained in a prescribed form under CASL. Implied consent is limited to certain enumerated categories, such as "existing business relationships" as defined in the legislation.

Computer Programs

In general terms, CASL prohibits installing or causing to be installed a computer program on any other person's computer system or, having so installed or caused to be installed a computer program, causing an electronic message to be sent from that computer system without the express consent of the owner or an authorized user of the computer system or in accordance with a court order.

This prohibition applies if the computer system is located in Canada at the relevant time or if the person is either in Canada at the relevant time or

is acting under the direction of a person who is in Canada at the time when the direction is given.

Additional notice and consent requirements and other obligations apply in respect of programs that perform certain enumerated functions that the person who seeks express consent knows and intends will cause the computer system to operate in a manner that is contrary to the reasonable expectations of the owner or an authorized user of the computer system, such as collecting personal information stored on the computer system.

Consequences for Violations of CASL

CASL violations can lead to significant monetary penalties (up to $10,000,000 for organizations), directors' and officers' liability, and extended liability for those involved in committing the violation.

Pursuant to the CASL regulation originally scheduled to come into force on July 1, 2017, organizations would have also faced the prospect of civil litigation (including class action litigation) and statutory damages in respect of CASL violations. The commencement of this private right of action was suspended pending further government review.

8. Government Ethics, Transparency and Political Law

Ethics and transparency rules, as well as political laws, are important in helping to mitigate the risk of reputational damage and protect current as well as future business opportunities with government.

Lobbying Law

Lobbying in Canada is currently regulated at the federal level, in one territory (Yukon), and in all ten provinces (Alberta, British Columbia, Saskatchewan, Manitoba, Newfoundland and Labrador, Nova Scotia, New Brunswick, Ontario, Prince Edward Island, and Québec). Many municipalities have also passed similar lobbying laws. At the provincial-territorial level, only the Northwest Territories and Nunavut do not have lobbying laws in place.

The laws typically distinguish between lobbyists who are working for clients and employees who lobby as part of their jobs. The former are called "consultant lobbyists". The latter are known as "in-house lobbyists" (or "enterprise lobbyists" or "organization lobbyists" (Québec), or "organization lobbyists" (Alberta)).

When employees of an organization communicate with government officials on behalf of an organization, they are subject to the in-house lobbyist provisions of the laws. In their coverage of in-house lobbying, some of the laws treat all in-house lobbyists the same, while others distinguish between in-house lobbyists for business corporations and in-house lobbyists for other (mostly not-for-profit) entities.

Not all communication with government is subject to lobbyist registration. Further, in most places, a certain volume of in-house lobbying must occur before registration is required.

Failure to register accurately and completely is an offence. In addition to the potential for conviction and fine, failure to comply with the law can cause reputational damage. With enforcement on the rise in recent years, it is important for corporations and organizations to understand applicable lobbying registration laws and to implement effective internal compliance mechanisms to deal with this emerging and complex field of law.

Conflicts of Interest, Gifts and Hospitality

The federal government, all provinces and territories, and many municipalities in Canada have conflict of interest laws that include rules that govern the acceptance of gifts and hospitality by government officials and public servants. Further, individual departments, agencies, and Crown corporations often have their own conflict of interest rules that may apply as well.

In the majority of jurisdictions, no dollar-value limit determines whether a gift, hospitality, or other benefit to a government official is acceptable. However, in every jurisdiction, government officials and public servants are prohibited from accepting any gift, hospitality, or other benefit that may, either in fact or in appearance, influence their decision.

While a dollar-value limit does not usually determine whether a gift may be accepted, most jurisdictions do establish a threshold, at least for elected officials, that determines whether the gift must be disclosed. The responsibility for disclosure lies on the government official (recipient), not the giver. In some jurisdictions, disclosures become public; in other jurisdictions, disclosures remain with the appropriate ethics authority.

Even though it is the acceptance of the gift, and not necessarily the giving of the gift, that is caught by the rule, on a practical level, this distinction is immaterial. The acceptance of an improper gift or hospitality poses a significant risk of reputational damage if it were exposed and could jeopardize future business opportunities with government as well.

Election Law

The amounts that can be donated to political parties and candidates, who is eligible to make these donations, and the amounts that parties and candidates can spend during election campaigns, are heavily regulated.

Corporate political contributions are prohibited federally, as well as in many provinces (Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, and Québec), and are capped in most other provinces. As well, in some provinces where corporate contributions are allowed, contributions by non-residents are prohibited. Non-monetary contributions, such as office space or non-market discounts on services, may also contravene election contribution rules.

The amounts that individuals can contribute are capped in most provinces and by federal law. By American standards, the limits are very low (e.g. as of January 2019, the annual contribution limits at the federal level are $1,600 to each registered party and $1,600 in total among all the registered associations, nomination contestants, and candidates of a party).

Spending by political parties and candidates is also capped in federal and provincial elections. In federal elections, the limits are determined primarily by the population of the electoral district and, by American standards, are low. The spending limit is proportionately reduced if a party fields candidates in fewer than all 338 electoral districts. This spending limit adjusts upward for each day that a campaign is longer than the minimum thirty-seven days.

Political contribution rules vary significantly from jurisdiction to jurisdiction, and donations are heavily scrutinized by regulators. Improper donations can lead to significant reputational damage and impact a corporation or organization's ability to do business with government. For these reasons, it is very important to understand applicable election law before becoming involved in any way with the political process in Canada.

9. Competition/Antitrust Law

Competition laws in Canada are contained in one federal statute, the *Competition Act* (Act). The Act is administered and enforced by the Commissioner of Competition (Commissioner) and the Commissioner's staff, the Competition Bureau (Bureau), which is part of the Innovation, Science and Economic Development Canada portfolio. Subject to certain limited exceptions, the Act applies to all business activities in Canada.

The Act has five principal categories of provisions: (i) merger provisions, including pre-merger notification; (ii) criminal offences in relation to competition, including provisions dealing with conspiracies/cartels and bid rigging; (iii) civil reviewable practices provisions, including those dealing with non-criminal agreements between competitors, abuse of dominant position, and other restrictive trade practices; (iv) various deceptive marketing practices (civil and criminal offences); and (v) a provision establishing a private right of action for damages arising from conduct contrary to the criminal provisions of the Act or a breach of an order of the Competition Tribunal (Tribunal). Criminal matters and claims for civil damages are adjudicated before the courts. Civil reviewable conduct is dealt with by the Tribunal on application by the Commissioner or, in some cases, a third-party with the permission of the Tribunal. The Tribunal has the authority to issue a range of remedial orders and, in some cases, administrative monetary penalties.

We focus in this chapter on provisions that are relevant to parties expanding into Canada without necessarily investing into an existing Canadian business.

Conspiracies and Cartels

A conspiracy, agreement, or arrangement between competitors to fix prices, allocate markets, and/or restrict output is a criminal offence (cartel offence). Often referred to as the "supreme evil of antitrust," the cartel offence is the cornerstone of the Act and a top enforcement priority of the Bureau. Proof of competitive harm is not required to establish the offence. The term "competitors" includes not just actual competitors, but potential competitors as well. The cartel offence prohibits the following categories of agreements:

- Price Fixing Agreements include any agreement between competitors to fix or control the price, or any component of the price, to be charged by competitors. The term "price" includes any discount, rebate, allowance, price concession, or other advantage in relation to the supply of a product.
- Market Allocation Agreements include, among other things, agreements between competitors not to compete with respect to specific customers, groups, or types of customers, in certain regions or market segments, or in respect of certain types of transactions or products.

- Output Restriction Agreements include, among other things, agreements between competitors to limit the quantity or quality of products supplied, reduce the quantity or quality of products supplied to specific customers or groups of customers, limit increases in the quantity of products supplied by a set amount, or discontinue supplying products to specific customers or groups of customers.

Bid-rigging is another criminal offence under the Act that is deemed illegal without proof of anticompetitive effects. Bid-rigging occurs where two or more persons agree that, in response to a call for bids or tenders, one or more of them will not submit a bid, will withdraw a bid or will submit a bid arrived at by agreement.

The Act also contains criminal prohibitions against implementing a foreign conspiracy and sector specific offences, namely provisions prohibiting conspiracies involving federal financial institutions and conspiracies relating to professional sport.

The penalties for engaging in cartel offences are severe. They include substantial fines and, in the case of an individual, imprisonment. Further, the Act allows persons who have suffered loss or damage as a result of these criminal offences to bring civil damage claims in the courts. These claims are frequently brought as class actions, which can be expensive and time consuming to defend.

Civil Reviewable Practices

The Act contains a number of civil provisions, referred to as "reviewable practices", which relate to ordinary, lawful business practices that may occasionally have anticompetitive effects on the Canadian economy and consumers. Such practices are presumptively lawful and may only be prohibited if there is proof of anti-competitive effects arising from such practices.

Non-Criminal Agreements Between Competitors

The Act contains a reviewable practice pertaining to agreements between competitors that are likely to cause a substantial prevention or lessening of competition (SPLC) in any relevant market. The Tribunal may, on application by the Commissioner, make remedial cease-and-desist orders in connection with agreements between competitors that cause an SPLC. In particular, joint ventures, strategic alliances, and similar collaborations between competitors may be subject to review, prohibition, or other order under these provisions.

Abuse of a Dominant Position

The abuse of dominance provisions in the Act provide that, where one or more persons have market power, and where such a person or persons engage in a "practice of anticompetitive acts" such that competition has been, is being or is likely to be substantially prevented or lessened in a market, the Tribunal may, on application of the Commissioner, issue prohibition and other orders in respect of the conduct, including orders for administrative monetary penalties of up to $10,000,000 for an initial order and up to $15,000,000 for any subsequent order.

Restrictive Trade Practices

Restrictive trade practice rules apply to unilateral conduct, namely refusals to deal, resale price maintenance, exclusive dealing, tied selling, and market restrictions.

- **Refusal to deal** is a refusal to supply a would-be customer under certain specific circumstances. While there is no absolute obligation on any business to supply to any particular customer(s) or would-be customer(s), in certain circumstances, where the would-be customer is willing and able to meet the supplier's usual trade terms, is unable to obtain adequate supplies elsewhere, and the impact would

be that the would-be customer is unable to carry on business as a result (or would be otherwise substantially affected by the refusal), the refusal may be subject to review. Further conditions would also need to be met in order for the Tribunal to issue an order requiring that a supplier accept the customer (i.e. the product must be in ample supply and the refusal to supply must have had, or be likely to have, an adverse effect on competition in a market).

- **Price Maintenance** is where a person either influences upward or discourages the reduction of another person's selling prices by means of agreement, threat, promise, or any like means or refuses to supply or otherwise discriminates against a person because of that person's low pricing policy, in each case with the result that competition in a market is likely to be adversely affected.
- **Exclusive Dealing** occurs where a supplier requires or induces a customer to deal only, or mostly, in products supplied by the supplier or someone designated by the supplier.
- **Tied Selling** occurs when a supplier, as a condition of supplying a particular product, requires or induces a customer to acquire a second product, or prevents the customer from using or distributing another product with the supplied product.
- **Market Restriction** occurs when a supplier requires a customer to sell specified products in a defined market or penalizes a customer for selling outside of a defined market.

Where any of the aforementioned practices are viewed by the Commissioner as likely to have a substantial or adverse effect on competition in a market (depending on the provision in question), the Commissioner may apply to the Tribunal for an order to cease the practice. Subject to obtaining the permission of the Tribunal, private litigants may also bring cases to the Tribunal under these restrictive trade practices provisions.

Deceptive Marketing Practices

The Act contains both criminal and civil (reviewable) provisions to address deceptive marketing practices. The making of materially false or misleading representations to the public for the purpose of promoting a product, service, or business interest is both a criminal offence and a reviewable practice under the Act. The Commissioner has the discretion to choose which track (i.e. criminal or civil) to pursue with respect to suspected false and misleading representations. Specific provisions pertaining to marketing representations remove the requirement for the Commissioner to prove materiality where the representation at issue was contained in the sender information or subject matter of an electronic message. The Act also contains a number of more specific criminal offences and reviewable practices in connection with deceptive marketing, some of which are set out below for illustrative purposes:

Criminal Offences

- **Deceptive Telemarketing:** It is an offence where interactive telephone communications are used to make false or misleading representations in promoting the supply of a product or a business interest.
- **Double Ticketing:** It is an offence for a business to put two prices on a product, and charge the higher of the two prices.
- **Pyramid Selling:** It is an offence to engage in a multi-level marketing plan with certain characteristics. At a general level, multi-level marketing plans whereby participants generate earnings through recruitment as opposed to the supply of products that consumers are willing to purchase are subject to criminal prohibition.

Civil Reviewable Practices

- **Ordinary Price Claims:** The Act prohibits the making, or the permitting of the making, of any materially false or misleading representation, to the public, as to the ordinary selling price of a product, in any form. The ordinary selling price is determined by using one of two tests: either a substantial volume of the product was sold at that price or a higher price, within a reasonable period of time (volume test); or the product was offered for sale, in good faith, for a substantial period of time at that price or a higher price (time test).
- **Performance Representations:** The Act prohibits the making, or the permitting of the making, of a representation to the public, in any form, about the performance, efficacy, or length of life of a product, which is not based on adequate and proper testing. The onus is on the person making the representation to prove that the representation is based on an adequate and proper test, which must be conducted before the representation is made.
- **Bait and Switch Selling:** The Act prohibits a person from advertising, at a bargain price, a product or service that the person does not supply in reasonable quantities, having regard to the nature of the product in which the person carries on business, the nature and size of the person's business, and the nature of the advertisement.

The penalties for engaging in deceptive marketing practices are wide ranging and may include imprisonment, substantial fines, administrative monetary penalties, prohibition orders, the publication of a corrective notice, and/or restitution, depending on the conduct at issue and the Commissioner's enforcement approach.

Private Civil Actions for Damages

The Act contains provisions establishing a private right of action for damages arising from conduct contrary to the criminal provisions of the Act or a breach of an order made by the Tribunal or another court under the Act. Note that the Act provides only for single, not treble, damages. There is also a provision for the recovery of the costs of any investigation and any civil proceedings.

10. Labour and Employment

Legal Framework

Employment law in Canada is governed both by statute and, in nine of the ten provinces, by common law. The province of Québec differs in this respect in that it has no system of common law. Instead, it is governed by the *Civil Code of Québec*, which was originally modelled on the French Napoleonic Code and the jurisprudence interpreting it.

While statutory provisions may vary from province to province, there remains a fair amount of uniformity across the country in employment standards, workers' compensation, occupational health and safety, labour relations, and prohibitions on discrimination in employment.

An overall comparison between Canadian and American laws governing labour and employment also shows a considerable degree of similarity. One major difference between the two countries, however, is that there is no "employment at will" doctrine in Canada.

Generally speaking, Canadian labour and employment laws apply to employees who work in Canada, regardless of whether they are employed by a Canadian entity or a foreign entity with no presence in Canada. The laws may apply differently in particular situations, such as employees who work in Canada for only a part of the year and/or whose work is a continuation of the work they perform outside Canada.

Employment Standards

All jurisdictions in Canada (federal, provincial, and territorial) have minimum employment standards applicable to all employees within their jurisdiction. These minimum statutory employment standards include things like:

- The minimum wage for hours worked
- The maximum number of hours worked in a day and week
- Overtime rules
- The minimum time required off work
- Vacation and public holidays
- Equal pay for equal work
- Job-protected leaves of absence
- Notice and severance entitlements in the event of termination of the employment relationship

Employment standards legislation prescribes a minimum standard that employees cannot waive by contract. Higher standards are often customary in many industries in Canada and lower standards are unenforceable.

Human Rights

All jurisdictions in Canada (federal, provincial, and territorial) have passed human rights legislation prohibiting discrimination in the employment relationship based on grounds that usually include race, gender, age, religion, colour, disability (including drug and alcohol addiction), marital or family status, criminal record, ancestry or place of origin, sexual orientation, gender identity, and gender expression.

Federal works and undertakings are subject to employment equity legislation, the purpose of which is to provide employment and promotion opportunities to members of four protected groups: women, Indigenous people, people with disabilities, and visible minorities.

Pay Equity

In addition to employment standards legislation in many jurisdictions that requires equal pay for equal work, and human rights legislation in each jurisdiction that prohibits discrimination based on gender, some jurisdictions have separate pay equity legislation.

"Pay equity" ensures that men and women receive equal pay for work of equal value. Private sector pay equity legislation exists in Ontario, Québec, and, as of August 31, 2021, the federal jurisdiction. Pay equity legislation provides a comprehensive regime by which an employer must develop a pay equity plan and, thereafter, engage in pay equity maintenance and reporting. Steps include: identifying job classes in the workplace and determining the gender predominance of each class, determining the value of work performed, identifying the total compensation for each job class, comparing the total compensation of the predominantly female job classes with the compensation of the predominantly male job classes, identifying wage gaps, and making necessary adjustments. In many cases, employers must engage with a pay equity committee (including employee representatives) as they go through this process.

Occupational Health and Safety

All jurisdictions have legislation and other measures designed to reduce the incidence of occupational accidents and diseases in the workplace. Numerous obligations are placed on both employers and employees to create and maintain a safe workplace, including a workplace that is free from harassment and violence.

Health and safety authorities carry out inspections at construction sites, industrial plants, and other workplaces to ensure compliance with the regulations. In some jurisdictions, joint employer-employee health and safety committees are required for larger workplaces.

Workers' Compensation / Workplace Safety Insurance

Workers' compensation is not dealt with in Canada through private insurance. Rather, workers' compensation is dealt with by way of statute and systems administered by government bodies or agencies.

Workers' compensation programs provide benefits for workers suffering from job-related injuries and diseases. These legislated regimes provide a public "no fault" compensation system, whereby injured workers receive benefits from the program, but cannot take legal action against the employer. Certain employers pay premiums to provincial workers' compensation boards at rates determined primarily on the basis of the type of industry, size of payroll, and the employer's claim record.

Employment Insurance

Employment Insurance (EI) is a federal initiative established and governed by the *Employment Insurance Act*. The statute is designed to help workers adjust to economic change, while maintaining the incentive to work. The legislation recognizes provincial responsibility for labour market training and allows for federal-provincial partnerships to create new programs to assist in this regard. The employment insurance system is financed through payroll taxes levied on both employees and employers, up to an employees' maximum insurable earnings. Maximum insurable earnings vary each year, but are $60,300 for 2022.

Premium rates also vary each year. The premium rate for employees in Québec tends to be slightly lower than the rest of Canada, because Québec collects premiums from its workers to administer its own maternity, parental, and paternity benefits under the Québec Parental Insurance Plan.

Collective Bargaining

Canada's system of collective bargaining is embodied in federal and provincial labour relations acts and labour codes. Canadian workers have the right to join trade unions, which may be certified to collectively bargain conditions of employment with their employers on their behalf. Slightly less than one-third of all Canadian employees are members of unions, with rates of unionization continuing to decline each year.

In general, the system seeks to minimize disruption by certifying trade unions as the bargaining agents for specific groups of workers, often all or part of the non-managerial employees in a company. Exclusions from the bargaining unit are also provided in certain jurisdictions for non-managerial employees who have access to confidential information relating to labour matters.

Each jurisdiction has its own rules respecting the certification process.

Once a union has been certified by a labour relations board as an agent for a specific "bargaining unit", it has the exclusive right to negotiate with the employer on behalf of the employees, whether or not the employees are members of the union. In return, the union is obliged to represent all employees fairly.

Strikes and lockouts during the term of a collective agreement are normally prohibited in all jurisdictions. In some jurisdictions, for first collective agreements, there is a system of binding arbitration available to resolve disputes in a cost-effective and timely manner. Both the federal and provincial governments provide mediation and conciliation services, which can be mandatory before employees may strike or employers may lock out employees in furtherance of their bargaining aims.

Specific rules also regulate when a union can be decertified or replaced with another union.

Employment Termination

In Canada, an employment relationship may legally be terminated in one of two typical ways: (i) for cause or (ii) by way of providing reasonable notice (or pay in lieu of notice) to the other party. However, the right to terminate the contract of employment in the absence of just cause by providing the appropriate notice of termination (or payment in lieu) is limited in certain jurisdictions, namely Québec, Nova Scotia, and federal. Cause for termination is a high threshold, but can include incompetence, insubordination, conflict of interest, theft, material dishonesty, and other judicially recognized misconduct that warrants discharge. If an employee is terminated for cause, there is no obligation to provide advance notice to the employee or payment in lieu thereof.

Termination without cause occurs where an employee is terminated from employment not necessarily because the employee has done something terribly wrong, but rather because the employer, for whatever reason, has decided that the employee's services are no longer required. This includes a redundancy or reorganization scenario.

For termination without cause, employers in all jurisdictions are required to provide advance notice of termination or layoff, or to offer compensation in lieu of notice. The applicable employment standards legislation mandates the minimum notice period and provides a "sliding scale" of notice depending on the seniority of the employee, which typically peaks at eight weeks' notice. These termination notice periods are simply the statutory minimum periods of notice required. Some jurisdictions, such as Ontario and federal, also have a minimum statutory severance pay entitlement that varies depending on the seniority of the employee.

In addition to the minimums set by statute, and absent a binding employment contract setting out termination entitlements, employers are generally required to provide reasonable notice under both common law and civil law, as applicable. In the event of dispute, courts may be called upon to determine how much notice an employee is entitled to receive. Although the courts have never used a "rule of thumb" approach in determining the reasonable period of notice, judicial awards reach a typical maximum of twenty-four months. The courts will award additional damages to employees where their employment has been terminated in bad faith.

Additional advance notice of "group layoff" or "mass termination" (generally fifty or more terminated employees) obligations are required in all Canadian jurisdictions, except Prince Edward Island.

11. Executive Transfers and Immigration

Canadian immigration rules are very complex and change frequently. For foreign companies who conduct businesses in Canada, they would often need to send some of their employees to Canada to perform various duties in Canada, including attending business meetings, trainings, after sales services, and operations. For some of these activities in Canada, a work permit may be required. The foreign national may face severe legal consequences when the required legal authorization to work in Canada is not obtained.

As a general rule, foreign nationals wishing to work in Canada, even on a temporary basis, must obtain authorization to work in Canada in the form of a work permit, unless the foreign nationals are admissible to Canada as business visitors or under a work permit exemption category.

COVID-19 Pandemic – Travel Restrictions

Canada has largely lifted COVID-19 related travel restrictions, although restrictions may still apply for certain travelers. Travelers should consult the most recent travel and entry requirements for Canada. Travelers still need to have a valid temporary resident visa or a valid electronic travel authorization (eTA).

Temporary Business Visits

Business visitors engaged in international commercial activities in Canada, whose main source of income is from outside Canada and will not enter the Canadian labour market, may enter Canada as a business visitor without requiring a work permit. Further, the foreign national's country of citizenship will determine if a temporary resident visa is required to travel to Canada. Foreign nationals from a temporary resident visa exempt country (e.g the United States, the United Kingdom, Australia, France) do not require a temporary resident visa to travel to Canada, but do require an eTA to fly to Canada.

The most common activities allowed under the business visitor category are the following:

- Searching for potential clients or making a presentation to prospective customers
- Negotiating a contract with a Canadian client on behalf of a foreign company
- Attending coordination meetings with representatives of a Canadian company related to the foreign employer (subsidiary, parent, or sister company, etc.), where some policies or activities common to both companies are discussed
- Attending the board of directors meetings of a Canadian company
- Participating in a business convention

- Certain other activities explicitly considered as business activities by the Canadian immigration regulations and directives or under the Canada-United States-Mexico Agreement (CUSMA). Examples of such activities are:
    - Entering Canada to provide after-sales services
    - Entering Canada to provide training to the employees of a Canadian company or to receive training from a Canadian company, where the foreign company and the Canadian company are affiliated entities, such as parent/subsidiary relationship

In assessing whether or not the foreign national could enter Canada as a business visitor, the other criteria to be considered include the source of remuneration of the employee, the employer's principal place of business, the duration and frequency of the intended business visits, and whether or not the employee would be performing hands-on work while in Canada. Short visits, however, will not systematically be considered as business visits; in this case, the key factors are: (i) the nature of the activity to be performed in Canada; and (ii) on behalf of which company (i.e. a foreign company or a Canadian company) the services will be provided.

While numerous cases will be crystal clear, in others, the employee's eligibility for admission as a business visitor will require a careful analysis and preparation of complete documentary evidence to support the request for entry into Canada as a business visitor.

Work Permit Applications

When a foreign national performs work in Canada, a work permit is usually required. "Work" is defined in the Immigration and Refugee Protection Regulations as an activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market. This means that a foreign national may be considered by the Government of Canada as working in Canada, even if the foreign national is not remunerated in Canada, if the foreign national's activity in Canada may be in direct competition with activities of Canadian citizens or permanent residents in the Canadian labour market. In general, work permits are issued under two programs: (i) the Temporary Foreign Worker Program, which requires a labour market impact assessment; and (ii) the International Mobility Program, which does not require a labour market impact assessment. The work permit is either open without employment restrictions or closed with employment restrictions for the employer, occupation, and employment location.

Labour Market Impact Assessment

In general, unless there is a Labour Market Impact Assessment (LMIA) exempt work permit category, the employer in Canada must first obtain a positive LMIA opinion from Employment and Social Development Canada (ESDC). Prior to submitting a LMIA application, the employer must advertise the position while meeting ESDC's advertising criteria for at least four consecutive weeks and demonstrate that there are no qualified Canadian citizens or permanent residents for the advertised position. The positive LMIA opinion confirms the genuineness of the job offer and the likelihood of its neutral or positive economic effect on the labour market in Canada. Further, the positive LMIA is issued only if the employer has provided all foreign employees with the wages and terms of employment that were substantially the same as those set out in the original offer of employment.

The LMIA opinion will be based on the following criteria:

- The job creation or job retention for Canadians expected from the foreign worker's contribution
- The transfer of skills and knowledge for the benefit of Canadians
- The labour shortage the work may likely address
- The wages and working conditions offered, in compliance with Canadian standards
- The efforts made to hire or train Canadians for the position
- Any labour dispute in progress in the company at the time
- Fulfillment of any commitments previously made by the employer

Particular attention needs to be provided to the recruitment efforts. Save for certain exceptions, a positive LMIA is only issued once the employer has proved it has advertised the position by strictly following the guidelines issued by ESDC. "Reasonable efforts" do not suffice.

Once ESDC has issued a positive LMIA, the prospective employee may then submit their work permit application to Immigration, Refugees, and Citizenship Canada. When the prospective employee is a citizen of a visa-exempt country, the work permit application may be processed at the port of entry upon arrival in Canada. The prospective employee who is from a visa-exempt country would need an eTA to fly to Canada. If the employment location is in Québec, consent from the Québec Ministry of Immigration (MIFI) is usually required and a separate application for a Québec Acceptance Certificate is required. The LMIA will be issued jointly by ESDC and MIFI along with the Québec Acceptance Certificate.

Obtaining a positive LMIA can be difficult, since the onus is on the employer to demonstrate that there is a genuine need to hire a foreign worker for the position.

Labour Market Impact Assessment Exemptions

LMIAs are not required in every case. There are several exemptions that are available through the Immigration and Refugee Protection Regulations and under provisions of international agreements, such as the Canada-United States-Mexico Agreement (CUSMA), General Agreement on Trade in Services (GATS), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and Canada-European Union Comprehensive Economic and Trade Agreement (CETA). In most cases, these applications are the most expeditious and preferred options.

CUSMA Provisions for Foreign Workers

Entry under CUSMA is limited to citizens of the United States and Mexico, who may take advantage of the LMIA exemptions designed for professionals, intra-company transferees, traders, and investors. CUSMA does not apply to permanent residents of the United States or Mexico.

Please note that the criteria for entry to Canada, the required documentations, and the length of the permitted stay in Canada will vary from category to category and depends on the applicant's proposed activity in Canada. For instance, CUSMA intra-company transferees who fill a senior managerial position may stay in Canada up to seven years whereas intra-company transferees who possess specialized knowledge may stay for up to five, with limited exceptions.

General Agreement on Trade in Services (GATS): Intra-Company Transferee Work Permit

Canada currently has free trade agreements with the United States, Mexico, Chile, Peru, Colombia, Korea, Panama, the EU, the United Kingdom, Australia, New Zealand, and Japan. These free trade agreements have special

provisions for work permit applications and a LMIA is not required. This means global mobility of skilled workers and employees are now more convenient than before.

If Canada does not have a free trade agreement with a designated country, then the General Agreement on Trade in Services (GATS) could be used to facilitate the temporary transfer of employees from an overseas office to work in Canada on a temporary basis when specific requirements are met. The general requirements are: (i) the employee is currently employed by a multi-national company and seeking entry to work in a parent, subsidiary, branch, or an affiliate of that enterprise; and (ii) the employee is being transferred to a position in an executive, senior managerial, or specialized knowledge capacity and has been employed continuously by the company that plans to transfer them outside of Canada in a similar full-time position for at least one year in the three year period immediately preceding the date of the initial work permit application.

Other LMIA Exemptions

Several other LMIA-exempt categories are provided based on Canadian interests. These are intended to facilitate entry to Canada by foreign workers whose employment will have significant economic, cultural, or social benefits for citizens or permanent residents of Canada, or will create reciprocal employment for Canadians in other countries. As an example, spouses and common-law partners of temporary skilled workers or students will be eligible for an "open" work permit, authorizing them to work for any employer in Canada without employment restrictions. French speakers working outside Québec are also eligible for an LMIA-exempt work permit.

The documents required for these applications vary based on the work permit category and the applicant's personal situation.

Permanent Residence

A temporary resident in Canada may at one point wish to obtain permanent resident status. There are different categories to immigrate to Canada as a permanent resident. In general, dependent children who are under twenty-two years of age and are single may accompany the parents to Canada and be included in the parents' permanent resident applications.

One of the most common categories to immigrate to Canada as a permanent resident is through the economic class where a job offer from a Canadian employer is not mandatory. The economic class consists of three programs, namely: the Canadian Experience Class, the Federal Skilled Worker Program, and the Federal Skilled Trades Program.

Since January 2015, a new case management system called Express Entry has been implemented in Canada to better manage the flow of skilled applicants for permanent residence based on their ability to successfully settle and participate in Canada's economy under the economic class. Foreign nationals who are interested to immigrate to Canada under the Canadian Experience Class, the Federal Skilled Worker Program, or the Federal Skilled Trades Program would need to create an online Express Entry profile. Candidates with the highest Express Entry CRS score within the online Express Entry pool may receive an invitation to apply for permanent residence. The Express Entry system applies to applicants intending to settle in any province, except Québec. The Government of Canada is currently aiming to process Express Entry applications within six months. Other categories are currently taking two years or more.

Québec has its own selection process for permanent residents. In addition, various provincial programs are available for business people (such as self-employed individuals, entrepreneurs, or investors) as well as skilled workers.

12. Agribusiness

Introduction

The Agri-Food Industry in Canada

In Canada, agribusiness comprises all of the steps through which a given commodity has to go in order to reach the consumer's plate.

A major element of agribusiness is the agri-food industry, which is a rapidly growing sector in the Canadian economy. It can be divided into several subsectors, the sum of which encompasses agriculture, fisheries and aquaculture, as well as food and beverage processing and distribution.

The Federal and Provincial Jurisdictions

Jurisdiction over the regulation of the agri-food industry is split between the federal and provincial governments. Agriculture is mostly regulated at the provincial level through marketing, environmental and labour-related laws, municipal zoning, and restrictions with respect to the use and acquisition of agricultural land. The federal government controls imports and exports, as well as production planning.

Supply Chain: Production, Processing and Distribution

The Supply Chain

The agri-food industry functions as a supply chain. The process begins with primary agriculture. The raw agricultural commodities may then be processed prior to their distribution to food retailers or wholesalers. A certain percentage of the commodities to come out of both the food processing industry and of the food retail industry is distributed to the food service industry, which consists of businesses that prepare meals outside of the home, such as restaurants, cafeterias, and catering services.

The Main Actors

The main actors of the food supply chain are the farmers or producers, the food and beverage processors, the food retailers and wholesalers, and the food service providers. Agriculture and Agri-Food Canada (AAFC), a federal governmental body is, in collaboration with each of the provincial governments, responsible for the development of policies and programs applicable to each step of the supply chain.

Compliance

The Canadian Food Inspection Agency (CFIA)

The agri-food industry functions as a supply chain. The process begins with primary agriculture. The raw agricultural commodities may then be processed prior to their distribution to food retailers or wholesalers. A certain percentage of the commodities to come out of both the food processing industry and of the food retail industry is distributed to the food service industry, which consists of businesses that prepare meals outside of the home, such as restaurants, cafeterias, and catering services.

Food Safety

The Canadian regulatory framework with regard to food safety regulates, through policies and standards, all aspects of food production and safety, from health standards and nutritional quality of food to the humane treatment of animals and the importation of seeds into Canada. Compliance is enforced by the CFIA.

Some of the key legislation includes the *Health of Animals Act*, the *Consumer Packaging and Labelling Act*, the *Food and Drugs Act*, and the *Safe Food for Canadians Act*.

Labelling

Labelling is another food safety component that falls under the CFIA's and Health Canada's purview. Legislation, including the *Food and Drugs Act* and its regulations, as well as the *Safe Food for Canadians Act* and its regulations, set certain minimum information requirements for labelling and packaging. In addition, pursuant to subsection B.01.012(2) of the Food and Drugs Regulations, all labelling must be both in French and in English.

Certain categories of food, such as fresh fruits and vegetables, have additional labelling requirements.

Labelling and packaging requirements are enforced by the CFIA, with penalties varying from a fine to imprisonment or both, according to the severity, nature, and frequency of the offense.

Supply Management

People intending to conduct business in Canada should be aware of Canada's supply management system: a unique Canadian institution that sets certain rules with regard to certain products, in order to meet market needs and provide financial stability to farmers.

Supply management is regulated at both the federal and provincial levels. The production of milk, chicken, table eggs, hatching eggs, and turkey is subject to supply management at the federal level, and to some extent at the provincial level. Supply management has three central elements: (i) production discipline, (ii) cost-of-production pricing, and (iii) import controls.

Production Discipline

In order to avoid overproduction and shortages, the provincial and federal bodies representing each of the five aforementioned commodities are responsible for establishing a production rate relative to national demand. The *Farm Products Agencies Act* enables them to restrict the production of certain commodities through production quotas backed by the ability to assess financial penalties.

In order to operate a commercial farm that produces the targeted commodities, a farmer must obtain a permit. Each provincial body has its own quota exemption policy. Generally, smaller producers, who operate a small business and whose products are intended for personal consumption, are not subject to these quotas.

Cost-of-Production Pricing

In addition to production control, supply management allows for farmers to benefit from a price regulation mechanism. The regional bodies negotiate a minimal price that processors have to pay with respect to each supply-managed commodity. As a result, supply management allows for farmers to obtain a fair price for their products while avoiding significant price fluctuations.

The Province of Québec

Québec's situation slightly differs from that of other Canadian provinces. According to the *Act Respecting the Marketing of Agricultural, Food and Fish Products*, the marketing of several agricultural products is achieved in a collective fashion. Such a system allows for farmers to collectively negotiate and regulate the marketing of their products through a "joint plan".

Once a joint plan is adopted, anyone involved in the purchasing, transforming, and marketing of the subject commodity has the obligation to follow the provisions of the Act and to negotiate with the producer's office that administrates the plan.

Nevertheless, each Canadian province has its own legislation and regulations regarding the marketing of agricultural products and may put in place its own rules and commissions in that respect.

Import Controls

The final element of supply management is import control. In order to avoid flooding the Canadian market, the federal government limits, under several trade agreements, imports of certain commodities. To that effect, Canada grants a minimum level of access to importation and imposes high import tariffs.

Imports and Exports

Import and Export Requirements

Canada's federal government has jurisdiction over the import and export of agricultural products. Imported agricultural goods in particular are subject to a number of restrictions. Imported agricultural products and food must comply with federal health and sanitary legislation, as well as be appropriately coded as per the Harmonized Commodity Description and Coding System. There may also be additional provincial import requirements.

Certain agricultural products require an import permit for entry into Canada. To acquire an import permit, one must make an application through a broker with access to the Export Import Controls System. The full range of products subject to import permits are listed in the Import Control List and include wheat, barley, eggs, dairy, turkey, chicken, and processed foods derived from these ingredients.

Canada's supply-managed commodities (eggs, dairy, turkey, and chicken) are subject to import controls via Tariff Rate Quotas (TRQs), which set an overall annual import threshold for each good. Imports below these thresholds are subject to low or no tariffs, while imports exceeding the threshold are subject to high tariffs. The applicable duties for each agricultural product subject to a TRQ are laid out in the *Export and Import Permits Act*.

Regarding exports, there are a number of restrictions on agricultural products, including that they be free from exposure to or infection by contagious disease. In addition, most exported agriculture goods require an export certificate.

Other Issues Affecting Trade

Many countries, including Canada, have imposed maximum residue limits (MRLs) on the amount of residual pesticides and veterinary drugs that can remain in raw agricultural products and processed foods. An awareness of how MRL standards differ between various national and regional governments is important for both importers and exporters.

Another important issue is that of genetically modified (GM) agricultural products, of which Canada is a leading producer and exporter. Regulatory frameworks regarding GM agricultural products can affect trade and vary by country and region.

13. Life Sciences

Canada boasts a mature life sciences sector with a robust regulatory framework that is overseen by both the federal and provincial governments. The federal government regulates the safety and efficacy of health products throughout their lifecycle, while the provinces and territories each legislate over matters related to healthcare generally, including on matters of cost and reimbursement, the nature of the healthcare delivery system, and the privatization of the provision of medical services.

The public sector accounts for the majority of healthcare expenditures in Canada, though private insurance and individual expenditures also play a significant role.

The regulatory framework for health products in Canada aims to ensure their safety, efficacy and quality while meeting Canadian's health needs in a cost-efficient manner. In this chapter, we offer a brief overview of the healthcare system in Canada and describe the pathway to accessing the Canadian market.

The Healthcare System in Canada

Canada is known for its public healthcare system. Under the *Canada Health Act*, the federal government provides funding to the provinces to allow them to operate healthcare systems, so long as such systems are publicly administered, comprehensive, universal, portable, and accessible.

Specifically, provincial public health insurance must cover medically necessary physician services and hospital services. The provinces are, however, free to implement their own insurance schemes for drugs as well as other healthcare products and services that are provided on an outpatient basis. There is considerable variation between the provinces as to when and under what circumstances such drugs, products, and services are covered by public insurance, but, generally, the services of other healthcare professionals are likely to be beyond the scope of public insurance and may instead be covered by private insurance.

Overall, about 70% of healthcare expenditures, including drugs, in Canada comes from the public sector, with the remainder assumed by private insurance and out-of-pocket payments. As further discussed below, one of the consequences of the foregoing is that, in many cases, market access is influenced by public sector actors. Insofar as this results in fewer entry points into the healthcare system, it may simplify the process, though it also gives public sector payers considerable negotiating power.

Regulation of Healthcare Products

Healthcare products are regulated throughout their life cycle in Canada, from clinical research through advertising, distribution, and dispensing. While drugs represent the largest segment of expenditures, other health products are regulated, namely:

- Medical devices
- Natural health products (NHPs)
- Cosmetics

Regulation begins at the federal level. Health Canada must grant market authorization in respect of drugs (both innovative and generic), NHPs, and medical devices before they can be sold or promoted on the Canadian market.

Health Canada will only provide market authorization for a health product if they are satisfied with the evidence to support their quality, safety, and efficacy, as well as any claims related thereto.

Clinical Research in Canada

Product safety and efficacy is demonstrated through clinical trials. While Health Canada will accept clinical trials conducted anywhere, Canada's healthcare system is an attractive destination for clinical trials as the country offers world-class medical expertise and facilities, while remaining more economical than comparable countries. Canada participates in the International Conference for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use as a standing regulatory member, and the regulatory framework for the conduct of clinical trials is generally similar to that of most other high-income countries.

Prior to conducting clinical trials in Canada, a clinical trial application and supporting documentation must be submitted to Health Canada. If the application is deemed sound, a "No Objection Letter" will normally be issued within thirty days of receipt of the application. The conduct of a clinical trial is also subject to oversight by Health Canada and review by an ethics committee, which ensures that trial subjects' rights and well-being are respected.

Marketing Authorization

When the necessary data has been gathered in respect of a new drug, a manufacturer may submit a New Drug Submission (NDS) to Health Canada. The NDS must contain sufficient information to allow for an assessment of the drug's safety and efficacy, including administrative, manufacturing, preclinical, clinical, and labelling information. If the submission is satisfactory, a Notice of Compliance (NOC) will be issued in respect of the drug, meaning that the manufacturer is authorized to sell the product in Canada. At that time, Health Canada will also determine whether the drug should be made available only by prescription (on the basis of whether supervision by a healthcare professional is necessary).

Applications must also be submitted to, and approved by, Health Canada in respect of NHPs and Class II, III, and IV medical devices before such products are sold. In contrast, Class I medical devices (representing the lowest risk medical devices, such as a thermometer or ophthalmic lenses) need not be approved before marketing, though Health Canada monitors them through its establishment licence program as discussed below. Finally, most cosmetics may be sold without prior authorization, provided that the manufacturer notifies Health Canada of such sales.

Ongoing Surveillance of Product Safety

Health Canada's involvement in the regulatory process is not limited to granting market authorization, but rather spans the product lifecycle. For example, any changes to the information provided in the NDS or other marketing authorization application will generally require that an amended application be submitted and approved prior to implementation. In addition, consistent with its life-cycle approach to health products, Health Canada maintains pharmacovigilance programs to detect adverse reactions that may be associated with marketed products. Health Canada's powers were strengthened under the *Protecting Canadians*

from Unsafe Drugs Act (Vanessa's Law), which was adopted in 2014. For example, the regulator can now order any person to provide information related to a drug or medical device where it believes that the product may present a serious risk of injury to human health. The regulator can also order a manufacturer to conduct an assessment of a drug or medical device at any time and to provide Health Canada with the results. The new legislation also requires hospitals to report serious adverse drug reactions and medical device incidents.

Generic Market Entry

Generic manufacturers must demonstrate that their products are equivalent to the innovator product on which they are based in terms of quality, safety, and efficacy. In the case of conventional pharmaceuticals, the generic manufacturer may submit an Abbreviated New Drug Submission, in which clinical evidence may be limited to bioequivalence studies.

Health Canada will not issue a NOC in respect of a generic or biosimilar product if the innovator on which it is based holds a patent that is in force. A generic manufacturer may nonetheless submit a "notice of allegation", whereby it asserts that the innovator's patent claims are invalid. The innovator will then have an opportunity to respond to the notice of allegation and submit reasons why the claims are in fact valid. Only if the patent claims are found to be invalid is the NOC in respect of the generic issued.

Furthermore, under Canada's data protection regime, if the innovative drug contains a medicinal ingredient that has not previously been approved, a NOC in respect of the generic drug will not be issued until the data protection period of eight years has lapsed (starting upon issuance of the NOC in respect of the innovative drug).

Finally, Certificates of Supplementary Protection (CSPs) may be issued to innovative manufacturers to provide up to two years of additional market exclusivity, starting from the expiry of the applicable patent. CSPs are intended to compensate the manufacturer for time spent in research and development or in obtaining marketing approval.

Establishment Licences

In addition to marketing authorization for specific products, an establishment licence may be required to manufacture, distribute, import, and/or conduct other regulated activities with regards to drugs, NHPs, and medical devices. All such facilities must meet the applicable regulatory requirements, including those with respect to record-keeping, mandatory problem reporting, and recall procedures. Health Canada regularly inspects such facilities and can require corrective action where deficiencies are noted.

Once a product receives its marketing authorization, it can be sold in Canada. Nevertheless, there are still many regulatory considerations to keep in mind.

The PMPRB

The price of all patented medicines is regulated by the Patented Medicines Prices Review Board (PMPRB). The PMPRB is a quasi-judicial body that aims to ensure that the prices of patented medicines in Canada are not excessive. Factors considered in making this determination include the prices at which the medicine under review and similar medicines have been sold in Canada and in comparator countries. Where the price is deemed excessive following an investigation, the manufacturer may be required to offset any revenues the PMPRB has deemed excessive or contest the decision through a public hearing. If the price is deemed to be excessive following the hearing, the PMPRB can order price reductions and/or the offset of excess revenues.

The PMPRB operates in parallel to provincial price regulation.

Health Technology Assessment

Typically, prescription drugs and certain other health products must be covered by the public healthcare plan or by private insurers in order for physicians to prescribe, recommend, or use them to treat patients. To be considered as covered, the product must be listed on the applicable formulary.

To obtain such coverage, manufacturers must undergo a very complex process. This process begins with a health technology assessment (HTA). An HTA is an evaluation of the therapeutic value and the pharmacoeconomic value of a new treatment or a new indication. In other words, it is an evaluation of the relative "value" of a new product compared to existing therapies or the standard of care, which might include surgery or hospital stay. The result of the review is a recommendation as to whether the drug in question should be covered, and if so, under what conditions.

The pCPA and PLAs

Once an HTA has been performed, a manufacturer will need to negotiate with the pan-Canadian Pharmaceutical Alliance (pCPA), a body representing the public insurance plans. The pCPA was created at the initiative of the provinces in order to obtain greater value for the participating drug plans by combining their collective negotiating power. If negotiations are successful, the result is a letter of intent (LOI) regarding the public formulary list price of the product, typically a prescription drug, as well as confidential rebates, which may be provided to the public insurers.

Manufacturers then need to enter into actual, individual product listing agreements (PLAs) with each of the public insurers. While the essential terms of the PLA are provided for in the LOI, additional province-specific details may be added. Once a PLA has been negotiated with a province, the province's drug plan will list the drug on its formulary in accordance with the terms of the PLA, meaning that the drug is then covered by the province's public drug insurance.

A similar process including PLAs and rebates or other financial risk mitigation measures can also occur in the private market, though private insurers do not have any equivalent to the pCPA.

Public Procurement

Health products are also frequently procured by hospitals or governmental group purchasing organizations. As most healthcare facilities in Canada are operated as public institutions, they are generally required to follow a competitive bid process that is open, fair, and transparent.

There may be exceptions to the requirement for competitive bidding, which deserve particular attention in the healthcare context. These include:

- If an emergency situation exists (including, for example, what occurred in the context of the COVID-19 pandemic)
- When there is only one possible contract due to exclusive aspect of product or service

In the context of a competitive tender, manufacturers may be inclined to offer value-adds in order to help win the bid. A value-add is a product, service, or funding of any nature that is solicited in a request for proposal (RFP) or offered by a supplier company as part of an RFP response at no additional charge or on concessionary terms.

Generally speaking, manufacturers are not prohibited from offering value-adds in connection with RFPs, so long as the value-adds offered are not undue inducements and are limited to product(s) or service(s) provided for a related purpose and are reasonably necessary or useful for proper installation, use, or servicing of the product.

Drug Advertising

Once a product has insurance coverage or is procured by hospitals, manufacturers still need to tell physicians and/or patients about the product to ensure that it is used or prescribed.

Advertising of health products is highly regulated in Canada. To begin, all advertising is prohibited prior to marketing authorization. After market authorization, advertising is permitted, albeit under stringent conditions. For example, any claim made must be consistent with the terms of the marketing authorization otherwise it may be considered false, misleading, or deceptive. In addition, health products may not be advertised to the general public for the treatment, preventative, or cure for certain diseases for which self-care is not appropriate, including, for examples, diabetes and hypertension. An exception, however, is that preventive claims for non-prescription drugs and NHPs are permitted in advertising.

Furthermore, promotion of a prescription drug to the general public is limited to name, price, and quantity; in other words, an advertisement cannot mention the name of a drug and the condition it treats. Despite the foregoing, and although the term "advertisement" is broadly defined as any representation whose purpose is to promote a product, manufacturers remain free to communicate non-promotional messages, such as press releases and patient support group literature, provided certain criteria are respected.

Interactions with Healthcare Professionals

Transparency and Anti-Kickback Legislation

To date, there is no legislation in force in Canada that would require the public disclosure of payments to healthcare professionals or healthcare organizations in a manner comparable to the United States *Physician Payments Sunshine Act*.

Furthermore, there is no anti-kickback statute that specifically prohibits parties from making or accepting any form of payment that is intended to encourage or reward a purchaser to recommend, prescribe, or purchase any good or service that can be reimbursed or paid for by a government-funded healthcare program. Québec, however, is an exception as the province prohibits benefits to prescribers in connection with the sale or purchase of listed medications.

Instead of specific legislation, Canada relies on the *Criminal Code*'s provisions prohibiting bribery of public officials to address domestic corruption, as well as professional codes of ethics and industry self-regulation to ensure ethical behaviour and avoid any improper incentives.

Professional Codes of Ethics

Professional codes of ethics generally prohibit healthcare professionals (HCPs) from accepting any material benefit from industry or otherwise placing themselves in a conflict of interest position.

In the majority of provinces, these professional rules strictly speaking apply only to HCPs and so technically there is no related legal risk to manufacturers, though there may be business and/or reputational risks.

Nevertheless, in the province of Québec, there is a unique provision which stipulates that every person who helps or leads a member of a professional order to contravene a provision of a professional code of ethics is guilty of an offence.

Industry Self-Regulation

In Canada, the control of interactions between companies and HCPs is largely based on a system of self-regulation. Industry associations have developed guidelines that govern their members, including:

- Innovative Medicines Canada: Code of Ethical Practices
- Canadian Generic Pharmaceutical Association: Code of Marketing Conduct Governing the Sale of Generic Pharmaceutical Products in Canada
- Medtech Canada: Code of Conduct

While not binding on non-members, these codes represent best practices for all manufacturers in the respective market segments.

These codes regulate matters interactions between industry and healthcare professionals. For example, the codes address the conditions under which a manufacturer may retain the services of a healthcare professional, provide a grant or sponsorship, and offer meals and refreshments.

Provincial Regulation of the Supply Chain

In addition to the foregoing, the provinces have regulatory power over the supply chain for health products, in particular those that are covered by government-funded healthcare programs. The rules respecting the wholesaling and distribution of drugs vary by province and may include measures such as:

- Restrictions on exclusivity and preferential supply agreements
- Prohibitions on rebates paid to wholesalers and pharmacies
- Limits on wholesalers mark-ups and pharmacists dispensing fees

14. Franchising

Franchising is a business model pursuant to which a franchisor grants to a franchisee a licence to employ the franchisor's systems and methods of operations in the operation of a business that is usually associated with the franchisor's trademarks. The franchisor also provides its know-how and expertise, along with continuous support, in return for compensation, which usually is a continuous royalty fee.

Typical Franchise Structures

There are three typical franchise structures in Canada:

- **Unit franchises**
- **Area development franchises**
- **Master franchises**

Nevertheless, in recent years, a new franchise structure has been developed by our firm for the benefit of our clients whereby a franchisor proposes to become an equity co-shareholder (50%-50%) in the franchisee entity. This concept carries many advantages, namely: (a) the total investment for a franchisee is much less, therefore increasing the potential pool of good franchisee operators/investors; (b) it permits the franchisor to benefit (50%) from the profits generated by the franchise operations; (c) the franchisor can count on a reliable franchisee operator; (d) the franchisor has access to all franchisee information and statistics; (e) the franchisor is not engaged in the daily operations; (f) the franchisee entity still continues to benefit from lower tax rates, as it is not considered to be controlled by the franchisor; and (g) such a concept can be considered when contemplating having either a wholly-owned corporate store or a typical fully-franchisee-owned franchise unit.

Unit Franchises

A unit franchise – whereby a franchisor grants a right and licence to operate a franchise directly to a single franchisee for a single location – is a common approach to franchising in Canada.

Franchisees may acquire multiple unit franchises, but Canada tends to not have the large multi-unit franchisees that are common in other jurisdictions, such as the United States.

Area Development Franchises

Under an area development franchising arrangement, a franchisee is typically granted the right (and the obligation) to develop a number of unit franchises in a large geographical territory. This model can be advantageous to a franchisor seeking to rapidly expand its franchise system, but still wishing to maintain a direct relationship with the unit franchisee. An additional benefit to the franchisor is the reduction in the number of franchisees it needs to manage. Area developers must have access to sufficient capital and are usually more experienced than single unit franchisees. An area development agreement will

usually contain a development schedule that sets out the number of franchises the area developer is required to develop and over what time period. The franchisor's remedies (if the franchisee fails to meet its development obligations) may include the franchisee's loss of market exclusivity or its loss of rights to develop further franchises.

Master Franchises

Under a master franchise arrangement, the master franchisee is usually granted an exclusive territory (as in the area development arrangement), but is also granted the right to sub-franchise. The master franchisee has the responsibility to recruit prospective franchisees and to fulfill some or all of the roles usually fulfilled by the franchisor. Typically, the master franchisee keeps part of the royalties paid by the sub-franchisees, with the result that the franchisor will earn less royalty income than in a standard franchise model.

The master franchise model is often employed by foreign franchisors entering a new market, as it reduces the investment in overhead and supervision that a franchisor would otherwise have to make if it employed a unit franchise model. The master franchise model contains the highest degree of risk to the franchisor's brand, as the franchisor is relying on the master franchisee to service the sub-franchisees and maintain quality control. The master franchise agreement may contain provisions for the potential assignment of the unit franchisees to the franchisor or to a subsequent master franchisee in the event of the default or failure of the master franchisee. A master franchise agreement will usually contain a development schedule (as in the case of an area development franchise), with similar remedies in the event of the failure of the master franchisee to meet its development obligations.

Provincial Legislation

In Canada, franchising is regulated at the provincial level. There is no federal equivalent to the United States Federal Trade Commission's Franchise Rule. Six provinces (Alberta, Ontario, Prince Edward Island, New Brunswick, Manitoba, and British Columbia) have their own specific franchise legislation.

Although there are differences among the franchise legislations of the six provinces, there remains a high level of consistency. The legislation is generally viewed as "disclosure legislation" as opposed to the "relationship legislation" view that is common in some other jurisdictions. However, there are relationship elements in the provincial legislation. For example, the legislation imposes on the parties to a franchise agreement a duty of fair dealing in the performance and enforcement of the franchise agreement. The duty of fair dealing includes (in most provinces) the duty to act in good faith and in accordance with reasonable commercial standards. Franchisors are also prohibited from interfering with the rights given to franchisees to associate with other franchisees and to form or join an organization of franchisees. The legislation nullifies any provision of a franchise agreement that purports to limit the application of the law of the province or to restrict the jurisdiction or venue to any forum outside the province. Any purported waiver or release by a franchisee of its rights or of an obligation imposed on a franchisor under any of the franchise legislation is void.

Generally speaking, franchise legislation applies to franchises that operate either wholly or in part in the applicable province. Alberta restricts the application of the legislation to franchisees that are Alberta residents or that have a permanent establishment in Alberta. Whether or not a business is considered a franchise is determined by the definition of "franchise" in each of the provincial franchise statutes. However, the

definition of a "franchise" is very similar across all the provinces. Each province's legislation captures the essential business relationship between a franchisor and a franchisee, as well as all of the rights and duties that flow from their agreement. These include the right of the franchisee to sell goods and services that are substantially associated with the franchisor's trademarks and logo, and the franchisee's duty to make continuing payments to the franchisor. It does not matter what the parties call the business structure; if it fits the definition of a franchise under provincial legislation, it will be considered a franchise. A provision in an agreement that provides that the parties do not intend for the relationship to be considered a franchise will have no bearing. Similarly, the parties cannot contract out of the franchise legislation.

The franchise legislation in each province requires the delivery of a disclosure document to a prospective franchisee at least fourteen days prior to the execution of any agreement relating to the franchise or the payment of any money to the franchisor or the franchisor's associate. A distinguishing feature of Canadian franchise legislation is that, in addition to the considerable number of enumerated items that must be disclosed in a disclosure document, each disclosure document must disclose all "material facts." Material facts include any information about the business, operations, capital, or control of the franchisor, the franchisor's associate, or the franchise system that would reasonably be expected to have a significant effect on (i) the prospective franchisee's decision to acquire the franchise or (ii) the value or price of the franchise. Case law has determined that the disclosure document must be individualized to the particular franchise at hand. For instance, if there is a lease associated with a particular franchise location, it must be included as part of the disclosure document. In the event that a "material change" occurs during the time period following the issuance of the disclosure document and the execution of the franchise agreement or the payment of any money by the prospective franchisee, the franchisor must provide a material change statement. A material change is (a) any change in the business, operations, capital, or control of the franchisor or franchisor's associate or (b) a change (or prescribed change) in the franchise system that would reasonably be expected to have a significant adverse effect on the value or price of the franchise to be granted, or on a franchisee's decision to acquire the franchise. This definition also includes a decision to implement such a change, made by the board of directors of the franchisor, the franchisor's associate, or senior management of the franchisor or franchisor's associate who believe that confirmation of the decision by the board is probable. The franchisor's disclosure obligation ends upon the issuance of the franchise agreement; however, the renewal of a franchise, the transfer of a franchise, or the grant of an additional franchise location can revive the requirement for disclosure.

A franchisor must provide financial statements of the franchisor with the disclosure document, unless it qualifies for an exemption. The financial statements must be audited or prepared in accordance with generally accepted accounting principles that are at least equivalent to the review and reporting standards applicable to review engagements, set out in the Canadian Institute of Chartered Accountants Handbook. It is important to recognize that consolidated financial statements of the franchisor's parent company will not be sufficient. Where the franchisor has operated less than one year, the disclosure document needs to include only the franchisor's opening balance sheet. There are a number of exemptions from the obligation to provide a franchise disclosure document in the franchise legislation of the various provinces. Some of these exemptions are generally regarded as being somewhat ambiguous and are therefore difficult to rely upon.

The consequences of failing to give disclosure, or giving late or deficient disclosure, are serious and include a right of rescission. If no disclosure document is given at all, the right of rescission extends for a period of two years after the franchisee enters into the franchise agreement. Where the disclosure document is given late or is deficient, the right of rescission continues for a period of sixty days after the disclosure document is given.

A number of judicial decisions have determined that, where the deficiencies are significant, the disclosure is treated as not having been provided at all, giving rise to the two-year right of rescission. Where the franchisee maintains a valid case for rescission, the franchisor is required to: (a) refund to the franchisee any money received from or on behalf of the franchisee; (b) purchase from the franchisee its remaining inventory at a price equal to the purchase price paid by the franchisee; (c) purchase from the franchisee any supplies and equipment that the franchisee purchased pursuant to the franchise agreement, at a price equal to the purchase price paid by the franchisee; and (d) compensate the franchisee for any losses that the franchisee incurred in acquiring, setting up, and operating the franchise, less the amounts set out in paragraphs (a) to (c). In addition, the franchisee is entitled to retain all of the profits that were earned through the operation of the franchise. The fact that the franchisee has earned a profit does not relieve the franchisor of its obligations.

A franchisor can be liable to a franchisee for any losses that the franchisee incurs as a result of misrepresentations contained in a disclosure document and as a result of the franchisor's failure to adequately disclose. Directors and officers who sign the disclosure document may also be found personally liable for the aforementioned losses.

Quebec

Although the province of Québec does not have a specific statute dealing with franchises, franchises are governed by the *Civil Code of Québec*. It imposes the obligation of good faith upon both parties (somewhat equivalent to the obligation of "fair dealing") at every stage of the franchising arrangement. This includes, among other things, the obligation for both parties, at the pre-contractual stage, to disclose any information that could be material in the other party's decision-making process related to entering into the franchise agreement.

One must also be aware of the notion of a "contract of adhesion." Contracts of adhesion are contracts imposed on another party (i.e. agreements in which the essential stipulations are imposed or drawn up by one of the parties – generally the franchisor – and are not negotiable).

Under Québec law, most franchise agreements are considered contracts of adhesion. The main consequence of such a legal qualification is that when a contract is found to be a contract of adhesion, some of its clauses or paragraphs may ultimately be declared void by a tribunal or the inherent obligations may be reduced by the civil courts if the courts consider those obligations or paragraphs to be "abusive. Even though Québec does not have a law governing the franchise industry, more and more courts are ordering franchisors to pay damages when they act contrary to their "implied obligations". These obligations derive their sources from section 1434 of the *Civil Code of Québec*.

One must also note that the franchise model is extremely popular in Québec. Indeed, Québec is one of the Canadian provinces that proportionally has the highest concentration of franchisees in Canada. A joint study carried out and published in December 2018 by Raymond Chabot Grant Thornton on behalf of the Conseil québécois de la franchise (CQF), in collaboration with the Ministère de l'Économie et de l'Innovation,

Fasken, and Banque Nationale reveals that franchising represents sales in Québec of nearly $60 billion per year, nearly 10% of the total jobs held in Québec, or more than 405,000 direct and indirect positions, and a net annual growth rate of 6% in the number of franchisors registered between 2013 and 2016, with nearly 450 active franchisors. The Québec franchise industry therefore represents a powerful economic engine and a key development factor, active in all regions, in very diversified business sectors.

Considerations for Foreign Franchisors

Tax Issues

Under the *Income Tax Act* (ITA), royalty payments are subject to a 25% withholding tax. The United States–Canada Income Tax Convention reduces this withholding tax payable to 10%. In addition, American franchisors can apply for a foreign tax credit from the United States Internal Revenue Service that is equivalent to the amount paid in Canada.

Withholding the appropriate amount of tax is the responsibility of the franchisee. As a result, this translates into less upfront revenue for the franchisor. Although it may be tempting for franchisors to simply increase the royalty fee, franchisees will be naturally resistant to any additional cost increases. Alternatively, both parties should take care to contractually carve out the characterization of the specific payments for items other than the royalties for the right to use the franchisor's intellectual property, as this may considerably reduce the withholding tax burden.

For general information on taxation in Canada, see the chapter on Taxation in this publication.

French Language Requirements in Québec

French is the main language used by a majority of the Québec population. Québec is the only province in Canada where French is the official language.

The Charter of the French language, also known as Bill 101, makes French the language of government and the law, as well as the normal daily language at work, of commerce, and of business. It also includes rules on corporate names, signage, and work tools. Note that businesses with fifty or more employees must complete a francization program to ensure that the use and knowledge of French is generalized within the business.

15. Dispute Resolution

General Considerations

Disputes can arise at any time. Frequently, they occur between co-contracting parties, employers and their employees, businesses and their clients, or among shareholders under a unanimous shareholders' agreement.

Disputes may also arise between a business and various levels of government, particularly in heavily regulated industries. Most government decisions in Canada, though, are ultimately reviewable and subject to a court's scrutiny. Governments may similarly be the subject of damages claims in tort and contract.

For foreign parties expanding into Canada, disputes additionally may arise with local sales agents, distributors, or dealers that market products or services locally. Unlike certain other jurisdictions, there are no laws in Canada, either federally or provincially, that are aimed at the general protection of sales agents, dealers, and distributors from manufacturers. Accordingly, the legal relationship between such parties and a manufacturer is governed by the terms of their contract, if any, as well as general contract law principles. There is, however, an exception to this state of affairs for dealers/distributors of farm equipment in certain Canadian provinces. In each of Ontario, Alberta, Manitoba, Saskatchewan, Nova Scotia, and Prince Edward Island, a specialized statute exists that regulates and protects dealers/distributors of farm implements from manufacturers: *Ontario's Farm Implements Act*, *Alberta's Farm Implement and Dealership Act*, *Manitoba's Farm Machinery and Equipment Act*, *Saskatchewan's Agricultural Implements Act*, *Nova Scotia's Farm Machinery Dealers and Vendors Act*, and *Prince Edward Island's Farm Machinery Dealers and Vendors Act*. These statutes provide wide-ranging safeguards to dealers/distributors, such as establishing minimum requirements for sale agreements and restricting the ability of manufacturers to terminate their agreements with dealers.

Often, mechanisms and processes to resolve disputes are not thought of until conflicts arise. When it comes to doing business in Canada, it is always best to establish a rational approach to dispute resolution when negotiating any formal business arrangement or agreement.

Should issues arise, there are two basic options available for dispute resolution:

- Litigating through the courts
- Alternative dispute resolution: mediation and arbitration

Litigating Through the Courts

Choice of Governing Law and Forum

In Canada, parties may choose which laws govern their agreement through the inclusion of a "choice of law" clause. However, this clause is subject to certain limitations, such as legal provisions of public order, which may not be contractually waived. Parties can also include a "choice of forum" clause in their contract, requiring any disputes that arise to be dealt with in a specific jurisdiction or forum.

Canadian courts will presumptively uphold such clauses unless the validity of the contract itself is called into question, there is a statutory prohibition, or there are very strong public policy reasons for overriding the provision.

Where parties have not included a forum clause, the courts may decline to take jurisdiction over matters if there is a forum better suited to hear the case.

Treatment of Commercial Matters

Several Canadian jurisdictions have taken steps recently to reform and speed up the litigation process, particularly with respect to commercial matters. In certain cities of Ontario, for example, parties in a dispute are eligible to follow a "case management" process. This enforces a strict timetable that quickly moves cases to trial.

In Toronto, parties in a commercial dispute can opt to proceed before a special branch of the Superior Court known as the "Commercial List." If available, it is generally the preferred route as it allows cases to be heard by a judge specializing in commercial litigation, often resulting in a speedier trial and decision.

In the province of Québec, pursuant to legislation that came into effect on January 1, 2016, parties to an eventual litigation have the obligation to consider alternative dispute resolution methods before introducing a civil claim. The legislation also encourages litigators to present oral contestations (rather than in writing), which significantly reduces fees and costs.

Most provinces have provisions for a simplified civil claim procedure, provided the value remains within a statutorily defined amount and the claim relates to disputes arising from money and/or property. In Ontario, for example, the simplified procedure rules apply where a claim is for more than $25,000, but no more than $100,000. Claims for $25,000 or less are handled by the Small Claims Court. The same is true in Québec, where claims relating to amounts between $15,000 and $84,999.99 are handled by the Civil Division of the Court of Québec. Claims below $15,000 fall under the jurisdiction of the province's Small Claims Court. Class actions are not subject to the simplified procedure rules. British Columbia has a number of rules to expedite certain cases, including Fast Track Litigation for many matters where the amount at issue is less than $100,000.

Moreover, the Supreme Court of Canada has emphasized that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely, and just adjudication of claims.

Discovery Obligations

The scope of documentary discovery in most Canadian provinces (with some exceptions) is similar to that of the United States. The general rule is that parties to civil litigation must, after the pleadings have been delivered, disclose the existence of all documents relevant to the litigation, whether or not those documents are favourable to their position. In Québec, however, parties need only disclose documents that they intend to rely on at trial or that have been specifically requested by the other party. British Columbia's rules provide that only those documents relating to "material facts" must be produced, but the rules also permit a party to apply for production on the broader relevance standard.

Parties must also produce the content of relevant non-privileged documents. Opposing parties, however, also have the possibility to proceed to pre-trial examinations and/or to obtain the communication of various undertakings and documentation. This is commonly referred to as "examinations for discovery." If there is a dispute over a claim of privilege, a judge will make a determination on the issue. The term "document" has been defined broadly to include both hard copy and electronic communications, videos, tape recordings, and other sources of information.

Following the documentary discovery period, parties have the opportunity to examine an opposing party (in the case of an individual) or a representative of an opposing party (in the case of a corporation or organization). It is important to note that, in most provinces, each party is entitled to examine only one representative of an opposing party (even if that party is a large corporation), subject to certain exceptions requiring court approval.

Damages Awards

Damages awards tend to be lower in Canada than in the United States, particularly in the area of tort claims (known as "extra-contractual liability" in Québec). One reason for this is that few jury trials occur in civil cases in Canada. The Supreme Court of Canada has also set an upper limit for awards of non-monetary damages (i.e. pain and suffering), which is adjusted annually for inflation. Furthermore, awards of punitive damages are relatively rare and tend to be quite modest (usually in the tens of thousands of dollars, depending on the circumstances). In Québec, punitive damages are even more modest and are exceptionally rare.

Costs

In the United States, parties in a dispute typically pay their own legal costs. By contrast, the general rule in Canadian courts is that a portion of the costs of litigation is ordered to be paid by the losing party to the successful one.

The share of costs that a losing party may be required to pay will be affected by its conduct over the course of the action. For example, the portion of costs might be higher if a party makes unsubstantiated allegations of fraud or if an offer to settle made prior to the start of the trial was rejected, particularly when the offer was comparable to or better than that which resulted from the trial.

In Québec, the successful party may claim reimbursement of court costs, but unless there was abuse in the conduct of the legal proceedings, solicitor-client costs may not be recovered.

Class Actions

The Federal Court of Canada and all Canadian provinces (with the exception of Prince Edward Island and the three territories) permit class actions. In all jurisdictions, the class action must be certified by the court (authorized in Québec) in order to proceed. It is usually easier for a class action to be certified in Canada than it is in the United States.

There is no equivalent process in Canada to what is known in the United States as "multi-district litigation." As a result, it is possible that a company could face class action suits in more than one jurisdiction. However, parties will usually attempt to coordinate the proceedings in two or three provinces, including any measures being taken in the United States.

Alternative Dispute Resolution: Mediation and Arbitration

Although there are many different forms of alternative dispute resolution, mediation and arbitration tend to be the most common.

Mediation

In mediation, a neutral third-party mediator assists parties in settling a dispute. Mediation is a more amicable and co-operative process than other forms of dispute resolution, which are based on an adversarial model. In addition, mediation tends to focus on practical, as opposed to strictly legal, solutions to particular disputes.

Mediators do not decide cases or impose settlements. A mediation depends on the commitment and good faith of the parties involved in order to succeed. Following a successful mediation, parties generally enter into an agreement to resolve a dispute.

In certain Canadian courts, parties may be obligated to attend a mediation session as part of the litigation pre-trial procedure – a requirement that is increasingly being implemented as caseloads continue to grow.

Upon request, Québec courts can provide the parties involved in a litigation with the service of a judge-assisted mediation.

Arbitration

Arbitration can be a highly effective means of resolving disputes between two commercial parties. It is a more formal process than mediation: the arbitrator(s) hear evidence and legal arguments from the counsel of the respective parties. In contrast to the mediation process, arbitration proceedings are legally binding. Indeed, Canadian courts have become increasingly deferential to arbitral awards. An additional benefit of arbitration is that arbitral awards are typically easier to enforce in a foreign country than the judgment of a domestic court.

Arbitration is not necessarily confidential by nature. It is, however, private. The key distinction here is that the dispute is out of the public eye because it is not held in the courts. In certain jurisdictions, the only parties bound by a duty of confidentiality in an arbitration are the arbitrators. If the parties in a dispute wish the arbitration to be confidential, they must sign a confidentiality agreement at the outset.

British Columbia, however, has recently become a more arbitration-friendly jurisdiction. The *International Commercial Arbitration Amendment Act*, which, among other things, adopts the UNCITRAL Model Law, makes arbitrations private and confidential and gives arbitrators jurisdiction to grant interim measures.

There are two major myths about arbitration: (a) that it is less expensive and (b) that it is faster than litigating through the courts.

The cost of an arbitration proceeding will be determined by the complexity of the dispute. Some factors that increase the cost of an arbitration proceeding are:

- When several arbitrators are required
- When witnesses need to be flown in from abroad
- When parties have to make on-site visits to international locations

In fact, international arbitration can be just as costly as any other cross-border dispute settlement.

Expediency in the arbitration process is also contingent on the complexity of the proceeding. Where several issues requiring substantial technical expertise arise, the arbitration will likely take just as long as litigating the same issues in court.

The main benefit to arbitration is flexibility. Parties are able to tailor the arbitration process to meet their needs.

A well-drafted arbitration clause can reflect parties' agreement to, for example:

- Shorten the time for the production of documents and examination of witnesses
- Limit the arbitrator's powers to award punitive and exemplary damages
- Impose their preferred costs system
- Exclude, to the fullest extent possible, a review of the arbitrator's decision by the courts

Parties can also choose a mutually agreeable procedural framework within which to conduct the arbitration. Alternatively, they may opt for the arbitration procedures outlined in provincial legislation or those created by other private and public arbitration institutions, such as the ADR Institute of Canada or the United Nations Commission on International Trade Law.

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