

FASKEN



Key Legal Considerations When Doing Business in Canada

November 17, 2021




Key Legal Considerations When Doing Business in Canada

November 17, 2021

National Bar Association Commercial Law Section

Andrew Alleyne, Taisha Lewis, Andrew Nunes and Nicole Singh

FASKEN



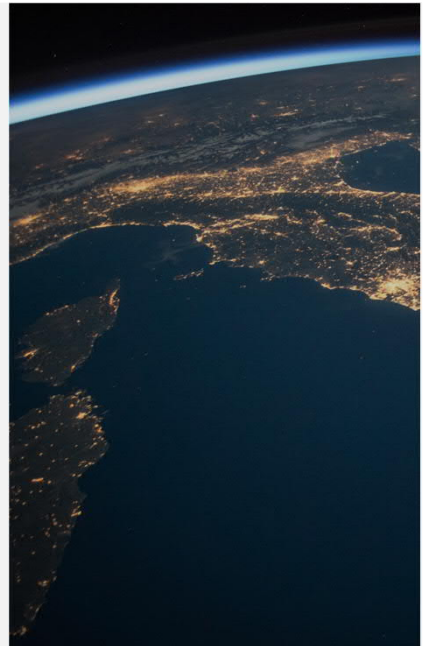
This handout/presentation is provided as an information service by Fasken Martineau DuMoulin LLP. It is current only as of the date of this presentation and does not reflect subsequent changes in the law. This handout/presentation is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers/viewers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

© 2021 Fasken Martineau DuMoulin LLP

FASKEN

▼ About Fasken

- We are a full-service Canadian law firm with clients around the globe, including close to half of the Fortune 100 companies. We offer expertise on legal issues affecting all types of industry, government and individual objectives.
- As the 2nd largest law firm in Canada, our team of over 800 lawyers across 10 offices in Canada, South Africa, the United Kingdom and China provides expertise in more than 40 practice areas and industry groups in a variety of languages including English, French, Cantonese, Mandarin, German, Japanese and Spanish.
- We advise on U.S.-Canada cross-border deals and have experience in all aspects of U.S.-Canada cross-border corporate and commercial litigation.



FASKEN

▼ About Fasken

- As a signatory to the Black North Initiative Law Firm Pledge, by 2025, we have committed to investing 3% of our corporate donations for the Black community, hiring at least 5% Black students and having 3.5% of our senior leadership roles held by Black individuals or visible minorities.
- Fasken has achieved Mansfield Rule 4.0 Certification confirming that at least 30% women, under-represented racial/ethnic groups, LGBTQ+ lawyers and lawyers with disabilities were considered for significant leadership and governance roles at the Firm. Fasken was the only largely Canadian-based law firm among the original 30 firms to commit to the Mansfield Rule.



FASKEN



Awards & Rankings

Leading guides and ranking agencies consistently recognize our collection of leading lawyers and deep bench strength.

While we appreciate each accolade, we take our greatest satisfaction from clients who continue to trust us with their most important and time-sensitive matters. We pride ourselves on being our clients' first call for all their legal needs.

Bloomberg

Bloomberg (2021) ranked Fasken No. 1 in Canada in the category of Announced Deals – by Deal Count

REFINITIV

Refinitiv (2021) ranks Fasken No. 1 in four categories:

- Canadian Involvement Announced – by Deal Count
- Canadian Involvement Completed – by Deal Count
- Canadian Involvement Mid-Market – by Deal Count
- Canadian Involvement Small-Market – by Deal Count



The Legal 500 Canada (2021) ranks Fasken as Tier 1 in Labour and Employment.



Fasken's Labour, Employment and Human Rights group won "Employment Law Firm of the Year" at the **Chambers Canada Awards 2021**.

Best Lawyers

The Best Lawyers in Canada (2021) recognizes Fasken as "Workers' Compensation Law Firm of the Year".

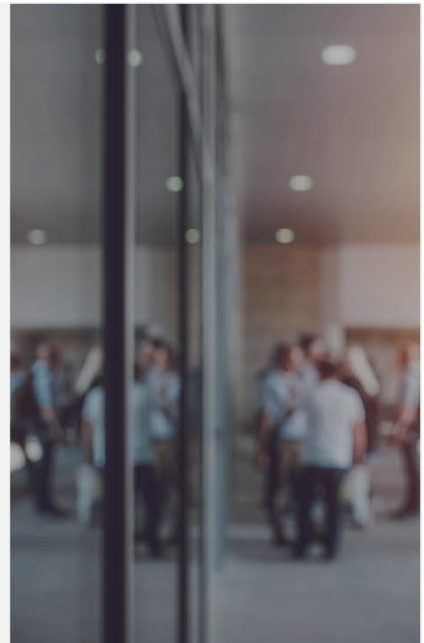
FASKEN



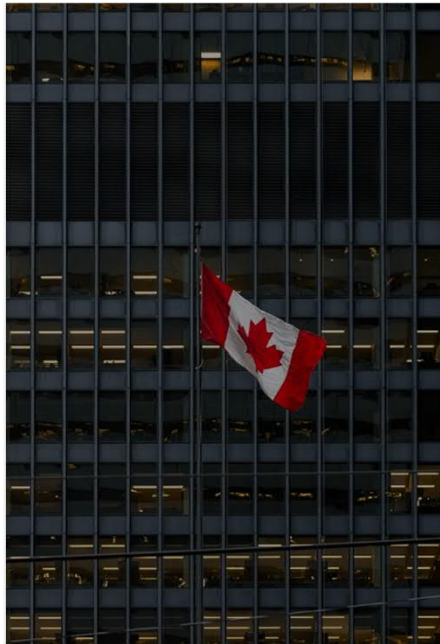
Overview

In today's webinar:

1. Acquiring a Canadian business
2. Other means of expanding into Canada
3. E-commerce with Canadian customers
4. Labour, employment and human rights considerations



FASKEN



Acquiring a Canadian Business

1

FASKEN

▼ Acquiring a Canadian Business

- Key issues:
 - Is the target privately held or publicly listed?
 - Is the transaction a share purchase or asset purchase?

FASKEN

▼ Share Purchase: Publicly Listed Company

- Key issues:
 - Which stock exchange and securities regulator(s) are involved?
 - How will the transaction be structured?

FASKEN

▼ Share Purchase: Publicly Listed Company

- Structure of the transaction:
 - Takeover bid
 - Friendly or hostile?
 - How will the purchaser finance the transaction?
 - Plan of arrangement
 - Amalgamation/Merger
 - Tax considerations

FASKEN

▼ Share Purchase: Privately Held Company

- Key issues:
 - What is the scope of due diligence?
 - Representation and warranty insurance?
 - What approvals or notices are required?

FASKEN

▼ Asset Purchase: Privately Held Company

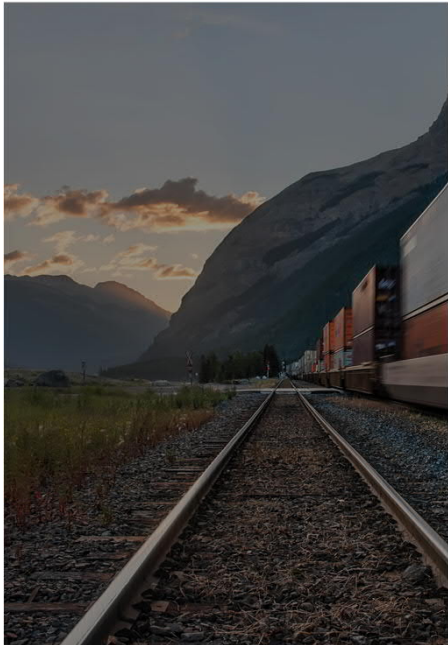
- Corporate Approvals
 - The sale of all or substantially all of the property of a corporation requires the approval of the shareholders holding at least 66⅔% of the shares voted at a meeting or all of the shareholders if approved by written resolution.

FASKEN

▼ Additional Considerations

- *Investment Canada Act*
- *Competition Act*
- Restrictive covenants
- Director residency post-closing

FASKEN



▼ Other Means of Expanding Into Canada

2

FASKEN

▼ Creating a new Canadian business

- Subsidiary or branch
- Director residency requirements
- Local registrations and agents
- Flow through vehicles
- Regulatory

FASKEN

▼ Tax considerations

- Commodities tax implications
- Netflix Tax
- Income tax implications
- Transfer Pricing
- Scientific Research & Experimental Development (SR&ED) program

FASKEN

▼ Branding and Marketing

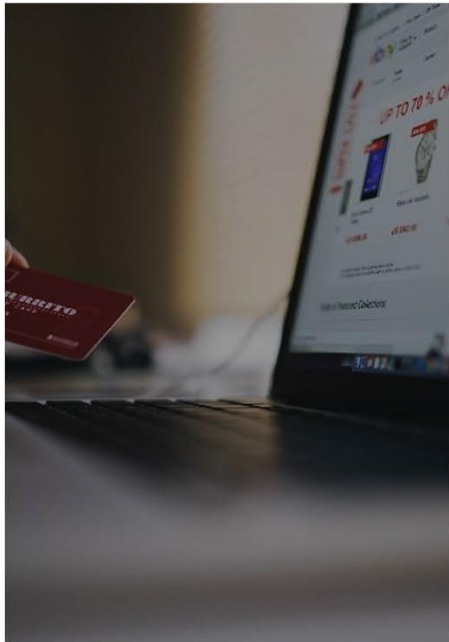
- Trade name, trade-mark and domain name registration
- Canada's Anti-Spam Legislation (CASL)
 - Prior consent or an exception/exemption
 - Content requirements
 - Penalties and due diligence defence

FASKEN

▼ Contracts

- Sale of Goods legislation
- Intellectual property laws
 - Works made for hire
 - Moral rights
 - Notice and Notice

FASKEN



E-Commerce With Canadian Customers

3

FASKEN

Electronic Contracting

- Conducting Electronic Commerce
 - Provincial and territorial e-commerce legislation
 - Functional equivalency of electronic versions of contracts.
 - Recognition of electronic or digital signatures.
 - Consider Automated Clearing Settlement System governing the use of credit cards and funds transfers by retail organisations & processing of credit card transactions must comply with PCI-DSS.
 - Goods and Services Tax (GST)/Harmonized Sales Tax (HST) levied on the supply of most goods and services.
 - Taxes to online sales within Canada are applied in the same way as in-person sales transactions.

FASKEN

▼ Offering Products to Canadians

- Accessibility
 - A business with an online presence must also ensure its websites are accessible to individuals with disabilities.
- Online Marketing
 - Competition Act prohibition on false or misleading representation and deceptive marketing practices.
- Online Broadcasting
 - Currently not licensed but there is government intent to establish a new class of regulated broadcaster "online undertakings", which would include any services that transmit programmes over the internet in Canada, but would exclude social media services or user-generated content.

FASKEN

▼ Consumer Protection

- Broadly applicable Provincial/Territorial domain
 - (10 provinces & 3 territories) / (Common Law & Civil Law)
 - Generally similar in content, but there can be (significant) differences
- Exceptions to application
- Impact of Non-compliance

FASKEN

▼ Language Requirements

- Canada is officially bilingual (English & French)
- Doing business in/targeting Quebec residents triggers French language requirements

FASKEN

▼ Privacy

- PIPEDA
- Provincial Privacy Laws
- Principle of Knowledge and Consent

FASKEN



Labour, Employment and Human Rights

4

FASKEN

▼ Agenda

1. Overview of Canadian Labour and Employment Law
2. Current Hot Topics
 - a. Employment Agreements
 - b. Human Rights
 - c. Pay Equity
 - d. COVID-19 Vaccination
 - e. Upcoming Changes
3. Wrap Up and Questions

FASKEN

▼ Overview

- Labour and employment laws are provincially regulated
 - May change drastically from province to province
 - Quebec uses civil law system, the rest of Canada uses common law system
- Certain employers/industries are federally regulated and subject to federal legislation and standards

FASKEN

▼ Provincially Regulated Organizations

- Employment standards legislation governs:
 - Minimum wage, overtime and vacation time and pay
 - Termination and severance entitlements
 - Hours of work
- Other provincial legislation:
 - Occupational Health and Safety
 - Human Rights
 - Workers' Compensation

FASKEN

▼ A. Employment Agreements

- The concept of “at-will employment” does not exist in Canada
- Employees may be dismissed with or without cause
- Entitlements upon termination are determined by the relevant employment standards legislation OR common law

FASKEN

▼ Entitlements Upon Termination

- Employment agreements can limit exposure
- Duty to provide reasonable notice of termination will be “read into” an employment contract by the courts unless it is otherwise expressly addressed in the contract itself

FASKEN

▼ Common Law Notice

- Common law entitlements depend on a number of factors, including:
 - Character of employment
 - Length of service
 - Age
 - Availability of similar employment

FASKEN

▼ Common Law Notice Cont'd

- Only exceptional cases awarded more than 24 months
- Can be very generous for older, longer service employees
- Tends to be disproportionately high for short service employees
- Precedent cases provide range of reasonable notice; not certainty

FASKEN

▼ Employment Agreements Cont'd

- Well drafted employment contracts have never been more important (and difficult to achieve)
- Drafting a termination provision in the employment contract allows an employer to modify terms implied by law (e.g. reduce the notice period)
- If there is no termination provision, or the termination provision is found to be unenforceable, the employee will be entitled to common law notice
 - New considerations in light of Ontario Court of Appeal's decision on June 17, 2020 in *Waksdale v Swegon North America Inc*, 2020 ONCA 391

FASKEN

▼ B. Human Rights

- Employees have right to be free from discrimination/harassment in employment
- Provincial human rights legislation set out “prohibited grounds”
 - Vary slightly from province to province
- Human rights create separate heads of monetary damages
 - E.g. Injury to dignity, feelings, and self-respect

FASKEN

▼ Human Rights Cont'd

- Employees can commence proceedings at human rights tribunals *and* civil courts
- Human rights damages have been steadily increasing
 - In 2018, the Human Rights Tribunal of Ontario awarded \$200,000 to a single applicant for human rights damages
 - In October 2021, the Nova Scotia Court of Appeal awarded \$300,000 for human rights damages

FASKEN

▼ Human Rights Cont'd

- There is overlap between human rights and occupational health and safety legislation
 - General duty to provide safe workplace (*i.e.* free of physical danger, discrimination, and harassment, including sexual harassment)
- Vicarious liability for actions of employees and third party contractors
- Specific requirements for investigations into complaints of:
 - Sexual harassment
 - Discrimination
 - Workplace violence

FASKEN

▼ Investigations

- Importance of conducting “reasonable” investigation into complaints to avoid potential liability
- Certain jurisdictions provide statutory obligations regarding workplace investigations
 - Who is qualified to conduct investigation?
 - What information needs to be provided and how?
 - Reporting requirements
 - Post-investigation obligations

FASKEN

▼ C. Pay Equity

- *Pay Equity Act* came into force August 2021
- The Act imposes new proactive pay equity obligations on federally regulated employers with 10 or more employees:
 - Establishing committees
 - Developing and implementing pay equity plans
 - Maintaining and reporting

FASKEN

▼ D. Workplace Vaccine Requirements

- Is it legal to mandate that employees be vaccinated?
 - Federal government recently mandated that all federal public servants must be vaccinated
 - What about other jurisdictions?

FASKEN

▼ Can you implement a voluntary vaccination policy?

- In most cases, yes!
- To ensure compliance with government guidance and human rights legislation, policies should:
 - Provide a reasonable timeline for compliance
 - Provide for accommodation on recognized grounds (*i.e.* medical condition or religious exemption)
 - Provide warnings for consequences of non-compliance
 - Consider alternatives

FASKEN

▼ Disciplinary Options for Failure to Comply

- Unpaid leaves
- Suspension
- Termination

FASKEN

▼ Discipline for Failure to Comply Cont'd

- Whether or not you can terminate for cause is highly contextual
 - Nature of the employee's work
 - The particular workplace
 - Whether the employer is complying with legislative requirements
 - The efficacy of alternatives
 - The broader COVID-19 situation

FASKEN

▼ E. Upcoming Changes

- Bill 27: *Working for Workers Act, 2021*
- Ontario proposed legislation
- The “Right to Disconnect”
 - Employers with 25+ employees required to have written policy about employees disconnecting from work
 - E.g. No emails, telephone calls, reviewing or sending messages

FASKEN

▼ *Working for Workers Act, 2021 Cont'd*

- Banning Non-Compete Agreements
 - Carve out for certain sales of business
 - Unclear what the impact would be on existing agreements

FASKEN

Minimum Wage Increase

- Ontario government announced that it plans to introduce legislation to:
 - raise general minimum wage to \$15.00 / hour
 - eliminate separate minimum wage for food / liquor servers
 - Increase minimum wage for students and homeworkers
- Legislation tabled in November 2021 to raise minimum wage to \$15.00 / hour
- British Columbia recently made similar changes and raised minimum wage \$15.20

FASKEN



Questions?

FASKEN



Andrew C. Alleyne

Partner

+1 416 868 3338 | aalleyne@fasken.com

Andrew Alleyne's practice is focused primarily on corporate and commercial transactions, particularly technology and M&A matters.

Serving on the Steering Committee of the firm's Technology practice group, Andrew is highly experienced in Technology related contracting. He advises a broad array of clients (from blue-chip to emerging technologies) on the challenges and complexities of commercializing, acquiring and implementing technology solutions.



Taisha Lewis

Partner

+1 416 865 4465 | tlewis@fasken.com

Taisha Lewis' corporate commercial and securities law practice is focused on mergers and acquisitions and corporate finance. Taisha advises clients on a wide range of transactional matters, including domestic and U.S.-Canada cross-border mergers and acquisitions, private placements, public offerings, and securities regulatory compliance. Taisha also advises clients on corporate governance matters, including shareholder arrangements and management fiduciary duties.

Taisha is a recipient of the National Bar Association's 40 Under 40 Award.

FASKEN



Andrew S. Nunes

Partner

+1 416 865 4510 | anunes@fasken.com

Andrew Nunes is a Vice-Chair of Fasken's Business Law Department (Ontario) and the Ontario IT representative on the firm's Technology, Media and Telecommunications (TMT) industry group Steering Committee.

Andrew's corporate and commercial practice is focused on mergers and acquisitions, reorganizations, joint ventures, business partnerships, complex outsourcings and other business transactions, with a particular emphasis on the technology sector and technology related matters.



Nicole Singh

Partner

+1 416 868 3481 | nrsingh@fasken.com

Nicole Singh has a broad labour and employment practice. She regularly advises public and private sector employers on a wide range of issues, including labour disputes, grievance arbitrations, human rights and accommodation, employment standards, employment contracts and terminations, collective agreement interpretation, and wrongful dismissals. Nicole has represented clients before arbitrators, courts, the Ontario Labour Relations Board and the Ontario Human Rights Tribunal.

FASKEN

FASKEN

FASKEN

Ten offices Four continents One Fasken

> fasken.com



Canada

Vancouver, BC
550 Burrard Street, Suite 2900
T +1 604 631 3131
vancouver@fasken.com

Calgary, AB
350 7th Avenue SW, Suite 3400
T +1 403 261 5350
calgary@fasken.com

Ottawa, ON
55 Metcalfe Street, Suite 1300
T +1 613 236 3882
ottawa@fasken.com

Québec, QC
140 Grande Allée E., Suite 800
T +1 418 640 2000
quebec@fasken.com

Surrey, BC
13401 - 108th Avenue, Suite 1800
T +1 604 631 3131
surrey@fasken.com

Toronto, ON
333 Bay Street, Suite 2400
T +1 416 366 8381
toronto@fasken.com

Montréal, QC
800 Victoria Square, Suite 3500
T +1 514 397 7400
montreal@fasken.com

Global

London, United Kingdom
15th Floor, 125 Old Broad Street
T +44 20 7917 8500
london@fasken.com

Johannesburg, South Africa
Inanda Greens, 54 Wierda Road
West Sandton 2196
T +27 11 586 6000
johannesburg@fasken.com

Beijing, China
Level 24, China World Office 2
No. 1 Jianguomenwai Avenue
T +8610 5929 7620

FASKEN

Institute