

INTELLECTUAL PROPERTY PROTECTION



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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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The following currency notation is used in this book.

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.

1. 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 CAD30,000 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.

Effectively protecting a business's intellectual property rights has become an increasingly important element of safeguarding the success of many businesses nowadays. The following is a general overview of the four key areas of intellectual property protection: trade-mark, copyright, patent and industrial design.

TRADE-MARKS

The Trade-marks Act defines a trade-mark as a mark that is used for the purpose of distinguishing wares or services manufactured, sold, leased, hired or performed by the owner of a trade-mark from similar wares or services of others.

A person can obtain registration in Canada of his/her foreign-registered trade-mark, if the trade-mark has been used or made known in Canada, has been duly registered in its country of origin (which country must be a member of the Paris Convention, which covers most industrialized countries), or is actually used in Canada after the allowance of the application but before registration of the trade-mark.

Registration provides the owner with the right of exclusive use of the trade-mark throughout Canada for 15 years in respect of the wares and services for which it was registered, provided there is continuous use of the trade-mark. Registration may be renewed indefinitely for further periods of 15 years.

Owners of unregistered trade-marks also have rights at common law via the tort of "passing off." However, such rights only extend to the geographic locations in which the unregistered trade-mark is used or made known in Canada. As it is far easier to establish the essential elements of a claim for trade-mark infringement (available only to owners of registered marks) than it is to make a common law "passing off" claim, registration in Canada of a trade-mark provides the best possible protection for this type of intellectual property.

As in other countries, a trade-mark will not be registrable if it is clearly descriptive or deceptively misdescriptive of the character, quality or the place of origin of the related wares or services, or of the conditions of or the persons employed in the production of such wares or services. A trade-mark will also not be registrable if it can be confused with an existing registered trade-mark.

It is often appropriate for a foreign corporation to register a trade-mark even when it is not carrying on business in Canada. If a foreign corporation grants rights to use or sell a product bearing a trade-mark, it will be prudent to have the trade-mark registered in Canada as the property of the foreign owner.

License distribution agreements then clarify the right of the owner to enforce its trade-mark exclusivity when the distribution arrangement is terminated.

There is, as yet, no amendment to the Trade-marks Act concerning the issues surrounding Internet domain names, but there have now been several Canadian cases decided on that issue. The general confusion rules appear to be adequate to protect trade-mark owners from others trying to benefit from a trade-mark's value.

Trade-mark owners often indicate the registration of a trade-mark through symbols such as ® (registered), ™ (trade-mark) or MC (*marque de commerce*). The Trade-marks Act does not require the use of these symbols, but their use is recommended. In fact the ™ or MC symbols may be used with unregistered trade-marks.

COPYRIGHT

A copyright gives the creator of every original literary (including computer software databases), dramatic, musical and artistic (including choreographic work) work the exclusive right to produce or reproduce in any material form, perform, to deliver in public or publish, a work or any substantial part of the work or authorize the doing of any of the above.

Copyright arises upon the creation and fixation into a tangible form of a particular work and does not depend upon registration. Generally a copyright in Canada lasts for the life of the author, the remainder of the calendar year in which the author dies, and for 50 years following the end of that calendar year. Some exceptions may apply with regards to the following works:

- Anonymous and pseudonymous works
- Posthumous works
- Cases of joint authorship
- Photographs
- Cinematographic works
- Where copyright belongs to Her Majesty
- Sound recordings
- Communication signals

Copyright marking is not mandatory in Canada but is strongly recommended. A copyright may also be registered with the Copyright Office in Canada. A Certificate of Registration is evidence that a work is protected by copyright and that the registrant is its owner. In the event of a legal dispute, the registrant does not have to prove ownership; the onus is on the opponent to disprove the registrant's ownership.

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In Europe and in the United States, a copyright has a term of 70 years. In a report filed with the Canadian Parliament a number of years ago, the amendment of the term of a copyright to 70 years was proposed along with several other amendments, but there is currently no amendment pending to the Copyright Act that deals with extending the term of copyright ownership in Canada.

A copyright owner can bring an action for infringement against any person who, without the consent of the owner, copies the whole or a substantial part of a copyrighted work, or sells, leases, distributes, exhibits by way of trade or imports for sale or hire into Canada any work that to his/her knowledge infringes copyright or would infringe copyright if it had been made in Canada. There also exist statutory penalties under the Copyright Act for knowingly infringing a copyright. While seldom used, copyright infringement can lead to a prison term of up to two years.

If it can be shown that an infringer was not aware or did not have reasonable grounds for suspecting the subsistence of the copyright, the owner can only be awarded an injunction. Alternatively, if it can be shown that the infringer had knowledge of the copyright, a copyright owner may be entitled to an injunction, damages, an order for the detention of imported infringing copies, an accounting for profits, recovery of infringing copies and/or costs. Although registration is not a prerequisite to copyright protection, it is deemed to give a potential infringer reasonable grounds for suspecting that copyright subsists in the material. A certificate of registration of copyright is evidence that the copyright subsists and that the person registered is the owner of the copyright.

Canada is a member of the Berne Convention and the Universal Copyright Convention. Copyright protection is extended to nationals of countries that are members of these Conventions or works first published in countries that are members of these Conventions.

Since amendments to the Copyright Act in the 1990s, a levy has been administered on the sale of blank recordable media (tapes, CDs, etc.) and the collection of performer's performance royalties, commonly referred to as "neighboring rights."

An amendment to the Copyright Act dealing with resolving the rising confusion surrounding the retransmission or rebroadcast of television signals over the Internet was passed and proclaimed in force in the spring of 2003. Further and more substantial amendments to the Copyright Act were made and will become law in November 2013. These amendments bring Canada in line with its obligations under world Intellectual Property Organization treaties, modernize Canadian copyright law for the digital and online age, and broaden the legal defence of "fair dealing" for uses of copyright protected works that would

otherwise constitute an infringement of those rights. For example, uses of such works that are incidental and not motivated by financial gain may constitute fair dealing, thereby protecting such users from liability.

Most substantially, these changes to the Copyright Act address issues such as Internet service providers' (ISP) liability for the copyright infringements of their users, digital rights management (DRM), and technological protection measures (TPMs). These amendments also contain what is known as a "notice and notice" mechanism by which an ISP must, in order to avoid liability for facilitating infringement, cooperate with a copyright owner by (a) providing notice of online copyright infringement to the ISP's user, and (b) storing information about the user in order to facilitate later prosecution by the copyright owner. Currently, these amendments have not yet been proclaimed into force, but are expected to become law in the near future.

PATENTS

Under the Patent Act, an inventor or assignee of the inventor who is first to file (not first to invent) an application in respect of an invention will be entitled, subject to certain qualifications, to the grant of a patent.

An invention is defined as any new and useful art, process, machine, manufacture or composition of matter or any new and useful improvement thereof. Any scientific principle and abstract theorem is not patentable under the Patent Act. "Pure" computer software, mammals and inventions requiring the use of professional skills are not patentable.

Therefore, to be patentable, the invention must be new, useful and not have been obvious to a person skilled in the art or science to which the invention relates.

Public disclosure of the invention by a third party not having obtained the invention from the inventor in Canada or elsewhere bars the grant of a patent. Such disclosure by the inventor/patentee is subject to a one-year grace period before the first patent application has been filed in Canada or elsewhere. This is different from many other countries where public disclosure is completely forbidden.

A patent gives the patentee the exclusive right to make, construct, use and sell the invention for a period of 20 years (nonrenewable) from the date of filing the application. As Canada is a member of the Paris Convention for the Protection of Industrial Property, the deemed filing date of the patent application in Canada can be the earliest filing date in a member country of such Convention, as long as the patent application in Canada is made within a year of the earliest filing date in a member country.

Patent marking is not required in Canada.

A patent infringement action may be brought before the Federal Court anywhere in Canada or before the Superior Court of the province in which the infringement occurred. A person who infringes a patent is liable to the patentee and to all persons claiming under the patentee for all damages suffered by the plaintiffs after the grant of the patent. The plaintiffs are also entitled to reasonable compensation for any infringement damages suffered after the application for the patent became open to public inspection and before the grant of the patent as if the patent had been granted the day the application became open to public inspection.

INDUSTRIAL DESIGN

Under the Industrial Design Act, an industrial design means features of shape, configuration, pattern or ornament and any combination of those features that, in a finished article, appeal to and are judged solely by the eye. It does not protect any utilitarian function.

The proprietor of a design, whether the first proprietor of the design or a subsequent proprietor, may apply to register the design. Registration gives the proprietor the exclusive right to make, offer for sale, or sell an article in respect of which the design has been applied.

No protection provided by the Industrial Design Act can extend to features applied to a useful article that are dictated solely by a utilitarian function of the article or any method or principle of manufacture or construction.

An action for infringement of the exclusive right in a design shall be brought by the proprietor of the registered design. The remedies for infringement include an injunction, the recovery of damages or profits, punitive damages and the disposal of any infringing article or kit.

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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