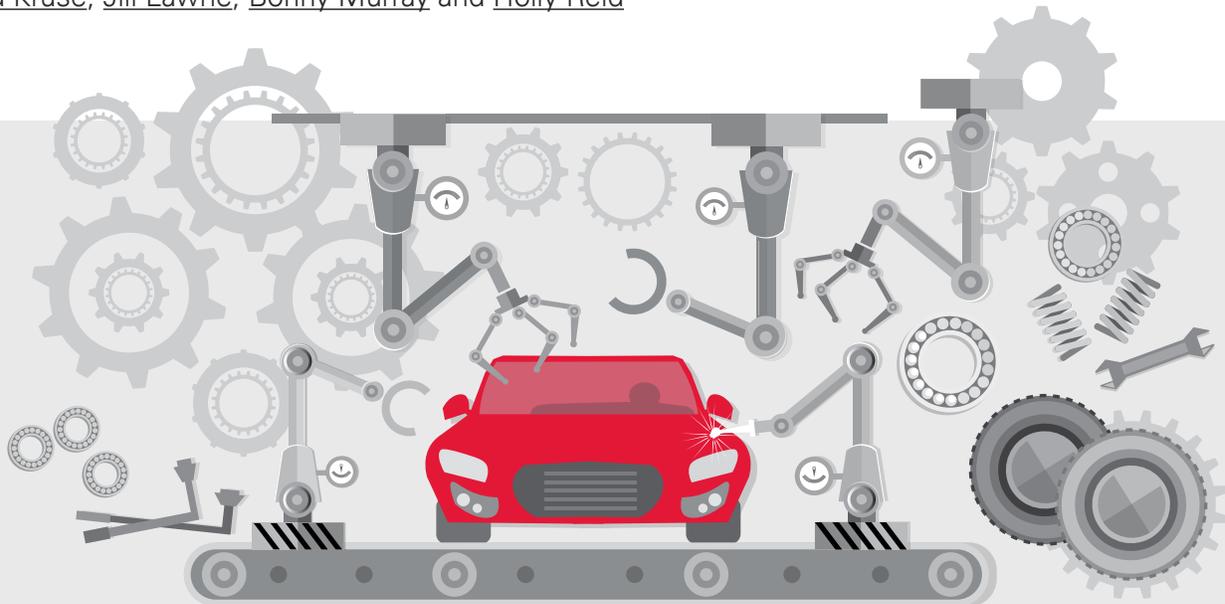


The Foreign Investor's Roadmap to Canada's Auto Market: 10 Key Considerations

By David Kruse, Jill Lawrie, Bonny Murray and Holly Reid



Electrification, increasing automation and new business models such as ride-hailing apps and car sharing are revolutionizing the automotive industry and giving rise to technology-driven trends with the potential to find non-traditional automotive revenue.

In this promising new landscape, Canada offers foreign investors a strategic location in the heart of one of the largest and most lucrative automotive markets and a strong technology hub that plays a key role in the development of connected and autonomous vehicles.

Here are 10 noteworthy considerations for any investor looking to enter Canada's auto market:



1 ■ **Manufacturing Strength**

Canada's automotive manufacturing industry has grown in value and volume in recent years following decline in 2009. Canadian automotive manufacturers are recognized for their strong capacity in launching complex and advanced automotive manufacturing projects due to their world-class plant and labour quality. Specifically, Ontario is the "top-ranked" vehicle assembly jurisdiction in North America and there are 37 high-volume assembly plants within a 500-km radius of the Windsor-Detroit border. Among the assembly plants are the U.S. "big three," plus Toyota, Honda and the Canadian head offices of several original equipment manufacturers (OEMs). The region has the capacity to produce as many as 7.4 million vehicles in one year and

boasts over 700 parts suppliers, including major tier-one suppliers, Linamar, Magna, Stackpole and Martinrea.

While Canada has one of the lowest cost structures among G7 countries and a tax incentive program for manufacturers who do research and development in Canada, the manufacturing sector is facing some headwinds owing to trade concerns and the availability of inexpensive labour in other markets.



2

Innovation

On January 22, 2019, Ontario's Ministry of Transportation (Ministry) moved one step closer to a future with driverless vehicles by expanding its 10-year pilot project to test and evaluate the use of automated vehicles (AVs) on Ontario roadways. Effective January 1, 2019, eligible participants in the Automated Vehicle Pilot Program are permitted to remotely operate automated passenger and commercial vehicles and streetcars on public roadways without a passenger in the driver's seat of the vehicle. Prior to this announcement, automated vehicles were only permitted on public roadways in Ontario if a driver was always seated in the driver's seat of the AV and monitoring the vehicle's operation. AVs equipped with Society of Automotive Engineers (SAE) international driving automation level 3 can now be driven on Ontario roads and are no longer restricted to pilot participants, subject to certain conditions.

The Ministry also announced a separate pilot programme for cooperative truck platooning. A cooperative truck platoon means two or more commercial motor vehicles that use an advanced driver assistance system and vehicle-to-vehicle communication system to travel in a convoy where the vehicles steer, accelerate and brake cooperatively and synchronously.



3

Foreign Investment Review

Canada regulates all foreign investments under the *Investment Canada Act* (ICA). Investments by non-Canadians to acquire control over existing Canadian businesses or to establish new ones are either reviewable or notifiable under the ICA. The rules relating to an acquisition of control, and whether an investor is a Canadian are complex and comprehensive.

Subject to certain exceptions, an acquisition of a Canadian business by a non-Canadian investor controlled by persons who are residents of World Trade Organization member countries (WTO investors), as of January 1, 2020, is reviewable where the enterprise value is C\$1.075-billion or more. There are additional restrictions in place in respect of certain prescribed circumstances such as investments by non-WTO investors and by state-owned enterprises.



4

Franchising

Franchising is not as heavily regulated in Canada as it is in several other jurisdictions. In Canada, franchising is a purely provincial matter. About half of the provinces currently have franchise legislation in effect. While there are slight differences in the legislation and regulatory requirements of each province, they are all derived from the U.S. model of mandated disclosure by a franchisor to prospective franchisees, coupled with a duty of good faith and fair dealing owed by each party to the other, and a right of franchisees to associate freely among themselves.



5

M&A

A threshold question in any acquisition is whether to purchase assets or shares. Under most Canadian corporate statutes, if a sale involves the disposition of all or substantially all of a corporation's assets, shareholders must approve the transaction by special resolution.

In addition to the usual considerations, a purchaser and vendor of an OEM or parts manufacturer may want to proceed by way of share purchase to avoid the right of members of the dealer network to consent to the assignment of the dealership agreements. In the case of an acquisition of a large OEM or parts manufacturer, regulatory considerations are important, particularly potential preclearance under the *Competition Act* and the ICA. Third-party consents from dealers, suppliers, landlords, equipment owners, creditors and shareholders are typical.

Two or more parties may engage in a joint venture or syndicate where they collaborate in a business venture. Although these structures are not uncommon, there is no specific statutory definition or regulatory scheme for joint ventures, at either the provincial or federal level.



6

Anti-Trust Regime

Canada's *Competition Act* is the key legislation regulating competition, including civil practices such as mergers, refusals to deal, price maintenance, exclusive dealing, tied selling, abuse of dominance, competitor collaborations and deceptive marketing practices, and those that prohibit criminal conduct, including conspiracies, bid rigging and criminal misleading advertising practices.

One of the key issues for the automotive industry has been the enforcement activity of antitrust regulators in the automotive parts sector. Specifically, antitrust regulators around the world have launched numerous investigations concerning alleged conspiracies and bid-rigging arrangements entered into among various suppliers for the sale and supply of automotive parts. These investigations have resulted in a number of convictions and fines, including in Canada. To date, the Canadian Competition Bureau's investigations have resulted in multiple guilty pleas and over C\$80-million in fines imposed by Canadian courts.



7

Environment & Regulatory

Vehicular greenhouse gas emissions (GHG) in respect of light-duty vehicles are regulated under the federal *Environmental Protection Act*. In May 2018, the federal government introduced new regulations under that Act establishing more stringent greenhouse gas emission standards for heavy-duty vehicles and engines.

In 2017, a federal government agency, Environment and Climate Change Canada, released a regulatory framework outlining the proposed design of Canada's Clean Fuel Standard (Standard), which is aimed at assisting in meeting Canada's goal of lowering GHG to a target of 30 per cent below 2005 levels by 2030 as part of Canada's participation in the Paris Agreement. The Standard will include reductions in the carbon footprint of transportation fuels and will require increases in renewable fuel content or the purchase of credits that can be generated through the deployment of energy sources that offset fossil fuels, such as electric vehicles.



8 ■ **Product Compliance and Safety**

The *Motor Vehicle Safety Act* (MVSA) was recently amended to introduce broad powers for Transport Canada to order manufacturers to submit a notice of defect or non-compliance when Transport Canada considers it would be in the interest of safety. The Motor Vehicle Regulations Enforcement Branch conducts post-market surveillance and oversight of the regulated community through programs of compliance inspection, testing, corporate audits, and the investigation of alleged safety-related defects and recall monitoring.

The Canada Motor Vehicle Safety Standards (CMVSS) prescribe the minimum performance levels that vehicles and equipment must meet. Each CMVSS standard includes performance requirements against which regulated vehicles and equipment are measured and compliance determined. These standards may include Transport Canada-approved Motor Vehicle Safety Test Methods, Technical Standards Documents or third-party published test methodologies.

The Defect Investigations Group has a mandate under the MVSA to investigate complaints relating to alleged manufacturing safety defects.



9 ■ **Consumer Protection and Disputes**

Disputes in the automotive industry generally arise in three contexts: vehicle owner/lessee claims against manufacturers, distributors and dealers, claims between OEMs and their dealer networks, and claims involving OEMs and their suppliers.

The Canadian Motor Vehicle Arbitration Plan (CAMVAP) is a free arbitration program from participating manufacturers. Vehicle dealers must let the buyer/lessee know if the car being purchased/leased qualifies for this program. If it does, the program can assist the owner/lessee in dealing with disputes about manufacturing defects.

Roughly 90 per cent of Canada's automobile dealers have agreed to participate with their manufacturers in a nationwide mediation and arbitration plan called the National Automobile Dealer Arbitration Program.



10 ■ **IP Litigation**

Non-practising entities more commonly referred to as "patent trolls," are a large issue in Canada. This is increasingly so in the automotive industry given the proliferation of communications technology in automobiles. Patent trolls typically acquire patent rights that are perceived to be infringed by the industry at large. Since the cost of patent litigation can be in the millions of dollars, patent trolls often propose a quick settlement that is less than the potential cost of litigation. A sophisticated intellectual property strategy — namely, having strong intellectual property protections in place — can minimize the effect of patent trolls.

CONTACT US

David Kruse

david.kruse@blakes.com
416-863-2467

Jill Lawrie

jill.lawrie@blakes.com
416-863-3082

Bonny Murray

bonny.murray@blakes.com
416-863-5272

Holly Reid

holly.reid@blakes.com
416-863-5255