# MARKETING & LABELING LEGISLATION



# DOING BUSINESS IN CANADA





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# PREPARED BY MERITAS LAWYERS IN CANADA

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## DOING BUSINESS IN CANADA

This publication has been prepared to provide an overview to foreign investors and business people who have an interest in doing business in Canada. The material in this publication is intended to provide general information only and not legal advice. This information should not be acted upon without prior consultation with legal advisors.

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CND Canadian Dollar

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The global financial crisis of 2008 and 2009 revealed the strengths and weaknesses of the world's financial systems. It is universally recognized that Canada's well-regulated financial institutions proved to be a model of prudence to the world. While the Canadian and American economies are interrelated, Canada has forged its own path to become a leader in reducing barriers to global commerce. Canada offers a stable and potentially lucrative market for international businesses and investors.

Over 90% of Canadians live within 160 kilometers (100 miles) of the U.S.-Canada border. As a result, Canada and the United States share many economic imperatives and cultural influences. The economic and material aspirations and realizations of the Canadian and U.S. populations are strikingly similar.

From a historic perspective, however, Canada remains significantly different than the United States. Canada today is a highly multicultural society which generally respects and enshrines cultural heritage rather than encouraging the population to form a homogeneous melting pot. Colonized by the British and French, Canada remains a bilingual country; English and French are the two official languages. Approximately 59% of the population has English as their mother tongue while about 23% of the population is French-speaking (mostly in the province of Québec). The remaining 18% speak other languages.

Canada remains an attractive location for the establishment or expansion of business in North America. During the past decade, there has been a marked trend toward fiscal conservatism. Federal and provincial governments made serious efforts to reduce deficits and balance budgets. Budget surpluses have been achieved on the federal level and in many provinces. Inflation and interest rates have remained low.

Except in certain industry-specific situations where cultural values are at risk, Canada is receptive to foreign investment. Despite its relatively small population, Canada is one of the strongest trading nations in the world. Although historically Canada was an exporter of raw materials and an importer of manufactured goods, shipments from Canada are now balanced between raw materials and finished goods. In addition, Canada is recognized internationally as a world leader in such areas as fibre optics and telecommunications.

This book provides a general overview as of July 2013 of particular matters of interest to businesses considering entry into the Canadian market. Where appropriate, descriptions of both federal and provincial laws are provided. However, this book should not be considered an exhaustive review, and

particular businesses may be subject to industry-specific legislation and other legal requirements which are not dealt with in this book. Accordingly, before undertaking any business transaction involving entry into Canada, it is prudent to seek the advice of counsel.

# I. WHAT LAWS INFLUENCE THE RELATIONSHIP BETWEEN LOCAL AGENTS AND DISTRIBUTORS AND FOREIGN COMPANIES?

Foreign companies doing business in Canada will be influenced by legislation, the common law and various international treaties. Canada's Constitution creates mutually exclusive jurisdictions for federal and provincial legislation. For example, Canada's intellectual property, competition, bankruptcy and criminal laws are solely within the purview of the federal government. Provincial legislative authority is granted for the regulation of trade and commerce, education and health within the province. However, the jurisdictional distinctions are often blurry, and the subject matter of federal and provincial legislation sometimes overlaps. In addition, Canada has entered into many international trade and tax treaties with other countries which will influence foreign companies doing business in Canada.

# 2. HOW DOES THE CANADIAN GOVERNMENT REGULATE COMMERCIAL JOINT VENTURES BETWEEN FOREIGN INVESTORS AND LOCAL FIRMS?

Legislation by the federal government and each of the provincial governments regulates ventures between foreign investors and local firms, including agents and distributors. From a contracting perspective, there is no material distinction between business parties who are foreign and those who are local.

The foreign investor will have to comply with the direct investment provisions noted below in question 3 and discussed in more detail in the Foreign Investment & Merger section of this Guide.

In addition, many obstacles to foreign investment have been removed as a result of the various free trade agreements that Canada has negotiated with other countries, such as the North American Free Trade Agreement discussed in detail in the International Trade section of this Guide.

# 3. WHAT ROLE DOES THE GOVERNMENT OF CANADA PLAY IN APPROVING AND REGULATING FOREIGN DIRECT INVESTMENT?

Non-Canadians who acquire control of an existing Canadian business or who wish to establish a new unrelated Canadian business are subject to the federal Investment Canada Act (ICA). In either case the non-Canadian investor must submit either a Notification or an Application for Review to the federal government. A Notification must be filed each and every time a non-Canadian commences a new business activity in Canada and each time a non-Canadian acquires control of an existing Canadian business where the establishment or acquisition of control is not a reviewable transaction. Only in certain circumstances does the ICA seek to review or restrict new investments by non-Canadians. In general terms, the transactions which are subject to review under the ICA are larger transactions, and transactions in certain politically and culturally significant sectors (as noted below in question 5). Securities transactions and venture capital deals, acquisitions of control in connection with realization on security, certain financing transactions and certain direct and indirect acquisitions of control by insurance companies are exempt from the ICA. For all other transactions a Notification needs to be filed

More detailed information on the ICA and direct investment in Canada can be found in the Foreign Investment & Merger section of this Guide.

# 4. CAN FOREIGN INVESTORS CONDUCT BUSINESS IN CANADA WITHOUT A LOCAL PARTNER? IF SO, WHAT CORPORATE STRUCTURE IS MOST COMMONLY USED?

There is nothing preventing a foreign investor from conducting business in Canada without a local partner. All businesses, foreign or local, must register in the appropriate jurisdiction to conduct business; however, these are administrative filings.

Most foreign investors, however, would incorporate a new company in a Canadian jurisdiction in order to carry on their business. This Canadian subsidiary may be a standard limited liability corporation or it might be an unlimited liability corporation, depending on the tax characteristic of the parent's jurisdiction. More detailed information on the forms of business organization in Canada can be found in the Forms of Business Organization section of this Guide. In addition, the taxation of foreign investors and their Canadian subsidiaries is discussed in detail in the Taxes and Duties section of this Guide.

# 5. WHAT STEPS DOES THE CANADIAN GOVERNMENT TAKE TO CONTROL MERGERS AND ACQUISITIONS WITH FOREIGN INVESTORS OF ITS NATIONAL COMPANIES OR OVER ITS NATURAL RESOURCES AND KEY SECTORS (E.G., ENERGY AND TELECOMMUNICATIONS)?

As discussed in question 2, non-Canadians who acquire control of an existing Canadian business, or who want to establish a new unrelated Canadian business, are subject to the federal Investment Canada Act (ICA). The transactions subject to review include businesses within a prescribed type of business activity that is related to Canada's cultural heritage or national identity, and transactions where the Minister responsible has reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security. Notice of the transaction is given to the Review Division of Industry Canada. When a transaction is reviewable under the ICA, the investor is required to file an extensive pre-closing filing called an Application for Review with supporting documents. When a review is conducted, the investor is prohibited from closing the transaction until the Minister's approval is obtained. Investment reviews under the ICA proceed in tandem with reviews under the Competition Act.

Merger or antitrust review and prenotification in Canada are governed by the Competition Act. Mergers that exceed a certain size threshold require the Commissioner of Competition to be notified prior to completion. Whether a notification filing is required is determined by the value of the assets in Canada and the annual gross revenues from sales in, from or into Canada of the parties to the transaction, and of the target corporation itself.

There are sectors in Canada, such as telecommunications and other broadcast-related sections, that have ownership restrictions imposed by the federal government. In addition, Canada has anti-dumping legislation which imposes duties to prevent unfair competition with domestic Canadian goods.

More detailed information on the direct investment and competition laws in Canada can be found in the Foreign Investment & Merger section of this Guide.

# 6. HOW DO LABOUR STATUTES REGULATE THE TREATMENT OF LOCAL EMPLOYEES AND EXPATRIATE WORKERS?

For employers in Canada, the employment relationship is governed by various federal and provincial acts that provide minimum standards for most employees. In most cases, individual or collective agreements will be governed by these minimum standards. Accordingly, Canada cannot be considered a jurisdiction in which there is employment at will. There are minimum standards which mandate that employees are entitled to receive either notice of the termination of their employment or pay in lieu of notice if their employment is terminated without cause. The legislative requirements are minimum standards only and do not restrict an employee's right to sue for breach of contract, wrongful dismissal or other damages arising from the termination of his or her employment. In the absence of a written contract to the contrary, termination of employment without cause generally requires significantly longer notice periods than those provided by the legislation. Appropriate reasonable notice periods have been established by common law through the litigation process on a case-by-case basis. The courts consider various factors, including the employee's age, length of service, position, remuneration, how the employee came to be employed, their chance of finding replacement employment and the manner of dismissal. The judge will consider all of these factors to determine the appropriate "reasonable notice" period.

Reasonable notice established by the common law in Canada often greatly exceeds the obligations of U.S. employers to their employees. The grounds for termination for cause in Canada are also very limited and reserved for the most serious misconduct (for example, where the termination results from acts of dishonesty of the employee, or where the employee has been warned in writing various times and provided with assistance, yet continues to perform below expectations).

More detailed information on employment law in Canada can be found in the Employment Law section of this Guide. In addition, more detailed information on business visitors (temporary residents), temporary workers, professional workers under the various international trade agreements and permanent residents can be found in the Immigration Restrictions section of this Guide.

# 7. HOW DO LOCAL BANKS AND GOVERNMENT REGULATORS DEAL WITH THE TREATMENT AND CONVERSION OF LOCAL CURRENCY, REPATRIATION OF FUNDS OVERSEAS, LETTERS OF CREDIT AND OTHER BASIC FINANCIAL TRANSACTIONS?

Banking, currency and negotiable instruments are regulated uniformly in Canada by the federal government. Specifically, all banks in Canada are regulated by the federal government. The Bank Act, S.C. 1991, c. 46 is the main federal statute which regulates Canadian banking. Canadian banks are divided into three distinct categories. Schedule I banks are domestic banks that are allowed to accept deposits which may be eligible for deposit insurance. Schedule II banks are foreign bank subsidiaries that are authorized to accept deposits which may be eligible for deposit insurance. Foreign bank subsidiaries are controlled by eligible foreign institutions. Schedule III banks are foreign bank branches of foreign institutions that are authorized to do banking business in Canada.

# 8. WHAT TYPES OF TAXES, DUTIES AND LEVIES SHOULD A FOREIGN INVESTMENT IN CANADA EXPECT TO ENCOUNTER?

When doing business in Canada, you can expect to encounter sales and transfer taxes, income and capital taxes, and custom and excise duties.

Canada has a 5% goods and services tax (GST) which applies to most goods and services on the purchase price. Those engaged in commercial activity in Canada having worldwide sale of goods and services subject to GST greater than CND30,000 per year must register to collect GST. Registration entitles businesses to input tax credits (ITCs) equal to the full amount of GST paid by them on all business purchases. Some nonresidents carrying on business in Canada are also required to register to collect GST. Most Canadian provinces charge a sales tax ranging between 5% and 10% on tangible property and certain services. Harmonized Sales Tax (HST) has been implemented in Nova Scotia, New Brunswick, Newfoundland, British Columbia and Ontario. HST applies to all goods and services that are subject to GST and ranges between 12% and 15%. Registrants for HST are entitled to claim ITCs. The province of Québec administers its own sales taxes together with the GST. The rate of the Québec sales tax is 9.975%. In addition, a land transfer tax, ranging from .02% to 2%, is payable on the acquisition of real property in each province.

Canada imposes a federal income tax on nonresidents who conduct business or sell real property in Canada. Canada also imposes a federal nonresident withholding tax on certain Canadian source payments. This requirement can be waived if the non-resident is carrying on business through a permanent establishment. Canada has entered into bilateral treaties with many countries which contain tax relief provisions. A foreign tax credit may be available in the nonresident's own jurisdiction. A corporation incorporated in Canada will be considered a resident of Canada for income tax purposes. This means the corporation will be subject to Canadian income tax on its worldwide income. Foreign businesses can also be carried on through branch operations. Provinces and territories typically impose income tax on corporations carrying on business within the province and some impose a capital tax on corporations.

All goods entering Canada go through a customs inspection at the point of entry. Documentation accompanying goods ascertains the transaction value of the goods (the price paid for the goods by the importer, subject to adjustments for royalties, shipping fees and transportation). The amount of customs duty is determined by the customs tariff that sets out a specific list describing the class of goods and setting out the corresponding rate of duty. Member countries of North American Free Trade Agreement (NAFTA) receive a preferential duty rate. Imported goods, such as alcohol and tobacco, are subject to a special duty under the customs tariff that is equal to the excise duty paid by Canadian producers.

There are special anti-dumping duties for imported goods sold in Canada at prices that are below the prices in the home market. Dumping occurs when the "normal value" of the imported goods exceeds the "export price." These anti-dumping duties are imposed to provide Canadian producers with relief from unfair import competition.

More detailed discussion of this topic can be found in the Taxes and Duties section of this Guide

# 9. HOW COMPREHENSIVE ARE THE INTELLECTUAL PROPERTY LAWS OF CANADA, AND DO THE LOCAL COURTS AND TRIBUNALS ENFORCE THEM OBJECTIVELY, REGARDLESS OF THE NATIONALITY OF THE PARTIES?

Canada offers a fully developed and modern intellectual property law regime. Through federally based legislation that governs the acquisition and enforcement of intellectual property rights throughout Canada, parties are able to register and protect all aspects of intellectual property, including trade-marks, copyright, patents of invention and industrial designs. Canada is also a party to all of the major world intellectual property law treaties and conventions, including the Patent Cooperation Treaty, the Berne Convention and the various World Intellectual Property Organization treaties. Parties, including those based in foreign jurisdictions, have the ability to enforce their intellectual property rights in either the superior courts of the Canadian provinces, or, more often, in the Federal Court of Canada, which courts are required to enforce Canada's laws fairly and objectively, regardless of a party's national origin.

A more detailed discussion of this topic can be found in the Intellectual Property section of this Guide.

# 10. IF A COMMERCIAL DISPUTE ARISES, WILL LOCAL COURTS OR ARBITRATION OFFER A MORE BENEFICIAL FORUM FOR DISPUTE RESOLUTION TO FOREIGN INVESTORS?

Whether or not foreign investors will benefit more from bringing a dispute to private arbitration or to the courts will depend on the nature of the dispute. For example, a foreign investor may benefit from having a complex commercial matter arbitrated privately, as the parties can attempt to select an arbitrator who has experience and knowledge related to the subject matter at issue. Private arbitration can also be beneficial because it is generally a much faster process than court proceedings. In either case, Canadian law, and in particular Canada's Charter of Rights and Freedoms, guarantees equality under the law, which extends to foreign participants in court or arbitration proceedings, such that neither party to a dispute should benefit (or suffer) from the fact of their national origin.

# MARKETING & LABELING LEGISLATION

In Canada, the federal Competition Act prohibits certain marketing activities, which include:

- Resale price maintenance
- Predatory pricing
- Price discrimination
- Deceptive marketing, including telemarketing

# **RESALE PRICE MAINTENANCE**

Under the Competition Act, suppliers are prohibited from directly or indirectly attempting to influence upward, or discourage the reduction of, the price at which anyone else supplies, offers to supply or advertises a product within Canada. To contravene the Competition Act this behavior must have had, or is likely to have, an adverse effect on competition. This rule does not apply where the person attempting to influence the conduct of another person and that other person are:

- Affiliated corporations
- Director, agent, officer or employee of either the same or affiliated corporation, partnership or sole proprietorship
- · Principal and agent

This exception also applies to franchising relationships.

In addition, suppliers are prohibited from refusing to supply a purchaser because of a purchaser's low pricing policy. It is lawful in packaging to have "suggested retail prices"; however, requiring any business in the supply chain to maintain a minimum resale price is unlawful.

# PREDATORY PRICING

Predatory pricing involves the practice of selling goods and services at a price lower than the acquisition cost for the purpose of eliminating or disciplining a competitor. To be unlawful, this practice must be likely to have the effect of, or intended to have the effect of, substantially lessening competition in a market or eliminating a competitor in a market. Where specific competitors are targeted, or prices are set below cost, extreme caution should be exercised.

# PRICE DISCRIMINATION

The Competition Act prohibits selling a like quality and quantity of articles to purchasers who are competitors of each other at different prices, or offering volume rebates or other advantages to one purchaser where such rebate or advantage is not made available to its competitors at the time the goods are sold and where such conduct amounts to a "practice." This practice must have had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market. Selling products in one area of Canada at prices lower than those exacted elsewhere in Canada may also be unlawful if it tends to substantially lessen competition or eliminates a competitor in that part of Canada.

# MISLEADING ADVERTISING AND DECEPTIVE MARKETING PRACTICES

The Competition Act makes it unlawful to make a representation to the public, for the purpose of promoting a product or business interest, that is false or misleading in any material respect. To determine whether a representation is false or misleading, the courts consider the "general impression" it conveys, as well as its literal meaning. Representations may be deemed to be made by an importer of goods into Canada where the supplier is outside Canada.

Penalties for such representations are governed by a "two track" system, whereby the Commissioner of Competition may choose to pursue criminal or civil remedies against directors or their corporations. Over the last 10 years, the Canadian courts have been imposing higher fines and sometimes jail sentences for false or misleading representations.

Reviewable conduct includes representations made in the form of statements, warranties or guarantees regarding a product that are not based on adequate or proper testing, or making a false or misleading representation regarding the price at which goods will ordinarily be sold. Reviewable trade practices attract administrative remedies.

# **DECEPTIVE TELEMARKETING**

The Competition Act also mandates that anyone engaged in telemarketing must provide full, reasonable and timely disclosure of, among other requirements, the nature of the product or business being promoted, the purpose of the communication, the price of the product, any restrictions that may be imposed with respect to delivery of the product, as well as a prohibition against deceptive telemarketing practices.

# MARKETING & LABELING LEGISLATION

Deceptive telemarketing is a criminal offense. Deceptive practices include:

- Requiring payment in advance as a condition for receiving a prize that has been, or supposedly has been, won in a contest or game
- Failing to provide adequate and fair disclosure of the number and value of "prizes"
- Offering a "gift" as an inducement to buy another product, without fairly disclosing the value of the gift
- Offering a product at a grossly inflated price and requiring payment in advance

# PACKAGING AND LABELING LAWS

The information in this section concentrates on consumer products. In the event industrial products are exported into Canada, there may be specific rules regarding a particular product.

The Consumer Packaging and Labeling Act (CPLA) is designed to protect consumers from misrepresentation in packaging. Retailers, manufacturers, processors and producers of a "product" are required to comply with the CPLA. "Product" is defined in the CPLA as any article that is or may be the subject of trade and commerce. It includes both food and nonfood items.

The CPLA requires all prepackaged products to have affixed a label declaring the product identity, the net quantity of the product in the form prescribed by the CPLA and its Regulations, and the dealer's name and principal place of business. Generally, information is required to be in both English and French, and must express the quantity of the product in metric units. The product must conform with any other claims made which may, for example, relate to its type, quality, performance, function, origin or method of manufacture.

Certain products are required by the CPLA to be packaged in standardized containers. These include peanut butter, wine, glucose syrup, refined sugar syrup and facial tissue. This requirement is intended to prevent consumers from being misled or confused by an undue proliferation of container shapes and sizes.

Contravention of the CPLA can, in the most extreme cases, lead to a fine of up to CND250,000 or up to two years imprisonment.

# HAZARDOUS PRODUCTS ACT

The Hazardous Products Act (HPA) regulates the advertising, labeling, sale and importation into Canada of hazardous products. Schedule I to the HPA lists products which may not be imported or sold in Canada. Examples of such prohibited products are lead pigments in paint and asbestos in textiles.

The HPA also lists certain "restricted" and "controlled" products which may be imported or sold in Canada only if they comply with specified safety standards. Children's toys, furniture and certain flammable textile products are examples of products within the "restricted" category. "Controlled" products include products which are toxic, flammable and corrosive. Pursuant to the HPA, importation of controlled products may be prohibited unless the supplier or importer provides a material safety data sheet on the product and labels the product as specified in the regulations. This data sheet must contain details on ingredients, risks, injury prevention and treatment procedures. In certain cases, confidential ingredient information may be exempted from disclosure to competitors or the public.

# **TEXTILE LABELING ACT**

The Textile Labeling Act (TLA) is designed to provide consumers with information concerning the fibers contained in fabrics, clothing and other articles made from fabrics and yarns. The TLA requires a disclosure statement contained in a label indicating the name of the textile fibre (as such name is prescribed in the Textile Labeling Regulations), the percentage of that textile fibre contained in the product by weight, the name and address of the person/buyer for whom the article was imported and labeled, and the country of origin of imported articles.

In certain cases, consumer textile articles may be imported to Canada without a disclosure label, provided that a sample of the article and certain specified information regarding the article are delivered to a federal government inspector at the port of entry on or before the importation. However, before the imported article may be sold in Canada, the dealer must apply a disclosure label, notify the federal inspector that this has been done, and provide the inspector with a reasonable opportunity to inspect the article.

Regulations pursuant to the TLA exempt a number of articles from labeling requirements. As well, certain other sales are exempt where articles are made in compliance with specifications supplied by the buyer and the articles are not intended for resale.

## **FOOD AND DRUGS ACT**

The Food and Drugs Act (FDA) regulates the advertising, importation and sale of certain foods, cosmetics, drugs and medical devices. The FDA contains stringent standards for the preparation of food and drugs. There are also regulations regarding the labeling, advertising and packaging of foods, drugs, cosmetics and medical devices.

# MARKETING & LABELING LEGISLATION

Advertising with respect to certain products listed in a schedule to the FDA is prohibited. These prohibitions relate to advertising of certain foods, drugs, cosmetics and medical devices for illnesses such as alcoholism, cancer and heart disease. The definition of food contained in the FDA is broad enough to include chewing gum and ingredients that may be mixed with food for any purpose.

In certain cases, a food may become a drug for the purposes of the FDA. This will occur if medicinal claims are being made in connection with it. Medicinal claims must be substantiated through scientific study and a preapproval process through the Health Protection Branch of the Department of Health and Welfare.

Canada has become a world leader in reducing global trade barriers. Free trade with the United States and Mexico and freer trade with other countries have lowered many of the barriers to entering into the Canadian market. Canada, with its rich resources and vibrant marketplace, presents many opportunities for foreign businesses and investors. The foreign investor is encouraged to explore the competitive advantages of Canada. Sensitivity to the cultural, administrative and legislative differences in Canada will assist an enterprise's entrance into the Canadian market.

Through the general information provided in this book, we have attempted to illustrate the highly multicultural society that is Canada and to provide an overview of some of the main issues faced by foreign businesses and investors in Canada. It is important for foreign businesses and investors wishing to invest in Canada or enter into trade with Canadian businesses to understand the laws and culture of this country and to seek the advice of counsel at the appropriate time.

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