



BREXIT

THE IMPACT ON CANADIAN BUSINESSES



**“ Because the
world changed
again today.”**

OUTLINE

Topic

Background and context

How does the UK leave the EU?

The post-Brexit UK/EU relationship

What should Canadian businesses focus on?

Comprehensive Economic and Trade Agreement (CETA)

Brexit's impact on intellectual property rights

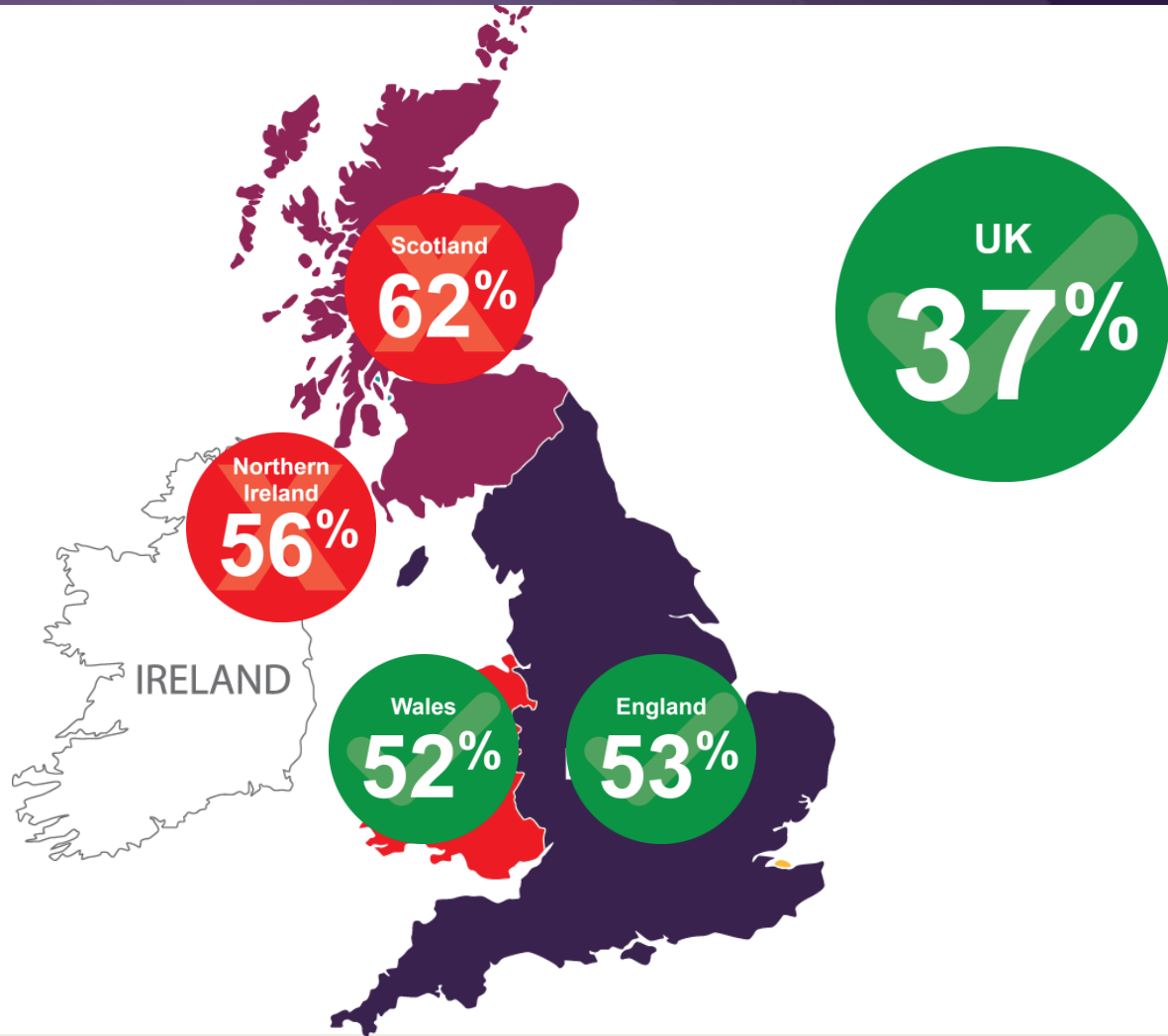
How can we help?

BACKGROUND AND CONTEXT

Brexit: The Impact on Canadian Businesses



WHAT HAPPENED ON JUNE 23rd?



WHAT IS THE CURRENT STATE OF POLITICAL LEADERSHIP IN THE UK?



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- **Changing of senior political leadership in Britain**
 - Conservatives: New leader and Prime Minister is Theresa May, sworn in on July 13, 2016
 - Labour: Jeremy Corbyn's leadership will be challenged by Angela Eagle and Owen Smith, both Labour MPs
 - UKIP: Nigel Farage has resigned; succession process unclear



HOW DOES THE UK LEAVE THE EU?



HOW DOES THE UK LEAVE THE EU?

- **The UK cannot be forced out**
- **Article 50 notice**
 - The mechanics



HOW DOES THE UK LEAVE THE EU?

- **Article 50 notice triggers a two year period for the UK's withdrawal from the EU**

Negotiations between the UK and EU to agree on the terms of withdrawal within the two year notice period. Any agreement must be approved by:



UK: Parliament



EU Parliament



European Council



**20 EU Countries
(65% of population)**

HOW DOES THE UK LEAVE THE EU?

- **Post notice options:**
 - Negotiated withdrawal agreement
 - Extension of the notice period
 - No withdrawal agreement and no extension: EU treaties cease to apply to the UK



THE TIMING OF THE ARTICLE 50 NOTICE?

- **PM May quoted as saying “Brexit means Brexit”**
- **Both PM May and Minister Davis quoted as saying Article 50 notice should be given by end of the year**
- **Some suggestion and speculation that the UK will seek to negotiate its exit terms with the EU before delivering the Article 50 notice but early response from the EU is that there will be no negotiations until the Article 50 notice is delivered (Donald Tusk, Pres. of the EU Council, June 29, 2016)**

WHAT COULD A POST-BREXIT UK/EU RELATIONSHIP LOOK LIKE?

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- **A WTO/free trade model**
 - Most significant break from the EU
 - Payment of tariffs
 - With a free trade agreement, no tariffs but still regulatory compliance
- **A customs union (Turkey)**
 - Tariff-free access to the EU for goods; agreement to levy tariffs in common with the EU on goods from outside the customs union
 - Requirement that UK law track EU law in certain areas – intellectual property and competition
 - Would not apply to services

WHAT COULD A POST-BREXIT UK/EU RELATIONSHIP LOOK LIKE?

- **European Free Trade Association (“EFTA”)**
 - Iceland, Liechtenstein, Norway and Switzerland
 - EFTA does not have an agreement with the EU
 - Switzerland has multiple (120) bilateral agreements with the EU
 - Iceland, Liechtenstein and Norway are members of the European Economic Area Agreement (“EEA”), which has an agreement with the EU



WHAT COULD A POST-BREXIT UK/EU RELATIONSHIP LOOK LIKE?

- **European Economic Area Agreement (“EEA”)**
 - The EEA agreement with the EU allows Iceland, Liechtenstein and Norway to participate fully in the EU as the EEA embraces the four freedoms and related areas; requires contribution to the EU budget
 - Countries are bound by the EFTA court, which was set up to enforce adherence to the EEA Agreement and therefore EU law
 - In practice, if the UK joined the EEA by becoming a member of EFTA, it would be subject to most EU laws, including those related to freedom of movement – therefore, is this a realistic option?



WHAT SHOULD BUSINESSES FOCUS ON DURING THIS PERIOD OF UNCERTAINTY?

KEY CONSIDERATIONS

- **Brexit has resulted in uncertainty that presents challenges for companies in four key areas:**
 1. Decision-making
 2. Immediate economic impacts
 3. Consequences resulting from the UK's exit from the EU
 4. Dual regulation

DECISION-MAKING

- **Companies may be required to make decisions based on incomplete information**
- **Important to set up a process to make the best decision:**
 1. Collect all available information
 2. Conduct a detailed risk assessment
 3. Consult with professional advisors

ECONOMIC UNCERTAINTY

- If you have operations in the UK, or if you do business in the UK, consider the impact of:
 - A **weakened pound** for a prolonged period of time
 - A slowdown in the UK economy; some are **predicting recession** in late 2016/early 2017
 - The Governor of the Bank of England has already hinted at interest rate decreases, and the availability of additional stimulus
 - An uncertain near and mid-term economic outlook with consequent volatility and general **weakening in the financial markets**



ECONOMIC UNCERTAINTY

- **What are the potential legal and commercial impacts of such uncertainty on your business?**
 - How do swings in the exchange rate affect your business?
 - Is there any threat to access to capital for your business – will credit tighten as lenders assess higher levels of risk?
 - Are there any pending transactions that need to be reassessed in light of the changed economic environment in the UK? Is there an opportunity to escape an undesirable contract or commitment?
 - Is there any solvency risk to your supply chain or customer base?
 - Should existing commercial contracts be reviewed to ensure that these new risks are adequately addressed in those contracts?
 - Is your business positioned to capitalize on new opportunities that may present themselves?

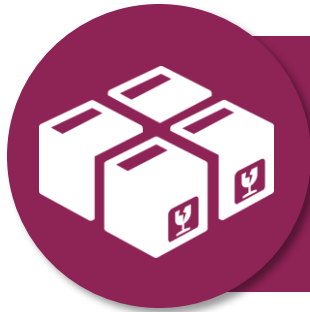
LEGISLATIVE & REGULATORY UNCERTAINTY

- **No legal changes yet**
- **The UK's withdrawal from the EU is going to bring legislative and regulatory change**
- **The degree of change will be determined over the course of the post-Article 50 notice negotiations**
- **Scope and severity of change will depend on exit model**



LEGISLATIVE & REGULATORY UNCERTAINTY

FOUR FREEDOMS:



Goods



Capital



Services



People

CONSEQUENCES OF FORMAL DEPARTURE

- **Will your business be impacted should the fundamental pillars of the EU no longer apply to the UK?**
 - Key employees?
 - The ability to sell goods and services throughout the EU?
 - Does your business need to consider establishing a subsidiary in the EU so it is prepared to access EU markets?
 - If you do business with UK companies that is predicated on access to the EU through the UK, then do you need to consider:
 - New options for your contractual arrangements
 - New European arrangements in order to address customs and duties that may be imposed on goods and services flowing from the UK into the EU

LEGISLATIVE & REGULATORY UNCERTAINTY

- Many UK statutes and regulations are harmonious with existing EU regimes. Will these change, and if so, how?

Life
Sciences

Data
Protection

Antitrust/
Competition

Sector
Regulations

Employment

Consumer
Protection &
Product
Safety

Commercial
Agents
Protection

Late
Payment
Protection

WHAT BREXIT MEANS FOR THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA)

- **Negotiations commenced in 2009. In 2016, the text of the final agreement was published**
- **3-Step EU ratification process**
 - European Council - Fall 2016
 - European Parliament - Fall 2016/Spring 2017
 - EU member State Parliaments - 2017
- **Considerable uncertainty about how Brexit will mesh with the CETA ratification process**

- **If CETA is signed before the UK leaves the EU, what are the potential options?**
 1. UK is cut out of CETA and has to negotiate its own agreement with Canada
 2. UK joins the EEA and adopts the EU single market legislation including CETA
 3. Bilateral UK – EU agreement signed directly between the parties, which could include rights under CETA

OUTLINE OF CETA

- **Background and context**
 - Broader in scope than NAFTA
 - EU is Canada's second largest trading and investment partner – the US is the largest
 - EU economy at \$18 trillion is the world's largest, US is the second largest
 - EU imported \$2.3 trillion in goods from around the world; Canada's total GDP was \$1.9 trillion (all 2013 data)

OUTLINE OF CETA

- **Impact**
 - Addresses **goods, services** and **investment**
 - **Goods:** on full ratification of CETA, 98% of EU product tariffs will not apply to Canadian goods, i.e. Canadian goods will enter the EU duty-free
 - 100% of non-agricultural products will be duty-free; 94% of agricultural products

OUTLINE OF CETA

- **Impact**
 - **Services:** the services sector accounted for 70% of Canada's GDP in 2013 (largest sector)
 - CETA will eliminate or reduce barriers to the service industry, such as citizenship/residency requirements, temporary entry restrictions, and ownership and investment constraints

OUTLINE OF CETA

- **Impact**

- **Investment:** EU is the second-largest source of foreign direct investment (FDI) in Canada (\$191 billion/28% of FDI in Canada) and the second-largest destination for Canadian foreign direct investment (\$187 billion/24% of Canadian FDI abroad)
 - CETA designed to encourage EU companies to invest in Canada to gain preferential access via NAFTA to the US
 - Non-EU companies can invest in Canada to gain preferential access to US (NAFTA) and the EU (CETA)

WHAT BREXIT MEANS FOR INTELLECTUAL PROPERTY

Brexit: The Impact on Canadian Businesses



OVERVIEW

- **Types of IP rights:**
 - Patents
 - Trademarks
 - Copyright
- **Managing your IP rights:**
 - Contractual considerations

WHAT IS A PATENT?

PATENTS

- **Exclusive right to *make, use and sell* an invention**
- **An invention is something with *utility*, that achieves a result (e.g. a new pharmaceutical, a better mousetrap etc.)**
- **Patents are granted for inventions that are *new* and *non-obvious***
- **Patents can be obtained for entirely new inventions as well as for *improvements* to existing technologies**

A TRADEMARK (IS NOT A PATENT)

TRADEMARKS

- A trademark is a word, slogan, logo *etc.* that identifies for consumers *the source* of a good or service they buy (e.g. STARBUCKS coffee)
- A registered trademark is obtained for *particular goods/services* (or particular classes of goods/services)
- Registered trademark's owner can prevent others from using a *confusingly similar* trademark for the same or similar goods/services

A COPYRIGHT (IS NOT A PATENT OR A TRADEMARK)

COPYRIGHT

- **Generally, the exclusive right to reproduce, publish or publicly perform an original musical, literary, artistic or dramatic work**
- **Software/source code are protected (in Canada they are considered a literary work)**
- **Also applies to other subject matter (performers performances, sound recordings, broadcast signals, etc.)**
- **Copyright owner can prevent others from reproducing etc. *all* or a *substantial part* of their work, unless a defence applies (e.g. fair dealing for research or criticism etc.)**

HOW ARE NATIONAL IP RIGHTS OBTAINED?

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1. Country by country in national IP offices

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1. Country by country in national IP offices
2. International treaties/conventions (independent of the EU) allow single initial application to lead (more cost effectively) to multiple country specific registrations in treaty/convention members
3. Unitary Patent System/European Union Trademark
Single application – *single* registration enforceable across all member states (affected by Brexit)

HOW ARE NATIONAL IP RIGHTS OBTAINED?

- **Country by country**
 - **Local national filings**
 - File an application with a national Intellectual Property Office (can be done for all IP rights)
 - Rights granted, enforced only in that country
 - IP rights granted in this way by the UK's IP Office are not affected by Brexit

HOW ARE NATIONAL IP RIGHTS OBTAINED?

- **Treaties/conventions (More efficient, but still country by country)**
 - **Patents:** Patent Cooperation Treaty, European Patent Convention
 - **Trademarks:** Madrid Protocol
 - **Copyrights:** Berne Convention and other treaties
 - Separate copyrights arise automatically in every country (limited exceptions) upon a work's creation (without the need to register)
 - *These treaties/conventions are independent of the European Union*
 - IP rights granted (or recognized) in this manner in the UK are not affected by Brexit

HOW ARE NATIONAL IP RIGHTS OBTAINED?

- “Unitary” systems are affected by Brexit
- Allow an IP owner to file a *single application* that results in a *single IP registration* that is automatically enforceable across *all member states*
- System does not exist for copyright registrations
- System exists in EU for trademarks: “European Union Trademark”
- System is proposed for EU patents: “Unitary Patent System”

UK TRADEMARK ROUTES

UNAFFECTED BY BREXIT



AFFECTED BY BREXIT



EUROPEAN UNION TRADEMARK

- Until Brexit is effective, a “European Union Trademark” is valid and enforceable in the UK (and throughout the EU)
- Once the UK ceases to be a member of the EU, the “EU trademark” will no longer extend to the UK

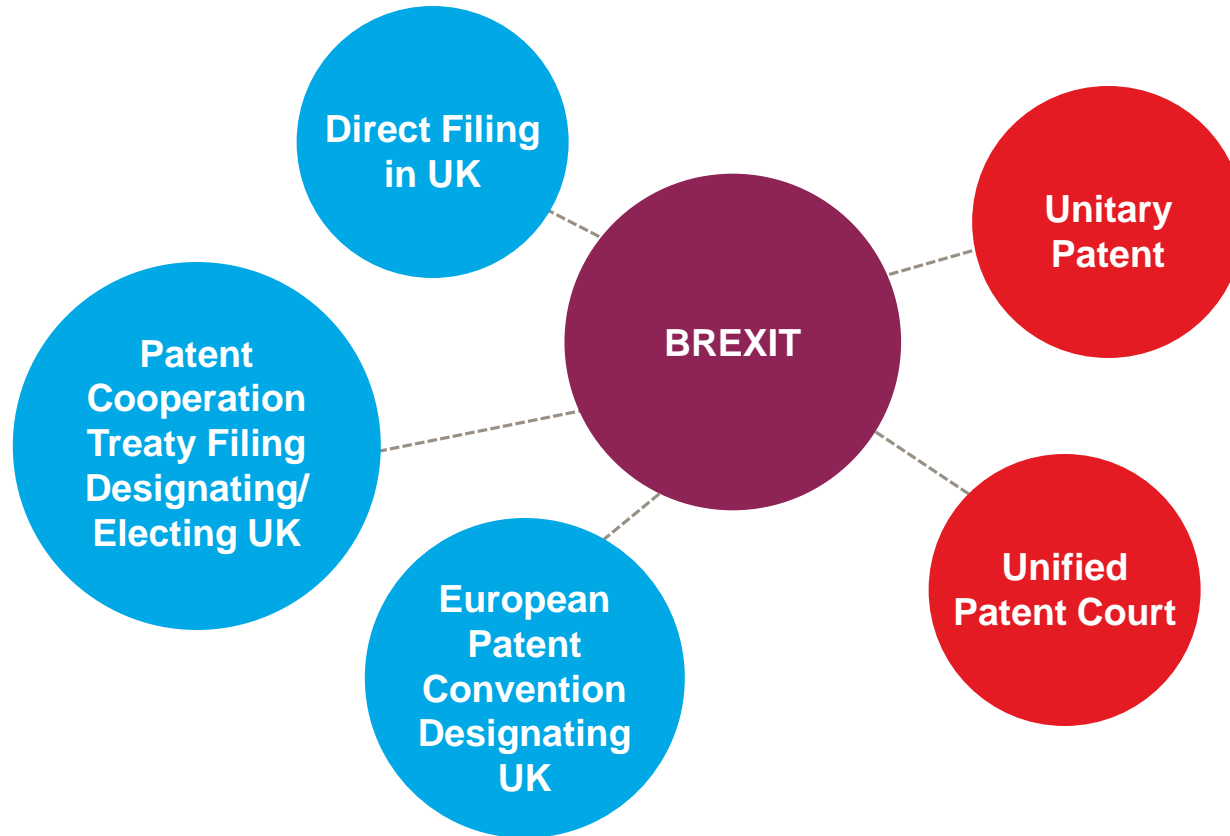
EUROPEAN UNION TRADEMARK

- What happens next?
 - Possible that UK will adopt a mechanism to convert an existing “EU trademark” registration into a UK trademark registration
 - Also possible that trademark owners will need to file new UK-specific application for their mark
- **Your professional advisor can develop the optimum strategy for you**

UK PATENT ROUTES

UNAFFECTED BY BREXIT

AFFECTED BY BREXIT



COPYRIGHT

- **Copyright law will not be directly affected by Brexit**
- **Future EU directives on copyright law may not be implemented by the UK after Brexit**

CONTRACTUAL CONSIDERATIONS

- **IP rights pertain to many contracts**
 - Licences
 - Settlement agreements
 - Co-existence agreements
 - Joint venture agreements

CONTRACTUAL CONSIDERATIONS

- **Existing contracts**
- If they cover the EU as a defined territory, review to consider whether/how they are affected



CONTRACTUAL CONSIDERATIONS

- **Future contracts**

Draft them to accommodate the extraction of the UK (and perhaps other countries in the future) from the EU without a need to re-open the contractual terms.

This may be problematic with existing agreements.

HOW CAN GOWLING WLG ASSIST?

Brexit: The Impact on Canadian Businesses

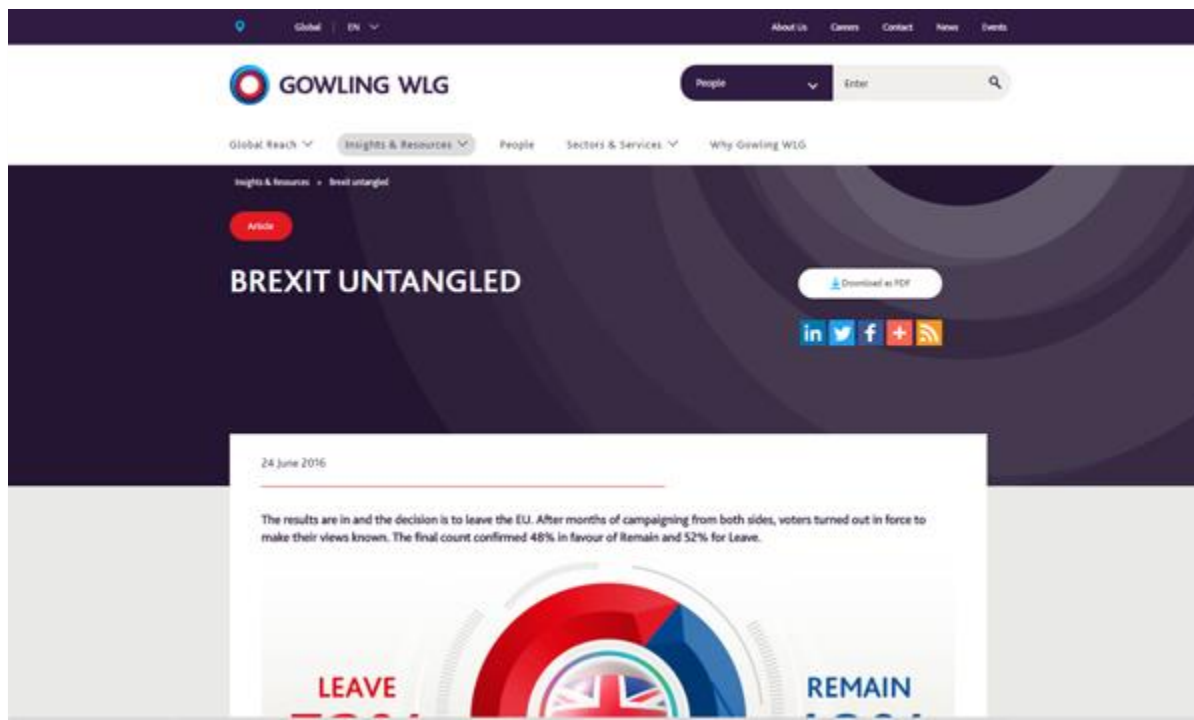


HOW CAN GOWLING WLG ASSIST?

- **Consider what issues you may face in your business**
- **Go to [our website](#) and access our [Brexit Untangled](#) online hub**
- **Contact the appropriate expert to assist you**

HOW CAN GOWLING WLG ASSIST?

- Visit our [Brexit Untangled](#) page – continually updated with the latest information on the impact of Brexit





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