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Franchising - Canada

Considerations for Franchising in Canada

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Authors

Bruno Floriani

Marvin Liebman

General Commercial Considerations

There are several different vehicles available to foreign franchisors that wish to carry on business in Canada, each of which has various fiscal and corporate consequences.

The preferred choice of vehicle used for the expansion of a foreign franchise system into Canada is the incorporation of a Canadian subsidiary. By using a Canadian subsidiary, the franchisor has a direct physical presence and indicates to the general public that it has made a commitment to Canada. Foreign franchisors may instead wish to enter the Canadian market by franchising directly from their country without setting up a permanent establishment in Canada, thus avoiding being considered by Canadian tax authorities as carrying on business in Canada.

Tax considerations relating to business structure

Generally, three business structures are available to a franchisor wishing to export its foreign franchise system into Canada.

First, a franchisor may choose to contract with its Canadian franchisees directly without having a permanent establishment in Canada. As the franchisor will be only minimally involved in the operations conducted by an arm's-length entity, income earned in Canada by the franchisor through royalty payments and rent will be qualified as passive income and subject, in Canada, to a withholding tax only.

Second, a franchisor may opt to carry on business in Canada using a Canadian branch or division. If the franchisor actively participates in the operation of the Canadian franchise, any income derived therefrom will qualify as business income which is taxable in Canada on a net income basis. Furthermore, the income of a non-resident franchisor carrying on business through a Canadian branch will typically be subject to a branch tax which is payable at the time the earnings of the subsidiary are accrued (and not at the time the income is paid to the foreign franchisor). In light of the foregoing, few franchisors choose to establish a branch office or division for the purpose of expanding into the Canadian market.

Third, a franchisor may choose to carry on business in Canada through a federally or provincially incorporated subsidiary. This is the most frequently used vehicle by non-resident franchisors wishing to export a franchise system into Canada.The incorporation of a subsidiary presents certain advantages, including the avoidance of Canadian withholding tax on passive income. Nonetheless, the subsidiary's income will be taxable in Canada on a net income basis and dividends paid to its parent will be subject to a withholding tax. The franchisor may also charge a reasonable fee for providing assistance to its Canadian subsidiary in the operation of its business activities, with the expectation that a reasonable portion of such fee may then be deducted from the subsidiary's income for tax purposes.

Significant business and tax consequences arise from each of the above-mentioned structures and a careful review of all relevant legislation pertaining to each is highly advised. In addition, fiscal treaties ratified by Canada may substantially derogate from the tax considerations set out above and should therefore be consulted where applicable.

Labour and employment considerations

Each Canadian province has enacted its own health and safety, employment standards and labour relations legislation. Accordingly, provincial laws and regulations govern most matters relating to labour law (eg, minimum wages, hours of work, overtime, leave, termination of employment, union certification and collective bargaining rights).

Specifically, it is important that each franchisee operates as a truly independent and distinct entity from its franchisor so as to be considered a separate employer for labour union certification and collective bargaining purposes. In addition, even if the franchisee is separately incorporated and operates independently, it is imperative to ensure that there exists no common control or direction emanating from the franchisor which is greater than that which typically characterizes the franchisor-franchisee relationship.

Otherwise, one runs the risk of having a union certification or collective agreement with respect to one franchisee being extended to other franchised outlets operated by the franchisor or other franchisees. Furthermore, most provincial jurisdictions recognize successor liability following a transfer or sale of a franchise agreement, such that the new employer is bound by the union certification and, in certain circumstances, by the collective bargaining agreement concluded with the union representing the employees of the sold business.

Protection of trademarks and know-how
The Trademarks Act (Canada) defines a trademark as:

A *"mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others, a certification mark, a distinguishing guise or a proposed trademark."*

As such, distinctiveness is central to the definition and a trademark need not be registered to be valid or even licensed. Nonetheless, registration with the Canadian Intellectual Property Office has the advantage of providing nationwide protection of the registered trademark. An application for registration may be based on previous use or making known, proposed use or foreign use and registration.

Remedies available following the breach of exclusive use or the use of a confusing trademark range from injunctive remedies to passing-off actions which may be instituted before either the Federal Court or provincial superior courts.

There is no statutory protection for know-how in Canada. Parties must rely on common law tort and contractual undertakings to protect know-how from unauthorized disclosure or use. Accordingly, the nature of the confidential information that a franchisor wishes to protect, as well as the legal consequences arising as a result of its dissemination, should be clearly identified by the contracting parties in their franchise agreement.

Real estate market and law
With the exception of Quebec, all provincial property laws are based on the English common law system, pursuant to which real estate can be held either in fee simple or by way of a leasehold interest, and is registered with the public Land Registry. Quebec's property laws are based on the French civil law system. They require the registration of ownership rights and permit the registration of lease rights in the public Land Registry.

No particular restrictions exist as to the nature of the arrangement to be concluded between the franchisor and the franchisee with regard to property. For instance, franchisors may wish to enter into a head lease and sub-lease the premises to the franchisee.

In such circumstances, cross-default provisions are possible and even advisable so that the termination of the lease will result in the termination of the franchise agreement and vice versa. In the absence of such provisions, the franchise agreement and the sublease will be construed as two independent contracts and breach of one may have no bearing on the other.

Generally, Canadian real estate law does not restrict foreign ownership or transfer of Canadian property, save for those instances where property benefits from statutory protection for its cultural or historical significance.

Franchise Regulations

Statutory definition of a franchise
The offer and sale of franchises in Canada is regulated by the provinces rather than by the federal government. No definitive franchise legislation is in force in any Canadian province other than Alberta, Ontario and Prince Edward Island. However, franchise legislation has nearly completed working its way through the legislative process in New

Brunswick, and the Civil Code of Quebec contains provisions applicable to all contracts including franchise agreements.

The Arthur Wishart Act (Franchise Disclosure) in Ontario, the Prince Edward Island Franchises Act and the New Brunswick Franchises Act each generally define a 'franchise' as a right to engage in a business where the franchisee is required to make one or several payments to the franchisor in the course of operating the business or as a condition of acquiring the franchise or commencing operations. The franchisee is granted either: (i) the right to sell goods or services substantially associated with the franchisor's trademarks, in circumstances where the franchisor or any of its associates has significant control over, or offers significant assistance in, the franchisee's method of operation; or (ii) representational or distribution rights to sell goods or services supplied by the franchisor or its designated supplier, in circumstances where the franchisor (or any person it designates) provides location assistance to the franchisee.

The Ontario act and the Prince Edward Island act apply to franchise agreements entered into on or after July 1 2000 and July 1 2006 respectively, and to renewals or extensions of franchise agreements regardless of whether the latter were entered into before or after such date, if the business operated pursuant to such franchise agreements is to be operated partly or entirely in Ontario or Prince Edward Island respectively. The New Brunswick act is conceptually the same although the relevant date has not yet been determined. There is no residency requirement in respect of the franchisee under the Ontario act, the New Brunswick act or the Prince Edward Island act.

In Alberta's Franchises Act a 'franchise' is defined as a right to engage in a business: (i) in which goods or services are sold under a marketing or business plan substantially prescribed by the franchisor or any of its associates and which is substantially associated with any of its trademarks, trade names or advertising; and (ii) that involves a continuing financial obligation of the franchisee to the franchisor or any of its associates and significant continuing operational controls by the latter on the operation of the franchised business or the payment of any franchise fee (the latter fee being defined as any direct or indirect payment to purchase or to operate a franchise).

The Alberta act applies to the sale of a franchise made on or after November 1 1995 if: (i) the franchised business is to be operated partly or entirely in Alberta; and (ii) the purchaser of the franchise is an Alberta resident or has a permanent establishment in Alberta for the purposes of the Alberta Corporate Tax Act.

Given the breadth of these definitions, Canadian franchise legislation may capture a number of business agreements and traditional distribution or licensing networks which would not typically qualify as franchise agreements, as such term may be understood in other jurisdictions.

Principle requirements

The Alberta act, the New Brunswick act (though technically not yet in force), the Ontario act and the Prince Edward Island act (collectively, the Canadian franchise acts) set forth a number of requirements governing the relationship between a franchisor and a franchisee. The principal requirements are:

- the duty of fair dealing imposed upon the parties in respect of their performance of the franchise agreement;
- the statutory right of franchisees to associate with each other and form an organization; and
- the obligation of franchisors to disclose material and prescribed information to their franchisees in compliance with the relevant statutory and regulatory scheme.

Exemptions

Exemptions from the application of the Canadian franchise acts are contained therein as follows:

Full exemptions

The Ontario act, the New Brunswick act and the Prince Edward Island act do not apply to the following commercial relationships:

- employer-employee relationships;
- partnerships;
- memberships in a cooperative association, as prescribed in the New Brunswick act, the regulations to the Ontario act or the Prince Edward Island act, as the case may be;
- arrangements for the use of a trademark, trade name or advertisement to distinguish a paid-for evaluation, testing or certification service for goods, commodities or services;
- arrangements with a single licensee in respect of a specific trademark, trade name

or advertisement if it is the only one of its general nature and type to be granted in Canada;
- any lease, licence or similar agreement for space in the premises of another retailer where the lessee is not required or advised to buy the goods or services it sells from the retailer or any of its affiliates (Ontario only);
- oral relationships or arrangements without any writing evidencing any material term or aspect of the relationship or arrangement;
- a service contract or franchise-like arrangement with the crown or an agent of the crown; and
- an arrangement arising out of an agreement for the purchase and sale of a reasonable amount of goods at a reasonable wholesale price or for the purchase of a reasonable amount of services at a reasonable price (New Brunswick and Prince Edward Island only).

Partial exemptions
The Ontario act, the New Brunswick act and the Prince Edward Island act contain exemptions from disclosure requirements that include, for example, the sale of a franchise to a person to sell goods or services within a business in which that person has an interest if the sales arising from those goods or services do not exceed 20% (percentage not yet determined for New Brunswick) of the total sales of the business.

Exemptions are also set out in the Canadian franchise acts in connection with the grant of a franchise if the prospective franchisee is required to make a total annual investment to acquire and operate the franchise in an amount that does not exceed the amount prescribed under each of the Canadian franchise acts, currently C$5,000 (threshold not yet determined for New Brunswick).

The exemptions set out in each of the Canadian franchise acts, while substantively similar, are not identical. In Ontario, for instance, the sale of a franchise to a franchisee who invests more than a prescribed amount (currently C$5 million) in the acquisition and operation of the franchise over a prescribed period (currently one year) is exempted from the application of the disclosure requirements. One need not comply with the disclosure requirements in Alberta when granting a licence to a person to sell goods or services within or adjacent to a retail establishment as a department or division of said establishment, without requiring that the person purchase goods or services from the operator of the retail establishment.

In addition, each of the Canadian franchise acts affirms that a franchisor may apply for a ministerial exemption allowing it not to include its financial statements in a disclosure document.

Application to sub-franchising
Each of the Canadian franchise acts imposes the obligation to disclose upon 'franchisors', the definition of which includes a sub-franchisor with regard to its relationship with a sub-franchisee.

Accordingly, pre-sale disclosures must be made to a sub-franchisee by the sub-franchisor in accordance with the same procedural and substantive requirements, and exemptions pertaining thereto, that apply to franchisors with regard to their relationships with their franchisees. Moreover, information regarding a sub-franchisor's relationship with the franchisor must be disclosed to a prospective sub-franchisee only to the extent that such information constitutes a material fact or is necessary for the sub-franchisor properly to acquit itself of its duty to furnish the information expressly prescribed by the relevant statutory and regulatory provisions governing disclosure.

Pre-contractual disclosure
A franchisor governed by any of the Canadian franchise acts must furnish a prospective franchisee with a disclosure document not less than 14 days before the earlier of: (i) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; or (ii) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or any of its associates relating thereto.

The Alberta act, the New Brunswick act and the Prince Edward Island act, unlike the Ontario act, exclude confidentiality and site selection agreements from the definition of 'franchise agreements' for the application of the disclosure requirements. In addition, the Alberta act exempts agreements that contain only terms and conditions relating to a fully refundable deposit (ie, a deposit that does not exceed 20% of the initial franchise fee that is refundable without any deductions or binding undertaking of the prospective franchisee to enter into any franchise agreement).

Under each of the Canadian franchise acts, a franchisor must furnish a prospective franchisee with a description of any material change as soon as practicable after the change has occurred and before the earlier of the signing of any agreement or the

payment of any consideration by the prospective franchisee in relation to the franchise. A 'material change' is defined as a change (even if not yet implemented in certain cases) in the business, operations, capital or control of the franchisor or any of its associates, or in the franchise system, which would reasonably be expected to have a significant adverse effect on the value or price of, or on the decision to acquire, the franchise.

Nature of disclosure

The regulations under each of the Canadian franchise acts (other than the New Brunswick act, in respect of which no regulations are yet available) require that general information concerning the franchisor be included in the relevant disclosure document. Such information includes the history of the franchisor, the business background of its directors, the general partners and officers of the franchisor, and whether any of those persons has been subject to bankruptcy or insolvency proceedings or has previously been convicted of fraud or unfair or deceptive business practices. While substantively similar, the list of information that must be disclosed under each of the Canadian franchise acts is not identical.

Financial statements must be included in the disclosure document governed by the Canadian franchise acts, although the requirements set out in the regulations adopted under the Alberta act differ substantially from those adopted under the Ontario act and Prince Edward Island act. For instance, the Ontario and Prince Edward Island regulations compel the inclusion in each disclosure document of statements regarding initial risk factors, whereas those are not required under the Alberta regulations.

The disclosure document must also include all material facts. This encompasses any information about the business, operations, capital or control of the franchisor, its associates or the franchise system that would reasonably be expected to have a significant effect on the decision to acquire or the value of the franchise.

Disclosure requirements are typically enforced by the affected parties rather than by government agencies, as the interests are generally considered to be private rather than public.

Relief for violations of disclosure requirements

Under each of the Canadian franchise acts, an action for damages or rescission may be instituted by the franchisee for non-compliance. The New Brunswick act provides that a party to a franchise agreement may, in the event of a dispute with another party to such agreement, trigger a mandatory alternative dispute resolution mechanism (ie, mediation), which shall then be implemented in accordance with prescribed procedures. However, the foregoing does not preclude any party to such franchise agreement from availing itself of other recourses available under contract or at law.

Rescission

Pursuant to the New Brunswick act, the Ontario act and the Prince Edward Island act, a franchisee may rescind the franchise agreement without penalty or obligation for: (i) late disclosure, no later than 60 days after receiving the disclosure document if the franchisor failed to provide said document or a statement of material change within the prescribed time or if the contents of the disclosure document do not satisfy statutory requirements; or (ii) absence of disclosure, no later than two years after entering into the franchise agreement. In either case, within 60 days of the effective date of rescission the franchisor must (i) purchase from the franchisee any remaining inventory, supplies and equipment purchased pursuant to the franchise agreement, at a price equal to the purchase price paid by the franchisee, and refund any other money paid by the franchisee; and (ii) compensate the franchisee for the difference between any losses incurred in acquiring, setting up and operating the franchise, and any amounts paid or refunded pursuant to the preceding paragraph.

Pursuant to the Alberta act, if a franchisor fails to provide the disclosure document as required, the prospective franchisee is entitled to rescind the franchise agreement by giving a cancellation notice to the franchisor or its associate, as the case may be, no later than the earlier of (i) 60 days after receiving the disclosure document, or (ii) two years after the grant of the franchise.

The franchisor has no obligation to purchase any of the franchisee's assets under the Alberta act, but must instead, within 30 days of receiving a cancellation notice, compensate the franchisee for any net losses incurred by the latter in acquiring, setting up and operating the franchised business.

Damages

Under the New Brunswick act, the Ontario act and the Prince Edward Island act, if a franchisee suffers a loss because of a misrepresentation contained in the disclosure document or in a statement of a material change, or as a result of the franchisor's

failure to comply with any disclosure requirements, the franchisee has a right of action for damages against each of the following persons on a joint and several basis:

- the franchisor;
- the franchisor's broker (if any);
- the franchisor's associates;
- every person who signed the disclosure document or statement of material change; and
- in Ontario, the franchisor's agent.

Under the Alberta act, a franchisee who suffers a loss resulting from a misrepresentation contained in a disclosure document has a right of action for damages against the franchisor and against every person who signed the disclosure document, on a joint and several basis.

Non-limitative relief
The rights conferred by each of the Canadian franchise acts are in addition to, and do not derogate from, any other right, remedy or recourse that a franchisee may have at law.

Generally, the officers, directors and employees of a company cannot be sued in their personal capacity for the debts and obligations of the company. Accordingly, a key advantage presented by the subsidiary structure is the creation of a generally effective shield for the foreign franchisor seeking to avoid exposure to liabilities arising in Canada. However, liability will not be entirely absorbed by the corporate subsidiary in those cases where a separate entity furnished a guarantee under the franchise agreement or breached its legal or statutory obligations in regards to the same.

The Canadian franchise acts extend liability for misrepresentations contained in a disclosure document to a much broader class of persons than those who would otherwise be liable under Canadian common law. Under the Alberta act, a franchisee has a right of action not only against the franchisor, but also against every person who signed the misrepresentative disclosure document. Similarly, the New Brunswick act, the Ontario act and the Prince Edward Island act each provide that a franchisee may claim damages for misrepresentation not only from the franchisor, but also from the broker and associate of the franchisor, as well as every person who signed the relevant disclosure document or statement of material change. In light of the very broad statutory construction given to the term 'franchisor's associate', the principal owner or controlling shareholders of a franchisor which are personally involved in the granting or marketing of the franchise may qualify as franchisor's associates. Similarly, parent companies of Canadian subsidiaries incorporated for the purpose of conducting franchise operations in Canada may also qualify as franchisor's associates where such parent companies participate in the review or approval of a franchise grant.

Shared liability in sub-franchising
Liability is imposed on franchisors and sub-franchisors for misrepresentations contained in a disclosure document, although the extent and scope of such liability are contingent upon the applicable franchise legislation. Where a franchisor and a sub-franchisor are found liable for misrepresentations contained in a disclosure document, their liability will be of a joint and several nature.

General principles of law
General principles of law that may affect the offer and sale of franchises vary depending on the province in which a franchisor wishes to grant franchises.

In all provinces of Canada other than Quebec, general common law principles regarding contract formation govern the offer and sale of franchises. In Quebec, franchise agreements are governed by the general principles of contract formation found in the Civil Code of Quebec and are generally regarded as contracts of adhesion. The Civil Code of Quebec, in an effort to correct a presumed economic imbalance between the parties, provides more favourable interpretation principles and a significantly broader margin of redress for the adhering party to a contract of adhesion than that which would be available in the absence of a contract of adhesion. Furthermore, an abusive clause in a contract of adhesion will be considered null or the obligation arising from it may be reduced by the court.

Judicial decisions emanating from the common law provinces reflect a general and growing affirmation of the common law duty of good faith in franchising, the substantive requirements of which will be conditioned by the specific set of circumstances surrounding the formation of the franchise agreement and the conduct of both parties. Where the courts find that there has been a breach of such duty of good faith, the franchisor may be found liable to the franchisee for its damages. Not every breach of such duty will constitute a fundamental breach of the franchise agreement, which

fundamental breach would excuse the franchisee from future performance under the agreement.

Article 1375 of the Civil Code of Quebec establishes that the duty of the parties to conduct themselves in good faith also extends to pre-contractual negotiations, whereas the fair dealing provisions of the Canadian franchise acts apply only in the performance and enforcement of a franchise agreement. Pursuant to Article 1401 of the Civil Code of Quebec, an error by a party induced by fraud committed by the other party or with its knowledge will nullify consent whenever, but for the error, the misled party would not have contracted or would have contracted on different terms. In such circumstances the franchisee may also claim damages or, if it prefers that the contract be maintained, apply for a reduction of its obligations set out in the franchise agreement equivalent to the damages to which it would otherwise be entitled. In Quebec, silence may amount to a misrepresentation.

Effect of other laws

Other than the Canadian franchise acts, there are no specific statutes directly affecting the franchise relationship. However, the ongoing franchise relationship is subject to generally applicable federal and provincial statutes and the principles of contractual law that emanate from the common law or, in Quebec, the civil law.

Canadian courts have been pragmatic in their approach to ongoing relational matters as they relate to franchising. The clear and express terms of a franchise agreement will be determinative of the issues arising in connection with same. If such agreements are unclear on a given point, courts will generally construct the terms in a manner that provides for a sensible commercial result. However, this has not prevented courts from rendering judgments against franchisors that excessively and unlawfully interfere with the economic interest of their franchisees.

Termination

There are no restrictions at law on the parties' rights to establish contractually termination rights and consequences arising therefrom. However, courts may require that a material breach of the agreement be shown to permit its termination and will, from time to time, intervene to redress cases of abuse.

There are no rights at law that would specifically allow a franchisee to terminate the franchise relationship other than those applicable to all contracts under general principles of law and those expressly granted by the Canadian franchise acts. Similarly, there is no restriction precluding the parties from granting specific termination rights to a franchisee, although this is not often seen in typical Canadian franchise agreements.

Refusal to renew

In Canada, a franchisor may refuse to renew a franchise agreement with its franchisee unless such renewal is contractually required. The franchisor may contractually subject such renewal to the signature by the franchisee of a new franchise agreement and other conditions, including performance goals, which the franchisee is required to achieve.

Restriction on transfer

A franchisor may contractually restrict a franchisee's ability to transfer its rights and interests under the franchise agreement, most notably by subjecting such transfer to the prior consent of the franchisor.

Fees

No general restrictions apply to payment of initial fees. However, where franchises are involved in the sale of liquor, in certain provinces a franchisor's ability to collect royalties on such sales may be restricted.

Interest on overdue payments

Franchise agreements frequently set out the rates of interest charged on overdue fees and royalty payments. Section 347 of the Criminal Code provides that anyone who enters into an agreement to receive interest, or who receives a payment or partial payment of interest, at an effective annualized rate of interest (broadly defined) in excess of 60% on the credit advanced commits an offence thereunder.

In addition, Section 4 of the Interest Act specifies that an annual interest rate in excess of 5% cannot be charged unless the agreement expressly states the yearly rate or percentage of interest.

Currency

A franchisee may be required to make payments in a foreign franchisor's domestic currency. However, the Currency Act (Canada) precludes a Canadian court from rendering a judgment in any currency other than Canadian currency.

Confidentiality covenants
Confidentiality covenants in franchise agreements are not only enforceable, but highly advisable in light of the absence of any Canadian statute governing confidential information. Unlike non-compete clauses, confidentiality clauses usually extend for an unlimited period of time, in particular in respect of actual trade secrets.

Good faith
The Canadian franchise acts impose a general obligation of fair dealing upon the parties to a franchise relationship.

It is established law in Canada that the relationship between a franchisor and a franchisee is generally not a fiduciary one. However, Canadian courts have begun to read into franchise agreements an implied duty of good faith (this being a legal requirement in all contractual matters governed by Quebec civil law). Accordingly, the courts have stated that where the franchisor retains sole discretion to authorize, prevent or proceed with a particular course of action, the franchisor must exercise its discretion reasonably and honestly. In addition, the duty of good faith comprises a time component which requires a prompt response to another party's request and the making of a decision within a reasonable period of time thereafter. Moreover, parties under a duty of good faith must also pay any amounts that are clearly owed to another party in a timely manner.

The duty to act in good faith does not necessarily preclude a franchisor from competing with its franchisee (assuming, of course, the absence of contractual exclusivity in favour of the franchisee). A franchisor that opts to compete with its franchisee must ensure that it continues to perform its legal obligations towards the latter and acts in such a way that the franchisee may benefit from the advantages of its franchise. The common law principle of non-interference with the freedom of the parties to contract will often limit judicial interference in franchise agreements whose terms are found to reflect accurately the intent of the parties and are not patently inequitable. A determination as to whether a duty of good faith has been breached will be contingent upon all of the surrounding circumstances.

Language
The Charter of the French Language (Quebec) compels businesses to prepare franchise agreements and disclosure documents in French for use in Quebec, unless the parties have agreed in writing that another language may be used.

Competition Act matters
Franchise agreements often provide for exclusive territories and exclusive dealings with designated suppliers, which are not necessarily illegal but are subject to competition law concerns relating to substantial lessening of competition and market barriers, including the exclusive dealings and abuse of dominance provisions of the Competition Act (Canada). Restrictions on the customers that the franchisee is entitled to serve may not be acceptable as they may be viewed as violating the market division prohibitions of the Competition Act or providing strong evidence of collusion pursuant to the same.

Resale price maintenance provisions set out in the Competition Act considerably restrict the franchisor's right to establish the price at which its products are sold. The mere suggestion of a minimum resale price by the manufacturer or the franchisor, other than on the labelling or packaging of the product, creates a presumption of violation of resale price maintenance provisions. However, franchisors may impose maximum prices as long as the latter are clearly referred to and defined in the franchise agreement and are not construed by courts as demonstrating an intent to establish an indirect minimum resale price. Accordingly, it is always prudent for franchisors to include disclaimers, whether in advertising or on packaging, to the effect that franchisees are at liberty to establish their own resale prices. Furthermore, it is preferable to provide contractually that prices are suggested only, and that the failure of the franchisee to adhere to the suggested prices will not result in termination of the agreement or detrimentally affect the relations between the parties.

Price discrimination restrictions are also contained in the Competition Act such that franchisors may not discriminate, in their pricing policies, against competing franchisees. Moreover, while volume discounts may be used by franchisors, such discounts must be made available to all competing franchisees.

With regards to buying groups, it is common for franchisors to attempt to receive rebates from suppliers based on the total aggregate purchases of their franchisees. Franchisors must act with circumspection in such cases, as such actions may be construed as being collusive or in breach of the price discrimination provisions of the Competition Act. The price discrimination guidelines issued by the commissioner of competition affirm that where an approved supplier has negotiated directly with a franchisor that has contractually ensured that its franchisees deal exclusively with said

supplier, the requirements of the buying group are met even where the franchisees are making the actual purchases. However, the commissioner of competition will always study such circumstances on a case-by-case basis.

Non-competition covenants are closely monitored by the courts. All restrictive covenants raise restraint of trade concerns and, accordingly, only reasonable restrictions as to scope of action, duration and geographical reach will be upheld by the courts.

In addition, the Competition Act sets forth criminal and civil provisions which affect various practices, including:

- conspiracies and collusion;
- abuse of dominance;
- price maintenance;
- promotional allowances and price discrimination;
- misleading advertising;
- deceptive marketing and pyramid selling;
- refusal to deal;
- exclusive dealing;
- tied selling; and
- certain other vertical market restrictions.

While the criminal provisions, prosecuted by the attorney general, impose a higher burden of proof, their violation grants injured parties the right to sue for damages caused by such practices; those damages are restricted to actual loss and costs. On the other hand, reviewable practices are civil in nature and are subject to the exclusive jurisdiction of the Competition Tribunal, upon the request of the commissioner of competition or, as of late, at the request of a private party with leave from the Competition Tribunal to that effect. In this latter case, private litigants may seek redress only through orders, as monetary awards are not provided for.

The commissioner of competition heads the Competition Bureau and has broad powers of investigation and inquiry, such as search and seizure, examinations under oath, and ordering the production of physical evidence or records and wire tapping (in certain circumstances). Its enquiries are conducted under strict rules of confidentiality and the bureau's powers remain subject to the supervision of the courts. On the international level, the Competition Bureau has concluded numerous agreements of notification and mutual assistance with its international counterparts and is an active member of the International Competition Network.

Governing law, venue and dispute resolution
All Canadian provinces permit the selection of a foreign governing law as long as doing so is not considered to be in fraud of the domestic law. That said, Canada is party to numerous international treaties such as the Vienna Convention on the International Sale of Goods, which is of particular significance. In fact, where the selected or applicable law is that of Canada, the foregoing convention has automatic application unless expressly set aside by the parties.

Choice of forum clauses are generally enforced by the Canadian courts, thus making it possible for the parties to choose that a non-Canadian court resolve any dispute or claim arising from any agreement.

In addition, mediation and arbitration are viable and recognized mechanisms of dispute resolution across Canada. Furthermore, Canada is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Both the federal and the provincial governments have also adopted substantially similar legislation to the United Nations Commission on International Trade Law Arbitration Model Law. To date, two provinces (British Columbia and Ontario) have incorporated mandatory pre-trial mediation into their respective procedural statutes and most provinces have enacted arbitration legislation.

For further information on this topic please contact Bruno Floriani or Marvin Liebman at Lapointe Rosenstein by telephone (+1 514 925 6300) or by fax (+1 514 925 9001) or by email (bruno.floriani@lapointerosenstein.com or marvin.liebman@lapointerosenstein.com).

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