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New Challenges for International Franchising

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NEWS FROM AROUND THE WORLD: CANADA

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1. Introduction

During the past year there have been a lot of interesting developments in Canada in legislation and case law affecting franchising, including refinement to the franchisee's rescission remedy, injunctions, joint employment relationships, anti-poaching, use of arbitration clauses, prospective new legislation, and a move to settlement with 1,500 Canadian Tim Hortons franchisees in their class action. There have also been important updates to Canada's *Trademark Act.*

While not every case or legislative development can be covered here in this paper, the highlights will be discussed.

2. Judicial Refinement of Rescission Remedy under Franchise Legislation: the *Raibex* Decision

As franchise disclosure laws are under the jurisdiction of the provinces in Canada, and not the federal government, what has developed is a patchwork of franchise legislation across the country. Currently 6 of Canada's 10 provinces have franchise specific laws. While there are some relationship law provisions, in general the laws relate to pre-sale disclosure obligations.

A failure to provide a compliant disclosure document can lead to the franchisee having the right to rescind their franchise agreement. In each of the 6 provinces the franchisee can rescind the franchise agreement, without penalty or obligation, no later than 60 days after receiving the disclosure document, if the franchisor failed to provide the disclosure document or a statement of material change within the time required, or the disclosure document that was provided did not meet the requirements. If the franchisor never provided a disclosure document the franchisee's right to rescind is extended to 2 years. In summary, rescission is available to a franchisee if:

(i) 60-days where the disclosure document was not provided within the required time frame, or if the disclosure document is inadequate; or

(ii) 2-years where there has been no disclosure.

Prior to the *Raibex* Court of Appeal decision, Canadian courts tended to conflate the two remedies, giving franchisees the two year rescission remedy when there was inadequate disclosure. The case law had developed to find various deficiencies to amount to "no disclosure" allowing franchisees to rescind their agreements up to 2 years after receiving a disclosure document.

In *Raibex Canada Ltd. v ASWR Franchising Corp*, 2018 ONCA 62,, as is common industry practice, the franchisor provided a disclosure document to prospective franchisees and entered into a franchise agreement prior to identifying a specific site for the franchise. The lower court in *Raibex* enabled the franchisee to take advantage of the 2-year rescission remedy because the franchise disclosure document did not contain a copy of the head lease (and associated cost information), despite the fact that no site had been identified (and therefore no such head lease even existed). The court found that disclosure provided was "pre-mature" and failed to disclose

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the real estate and cost elements that were unknown at the time that the disclosure document was given and the franchise agreement was signed. The court opined that the franchisor should have waited to provide disclosure and sign the franchise agreement after these material elements were determined.

It was difficult to fathom how this could amount to 'no disclosure' under the 2-year rescission remedy.

The Ontario Court of Appeal's decision in *Raibex* overturned the lower court decision and emphasized the importance distinction between the two remedies (60 day and 2 years), and that mere imperfect disclosure is not the same as no disclosure. The court found that "deficient disclosure" was not the same thing as "no disclosure". The court found that the franchisee was not deprived of the opportunity to make an informed decision about the acquisition of the franchise. The court of appeal clarifies that the franchise laws impose a requirement as to what must be in a disclosure document, but does not state when the document must be given. Therefore, the conclusion that can be derived from this is that material facts that are not known at the time the franchise agreement is signed need not be included in the disclosure document. There is not a requirement to delay disclosure until future material facts evolve.

The *Raibex* Court of Appeal decision has been more recently considered in *1680960 Ontario Inc v Print Three Franchising Corp*, 2018 ONSC 1192 ("*Print Three*"), which involved a dispute between franchises being sold. The franchisees alleged that the disclosure provided was generic and did not contain specific information on the franchise being sold, and in particular, did not contain copies of the head lease (and its amendment), the agreement of purchase and sale, or certain historical financial information. The franchisees were seeking summary judgement, which the Ontario Court dismissed, finding that there was a genuine issuing requiring a full trial.

While *Print Three* was merely an application for summary judgement, it may stand for the principle that courts will be less likely to find disclosure documents to be deficient on summary judgement motions, especially where there is a real evidentiary dispute about what was provided to the franchisees.

3. Injunctions

Franchisors often attempt to enforce injunctions against franchisees in a variety of contexts, such as non-competition/non-solicitation, intellectual property, and various other breaches flowing from the franchise agreement.

Recently, the Supreme Court of Canada clarified the test for interlocutory injunctions in *R v Canadian Broadcasting Corp.*, 2018 SCC 5, making it more difficult to successfully seek a mandatory interlocutory injunction.

4. Joint Employer Relationship

In Canada, the discussion of the separation of a franchisor from its franchisees' local employment decisions has surfaced in a number of recent cases. Among these, some cases have questioned which of the two entities should share legal liability with regard to any human rights complaints, wrongful dismissals, union claims and/or relevant employment standards issues.

Nevertheless, even when franchisees make employment decisions the franchisor does not agree with, the franchisor will generally not step in to reverse these decisions, for fear that any such actions, whether direct or indirect, could have the unintended consequence of creating a joint employer relationship.

Litigation in both Canada and the U.S. deeming franchisors to be joint employers, along with recent debates about increases to minimum wage rates, has sparked concern for franchisors, in that they may be held liable for the manner in which their franchisees treat their employees.

While the issue of whether or not franchisors are joint employers has not yet been fully resolved in Canadian case law, case decisions in the U.S. strongly suggest franchisors that only indirectly deal with employment issues will not be legally considered joint employers of each franchisee's employees. Indeed, various labour relations boards and human rights tribunals have been asked not to treat franchisors and franchisees as related employers.

In Ontario, the provincial ministry of labour's *Changing Workplaces Review* interim report, released on July 27, 2016, almost saw special advisors to the provincial government recommend defining franchisors and franchisees as joint employers of the franchisees' employees; such recommendations were to be achieved through various proposed amendments to *Ontario's Labour Relations Act* and *Employment Standards Act*, with their proponents citing a need to better protect workers while supporting business in the modern economy.

A number of franchisors and other industry players argued such changes, as proposed in the interim report, were unnecessary and costly and, moreover, threatened the franchise business model in its entirety. To the great relief of the province's franchising sector, the proposed joint employer provisions specifically for franchisors were not included in the government's final legislative changes.

5. Arbitration Clauses

In a recent decision by the Supreme Court of Canada, the court confirmed in *Wellman v. Telus*, 2019 SCC 19 the enforceability of arbitration clauses in non-consumer contracts (such as franchise agreements).

This decision adds further certainty and predictability regarding enforceability of arbitration clauses between commercial entities.

6. New Legislation: the CURT Act

In November 2017, the province of Ontario passed the *Cutting Unnecessary Red Tape Act* ("CURT"), which included various amendments to Ontario's franchise legislation. The CURT Act does not yet have the force of law, and given a recent change in government, whether the CURT Act ever does take effect is an open question.

7. Settlement: Tim Hortons

In March 2019, around 1,500 Canadian Tim Hortons franchisees received a copy of a proposed settlement in two class-action lawsuits against Tim Hortons that could bring to a close a long-standing dispute between Tim Hortons and its franchisees.

The dispute relates to allegations of advertising fund mismanagement. Under the proposed settlement, Tim Hortons franchisee advisory board will regularly review advertising fund spending for added transparency, advisory board member terms will be shortened by a year and the company will institute electronic voting for the board. Tim Hortons will also pay $10 million over two years for local advertising efforts and $2 million to the Great White North Franchise Association's (a group of Tim Hortons' franchisees) law firm. It will also allow some franchisees to negotiate future contracts on their own after the current contracts expire.

Franchisees have until mid-April to accept the settlement or request to opt-out.

While this settlement may bring this particular dispute to a close, Tim Hortons still faces franchisee disputes south of the border from a U.S. class-action suit regarding charging above market prices for necessary products and services to its U.S. franchisees.

8. New Trademarks Act

On June 17, 2019, Canada's new *Trademarks Act* will take effect. As a highlight, there are 10 notable items to keep apprised of:

8.1 Adherence to the Madrid Protocol

For Canadians, the Madrid Protocol will provide the ability to secure international registration of a mark through a single application in a more cost and administratively efficient manner. In turn, foreign applicants will now be able to secure protection in Canada under the Madrid Protocol.

8.2 The elimination of use as a prerequisite to registration in Canada

There will be no more Declarations of Use. Nor do the new Regulations introduce any use-based maintenance requirement for Canadian registrations. This should reduce overall timing to registration for a standard application. Importantly, use will remain a crucial element for protection and enforcement of marks in Canada following the three-year protection period.

8.3 The elimination of the requirement to declare a specific filing base for applications

The new Regulations eliminate the requirement to claim existing Canadian use at the time of filing and the reliance on a foreign registration as a basis for a Canadian application. Applications will include a standard statement that the applicant has used or intends to use the mark in Canada.

8.4 Introduction of a "per class" application and renewal fee structure

While single class applications will enjoy a slight reduction in government fees, multiple class filings will see an increase. Similarly, government renewal fees for multi-class registrations will be more expensive than for renewals filed before the coming into force date. Multi-class applications filed now before the coming into force date will pay only a single government fee.

8.5 Renewal requests accepted only six months before or six months after a renewal deadline

Registrations with a renewal deadline that falls after the coming into force date can be renewed now — but will be allocated a 10-year renewal term. Currently, renewal requests may be filed at any time. It may be advisable to consider renewal requests now to avoid the per class renewal fee structure.

8.6 Reduction of term of registration from 15 to 10 years for new registrations issued after the coming into force date

Existing registrations will be converted at their next renewal date.

8.7 Introduction of Nice Classification

Implementation of the requirement to group and class goods and services according to the Nice Classification before approval of a new application and as part of the renewal process, or in response to a Canadian Intellectual Property Office ("CIPO") issued notice requesting classification for registered marks. CIPO currently provides the ability to classify applications and registrations in preparation for this on a voluntary basis.

8.8 Introduction of Letters of Protest

The proposed Regulations provide the ability to correspond with an Examiner to raise registrability concerns about a third party application at any point from filing to publication.

8.9 Division of Applications

The Regulations introduce the ability to divide goods and services in an application into two or more applications during examination and opposition to provide the ability to advance applications for certain goods and services, if others remain challenged.

8.10 Changes in Opposition Practice

For opposition proceedings, we will now have sequential filing of Written Arguments ending with the applicant's submissions and shared responsibility in cross-examination with the examined party to be responsible for submission of undertakings by the deadline.