CLARK WILSON LLP

FRANCHISING IN CANADA IN 2015

A Legal primer for international Franchisors

Clark Wilson LLP, Canadian lawyers

Franchise Law Group

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I INTRODUCTION

My name is John L. Rogers and I am pleased to be the editor of this paper. I chair the Franchise Law Group at Clark Wilson LLP, a Vancouver, Canada law firm established in 1912. I have practiced franchise law for over 30 years, both in British Columbia and Ontario, Canada.

Clark Wilson LLP has numerous fine lawyers and many of them have kindly contributed their time as authors. In each case, the contributors have expertise in the legal area(s) they have written on. Their names are attached to the sections they have written and their professional biographies can be found at the end of this paper.

Each section of this paper deals with an area of law which is relevant to franchising in Canada. Readers who are international franchisors or lawyers considering an expansion of franchise systems to Canada should find this paper to be a valuable introduction to franchising in this country.

As editor, I thank all contributing writers for generously donating their time to make this paper a success.

II FEDERAL LAWS

A. Trade-marks, Copyrights and .ca Domain Names (Neil Melliship)

[Editor's note: Since trade-marks and other intellectual property rights are central to franchise systems operating in Canada, this section is the most comprehensive.]

1. Trade-Marks (Neil Melliship)

It won't be news to non-Canadian franchisors that trade-marks (also referred to as "**marks**") used in connection with a franchise operating in Canada are extremely important. The trade-marks used in association with a franchise in Canada will form the foundation of that franchise's goodwill and reputation in this country. As such, they are exceptionally valuable assets of the franchisor that need to be properly protected. Common law (unregistered) trade-mark rights – i.e. rights acquired solely through use of a mark in Canada - are recognized and protectable in Canada. However, the extent of that protection will be limited to the geographic area within Canada in which the mark is recognized to be associated with the franchise by consumers. Proving that such reputation and goodwill exists typically entails significant uncertainty and cost in terms of gathering the required evidence.

Because of the above issues, registration of trade-marks in Canada is highly recommended for any franchise system operating or planning to operate in Canada. The primary benefit is that, once its marks are registered, the franchisor will gain the exclusive right to use those marks – and to license others (i.e. franchisees) to use those marks - throughout all of Canada, even though the franchise may only operate in one part of the country. The ability of a franchisor to stop others from using the same or a confusingly similar mark in Canada in association with the same types of goods and services is significantly improved when the franchisor has registered its mark.

While foreign trade-mark registrations are not enforceable in Canada in and of themselves, under Canada's federal *Trade-marks Act* (the "**Act**"), foreign registrants currently enjoy several advantages. Use and registration of a mark outside of Canada can be a basis for registration in Canada, though such a registration could be subject to attack if a mark is registered only on this basis, without actual use in Canada. Also, a foreign application can be the basis for a priority filing date claim in Canada, whereby a franchisor can potentially defer some application costs in Canada for up to six months from the date of the franchisor's first filing in its home country.

In addition to word marks, logos (design marks), sound marks (jingles), slogans, colours, packaging, labelling and store configuration are all potentially protectable as trade-marks in Canada.

(a) Registration

Registration of trade-marks in Canada is governed solely by the Act, which is federal legislation that applies equally throughout Canada. There are no provincial or territorial trade-mark registration laws. While there are provincial and territorial laws and systems in place for corporate and trade name registrations, such registrations provide no protection of trade-mark rights.

Prior to using or applying to register a mark in Canada, a highly recommended first step is to conduct due diligence by way of a registrability search. While no search will be 100% reliable, searching can greatly help avoid future lawsuits and thereby help a franchisor avoid unnecessary legal, marketing and re branding costs. If search results prove unfavourable, the proposed mark can be changed or alternatively, it may be possible to eliminate prior problematic marks or a dialogue may be initiated with a third party owning a problematic mark to determine whether there is a possible solution, such as an acquisition or co-existence arrangement.

Once searches have been reviewed and analyzed and a decision is made to proceed with registration of a proposed trade-mark in Canada, the next step is to prepare and file an application to register the mark with the Canadian Intellectual Property Office ("**CIPO**"). Under the current Act, an application to register is typically based on prior or proposed use of the mark in Canada (or, sometimes, a mix). As mentioned above, an application to register can also be based on registration and use by the applicant outside of Canada, either as an additional or the sole basis for registration in Canada.

Even though registration is generally granted to the person who is first to use a mark in Canada, proposed (intent to) use applications are permitted and gaining priority as the first to file is important, so franchisors looking to enter the Canadian market are encouraged to apply as early as possible and to also use their marks in Canada as soon as possible.

Once filed, a CIPO examiner will review the application to determine whether the mark applied for is registrable in Canada. This typically involves a search carried out by the examiner to determine whether there are any prior applications or registrations in Canada for confusingly similar marks in association with the same or related goods or services. The examiner will also make an assessment as to registrability of the mark and determine whether there are any formal or substantive problems with the application, for example, in terms of descriptiveness or misdescriptiveness of the mark, geographical or name/surname significance of the mark, unacceptable descriptions of the goods and services for which use is claimed or various other criteria under the Act. If the examiner determines that the mark is not registrable or that there is some other problem with the application, he or she will issue a report detailing objections to the application and, in that event, the franchisor will be afforded an opportunity to address those objections.

If there is no objection or if any objection raised is overcome, the application will be approved for advertisement in the Canadian Trade-Marks Journal. Such advertisement provides a time limited opportunity for any third party to oppose the application, for example, on the basis that the mark is confusing with a mark that the opponent has previously used and registered in Canada. Dealing with oppositions can be time consuming and costly, but the majority of cases are resolved with co-existence arrangements between the relevant parties. If no opposition is filed or if any opposition that has been filed is resolved, a Notice of Allowance will be issued by CIPO and final registration will then proceed very quickly.

The process from filing to final registration can be completed within 12 months in a best case scenario, however the timing can be and often is longer, and in some cases significantly longer if there are objections by the examiner or opposition proceedings by a third party. Franchisors are strongly recommended to use the services of an experienced Canadian trade-mark lawyer to assist them through the process, from conducting and analyzing registrability searches, to filing and prosecuting an application through to final registration.

(b) Licensing

Licensing of a mark by a franchisor to a franchisee is permitted in Canada, but only on compliance with specific provisions of the Act. This is important because, at common law in Canada, use of a mark by any person other than the owner, even if such use is authorized by the owner or is a use by a related entity, leads to a loss of distinctiveness of the mark, which in turn can result in the owner not being able to enforce its rights against unauthorized users of a confusing mark.

Under the licensing provisions of the Act, use of a mark by a franchisee, provided such use is properly licensed, will be deemed to be use of the mark in Canada by the franchisor, meaning that the franchisor will still be able to enforce its trade-mark rights against unauthorized third party infringement. Proper licensing requires that the franchisor exercise ongoing control over the character and quality of the goods and services that the franchisee uses the licensed mark in association with. While not mandatory, written license provisions are strongly recommended and are typically dealt with in the body of a franchise agreement or as a schedule to such agreement. Unlike in some countries, notably the United States, use of a mark by a subsidiary or affiliate of the franchisor is not deemed to be used under license and such use therefore needs to be properly controlled (and documented) by way of a license agreement.

(c) Significant Pending Amendments to the Canadian *Trade-marks Act*

The Canadian government passed significant amendments to the Act in the spring of 2014 which are expected to come into force as law sometime in 2017. The amendments will likely make life easier for non-Canadian franchisors in some ways but in other ways may make the selection, protection and enforcement of trade-marks in Canada more difficult and expensive. Key elements of the amendments include the following:

- Canada will become part of the *Madrid Protocol.* This means that franchisors from other *Madrid Protocol* signatory countries (including the United States and most other developed countries) will now be able to include Canada in their international trade-mark applications along with any other country that is a signatory to the *Madrid Protocol*, rather than having to file separate national applications in Canada.

- Canada will adopt the *Nice* classification system for the description of goods and services in trade- mark applications. This will be familiar to many foreign franchisors and could potentially reduce the number of examiners' objections about descriptions of goods and services in trade-mark applications. However, CIPO examiners will continue to require applicants to describe the claimed goods and services in "ordinary commercial terms", which could potentially result in more objections to goods and services descriptions than is currently the case. This requirement will also put Canadian franchisors at a disadvantage if they want to use a Canadian application as the home country application for a Madrid filing, since the Canadian descriptions will likely be required by CIPO to be narrower than the descriptions that are acceptable in many other Madrid signatory countries.
- Franchisors will no longer need to indicate in an application whether a mark has already been used or is proposed to be used in Canada. This will have the effect of removing much uncertainty about whether a mark is or is not already in use in Canada at the time when an application is filed with CIPO. Currently the issue of whether or not a trademark is in "use" results in much difficulty (and litigation), given the conflicting and evolving Canadian case law on what constitutes use of a mark in Canada. Similarly, there will no longer be a requirement that a franchisor use a mark in Canada or anywhere else in the world prior to registration being issued by CIPO in Canada.
- It will no longer be possible to base an application in Canada on registration and use abroad. Given some recent confusing case law on such basis for registration, this may be a welcome development for practitioners, though it will remove an advantage that many foreign franchisors currently have over their Canadian-only counterparts.
- It will likely become more difficult and expensive to conduct effective clearance searches prior to using a mark in Canada because it will be increasingly difficult, from the CIPO database, to determine whether an entity has commenced using a mark in Canada, since such information will no longer be required to be provided in an application. This means that additional market research and investigation will likely be required which will lead to additional cost for franchisors wanting to conduct reasonable due diligence.
- It is anticipated that the amount of trade-mark squatting and pirating will increase given the removal of the use requirement for registration. Similarly, the prevalence of opposition proceedings and co- existence arrangements is expected to expand, since clearance searching will be more difficult and will produce more uncertain results. Unfortunately, all of this will likely lead to more cost to franchisors that want to register and protect their marks in Canada.
- The term of a registration will decrease from 15 to 10 years, as will the term of subsequent renewals.

2. Copyrights

Copyright in Canada applies to all original literary, artistic, musical and dramatic works, provided the creator(s) of such works is a citizen of Canada or a resident of another WTO country or of a country that is a signatory to one or both of two different international copyright conventions to which Canada is a signatory (the Berne Convention and the Universal Copyright Convention). Copyright arises at the time a work is created. A Canadian franchisee will typically obtain access to a significant volume of materials from a franchisor which are subject to copyright protection.

Materials relevant to franchises that can be the subject of copyright protection in Canada include designs, logos, jingles, layout drawings, photographs, videos, websites, marketing and promotional materials and operational, training and other manuals. A copyright owner has the sole right (and the sole right to authorize others, including franchisees) to, among other things, reproduce, publish, translate and publicly perform its copyright protected works.

In Canada, registration is not a prerequisite to copyright protection or enforcement, nor is the use of any particular proprietary markings. Having said that, registration of copyright is inexpensive and relatively simple to obtain here. In Canada, two presumptions arise from registration: the presumption that the work covered by the registration is protected by copyright and that the registered owner is the owner of copyright in the work. This puts the evidentiary onus on any third party that may advance a copyright infringement claim to prove otherwise. Similarly, though not a prerequisite to copyright protection in Canada, the use of proprietary markings, such as "© [insert year of first publication and name of copyright owner]" are advisable to give notice to the world at large that the franchisor is claiming ownership of copyright in such materials and to potentially take advantage of copyright protection in countries that are signatories to the Universal Copyright Convention but are not signatories to the Berne Convention.

Franchisors operating in Canada should be careful to document, in writing, the assignment of copyright from the creator of a work to the franchisor, whether the creator is an employee of the franchisor or not. Under Canadian law, if a copyright-protected work is created by an employee in the course of that person's employment, the employer is deemed to be the first owner of copyright in that work. However, it is often difficult to prove (particularly after the fact, when there is a dispute) whether creation of a copyright-protected work occurred within the scope of employment. An additional problem arises in Canadian law because the courts have held that agreements to assign copyright in works that haven't yet been created are not effective to act as an assignment of copyright in that work once it is created. It is, therefore, highly advisable to include a copyright assignment obligation in each employment agreement which is to be entered into before any work is created by the employee. Such obligation should include a promise to sign a confirmatory assignment after a work has been created by that employee.

When hiring independent contractors to create copyright protected works, it is even more critical to obtain a written assignment, as, unlike the employment situation, there is no presumption at law that a work created by a non-employee in the course of he or she performing their contracted service is deemed to be owned by the person who engaged the contractor to perform those services (here, the franchisor). For any assignment to be effective it must be in writing. It is advisable to have a competent copyright lawyer draft the assignment to ensure enforceability.

In the case of both employees and contractors, it is also highly advisable to obtain written waivers of their "moral rights". These rights, which are separate from copyright, include the right to be associated with a work or to remain anonymous, as well as the right to control any modification to the work that he or she is the author of and to associate such works with products, businesses or causes. These rights can't be assigned, only waived, and any waiver should be in writing. Again, a competent copyright lawyer should be retained to prepare such a waiver.

3. .ca Domain Names

Most franchisors from outside Canada will have already secured domain name protection for their core marks, as well as for common misspellings or abbreviations of such marks, using the popular .com generic top level domain ("**gTLD**") and possibly with other gTLDs or country code TLDs, such as .net, .org, .biz, .us, .co.uk, .mx or .de. Franchisors that are planning to do business in Canada are strongly advised to obtain domain name registrations for their core marks with the Canadian .ca country code TLD as well, as soon as possible.

.ca domain names in Canada are inexpensive to register, are registered on a first come, first served basis and are not subject to a limit on the number of .ca domains that an eligible registrant can register, subject to the requirements of the Canadian Internet Registration Authority ("**CIRA**"). Most significantly for non-Canadian franchisors, CIRA has adopted a "Canadian presence" requirement for persons who want to register .ca domain names.

Satisfaction of the Canadian presence requirement is typically met in one of two ways. The first is to set up a Canadian (federal or provincial) subsidiary company and have that subsidiary register and own the .ca domains. If the franchisor decides not to establish a Canadian subsidiary, the second way is if the prospective registrant is the owner of a Canadian trade-mark and the requested domain name consists of or includes the exact word component of the registered mark. This is another reason for non-Canadian franchisors to apply expeditiously for registration of their core marks as trade-marks in Canada.

In the event of "cybersquatting" – a bad faith registration of a .ca domain name by someone other than the rightful owner – CIRA has a domain name dispute policy that is similar to the Uniform Dispute Resolution Policy that applies to .com gTLDs.

B. Patents - Utility and Design (Michael Roman)

The Canadian equivalents of a United States utility patent and a United States design patent are respectively called a patent and an industrial design registration. As in the United States, a Canadian patent protects function and an industrial design registration protects aesthetics.

In franchising industries, patents most commonly focus on functional aspects of:

- the products and services delivered;
- the equipment and processes used to make or deliver those products and services; and
- the electronic commerce systems used to engage customers or other supply chain entities in the delivery of those products and services.

Notably, the first two aspects are usually pursued only by direct participants in a market sector, for example, franchisors, to establish advantage over competitors; however, the third focus is popular with non-practicing entities (pejoratively known as “**patent trolls**”), who view franchisors as ripe targets for patent infringement suits. Currently, it appears that the patentability of electronic commerce inventions is in a period of retrenchment and uncertainty in the United States, whereas, in Canada, there are some indications that such patentability is becoming more acceptable and predictable.

A prudent franchisor should become aware of the patent landscape in its sector, both to recognize opportunities to establish competitive advantage from its own innovations and to assess and mitigate risks of patent infringement suits by competitors and non-practicing entities. Fortunately, patent litigation costs and awards in Canada tend to be significantly lower than in the United States, and outcomes tend to be more predictable, because trials are conducted by judges without juries; these and other factors make speculative patent litigation much less common in Canada.

An application for a Canadian patent must be filed within one year of any public disclosure. To be patentable in Canada, an invention must be new and inventive, evaluated as of the day when the inventor applies for a Canadian patent; however, if a Canadian patent application claims priority from a previous patent application filed in another jurisdiction no more than one year earlier, then newness and inventiveness will be evaluated as of the filing date of the earlier priority patent application. An online publication of Clark Wilson LLP entitled *Basic Patent Information* (http://www.box.net/shared/static/hx4sq4vzd3.pdf) addresses many of the initial questions people have about the patent application process and surrounding strategy.

An industrial design registration gives its owner the right to sue others for making, importing for the purpose of trade or business, selling, renting or offering for sale or rent, infringing products, within the jurisdiction of the registration.

Design registrations commonly focus on those aesthetic elements that are believed to be sufficiently appreciated by customers or franchisees so as to influence their purchasing or other business decisions. For example, design registrations exist:

- in the accommodation sector, for lobby fixtures, guestroom furniture and even guestroom layouts;
- in the quick service restaurant sector, for storefronts and interiors, serving and eating utensils, and displays and packaging;
- in the transportation and storage sector, for trailers and trailer parts, and storage containers;
- in the hardware sector, for tools; and
- in the tax return preparation sector, for pens.

Compared to the United States, design litigation in Canada is less frequent, less speculative and for smaller amounts of money.

Again, as with patents, an application for a Canadian design registration must be filed within one year of any public disclosure. To be registrable in Canada, the design must be new and original, evaluated as of the date of application for a Canadian design registration; however, if a Canadian design application claims priority from a previous design application filed in another jurisdiction no more than six months earlier, then newness and inventiveness will be evaluated as of the filing date of the earlier priority design application.

C. Competition Law

Competition (anti-trust) law is predominantly a federal matter in Canada. While some provincial statutes can impact competition matters, the federal *Competition Act* is the major piece of legislation in this area. This legislation addresses two categories of anti-competitive practices: those which are subject to criminal prosecution and those which are subject to civil review. Matters of criminal conduct are heard in the courts, while matters of civil review are heard by an administrative body known as the federal Competition Tribunal.

There are a number of competition law matters that franchisors need to be aware of, including price maintenance, abuse of dominance, exclusive dealing, tied-selling, refusal to deal, delivered pricing, misleading advertising and market restriction. (In 2010, the *Competition Act* was amended to de-criminalize resale price maintenance, although it remains subject to civil review by the Competition Tribunal.)

It is noteworthy that the Competition Tribunal lacks the jurisdiction to impose penalties against a franchisor; with minimal exception, its remedies are limited to restraining conduct. Therefore, franchisors have more freedom to adopt pricing policies so long as those policies do not adversely and materially affect competition in the marketplace.

A restriction on price maintenance is an important civil review area. Although a franchisor may set and enforce maximum prices at which its franchisees may sell products, it cannot set minimum prices. Further, the *Competition Act* prohibits franchisors and other suppliers from discriminating against any franchisee who sells for less than an advertised price.

Although the *Competition Act* restricts exclusive dealing and tied-selling generally, where, as is usually the case in franchising, one party (the franchisor) grants another party (the franchisee) the right to use a trade-mark to identify a business (the franchise system) pursuant to a marketing plan established by the trade mark owner (the franchisor), the franchisor will not be in contravention of either restriction.

D. Tax Considerations (Richard T. Weiland)

When a non-resident franchisor is considering an expansion to Canada, tax consequences often prove central to the structuring of that expansion.

The Canadian *Income Tax Act* requires Canadian residents to pay income tax on all of their worldwide income, regardless of source. Non-residents must only pay Canadian income tax on income or gains derived from these sources: employment in Canada, a business carried on in Canada or the disposition of taxable Canadian property. The provincial governments in Canada also collect income tax, generally calculated on the same basis.

Under Canadian tax laws, a non-resident franchisor is subject to tax on income from its Canadian business. However, most Canadian tax treaties allow Canada to impose tax on business income of a resident of another treaty jurisdiction only if they have a permanent establishment in Canada. A permanent establishment can be a branch, office or other business premises or can be acquired by habitually entering into contracts in Canada.

If control over a Canadian expansion is exercised from a foreign home office without acquiring a permanent establishment in Canada, the foreign franchisor will generally not be subject to Canadian tax. However, Canadian withholding tax will apply on any payments by a Canadian franchisee which constitute royalties for Canadian tax purposes. In general terms, royalties are any payments for the right to use any property, including trade-marks and other intellectual property. Withholding tax on royalties is generally 25% under Canadian law, but is reduced to 15% or less under most of Canada's bilateral tax treaties. Where payments from the franchisor will include royalties, the franchise agreement may separate the royalty payments from payments for administrative services provided by the franchisor so that withholding obligations may be reduced.

Another option for the expanding franchisor is to establish a Canadian branch operation. A branch operation involves establishing a Canadian office or other permanent establishment, without incorporating a separate legal entity. Under this model, business income from the Canadian branch is taxable in Canada on a net income basis at corporate rates that vary from 25% to 30% depending on the province or territory where income is earned. Additionally, branch operations of a non-resident corporation will attract a "branch tax" at a rate of 25% of net after tax income. However, the applicable rate of branch tax may be reduced under the terms of an applicable tax treaty between Canada and the franchisor's home country. Under the Canada-U.S. tax treaty, for example, the first $500,000 of Canadian after-tax income earned is exempt from the branch tax and beyond that threshold the branch tax is reduced to a rate of 5%.

A further alternative is for the franchisor to structure its Canadian expansion though a Canadian subsidiary. The subsidiary will be controlled by the parent (the non-resident franchisor) through the holding of its shares and the right to elect the subsidiary's board of directors. Tax on net income of the subsidiary is calculated at corporate rates which vary among the provinces and territories. Dividends paid by the subsidiary will be subject to a withholding tax of 25%, subject to reduction under an applicable tax treaty. Under the Canada-U.S. tax treaty, withholding tax on a dividend to a U.S. parent is reduced to 5%. The parent may charge a reasonable fee to the Canadian subsidiary for overhead and services relating to Canadian business activities, which may be deducted in calculating the subsidiary's income. One disadvantage of using a subsidiary is that any losses incurred by the Canadian subsidiary cannot limit the foreign parent's home office tax liability.

In addition to income tax, franchisors operating in Canada must pay goods and services tax ("**GST**") or harmonized sales tax ("**HST**"), depending on the province involved. GST or HST are imposed on goods and services supplied in, or imported to, Canada. A Canadian subsidiary or a non-resident franchisor operating through a branch in Canada that qualifies as a permanent establishment for GST purposes may be required to register for and collect GST/HST on taxable supplies of property or services. The provision of franchise services by such a franchisor to a franchisee in Canada is generally subject to GST or HST, as applicable.

The provision of franchise rights by a non-resident franchisor with no permanent establishment in Canada is considered to be made outside Canada and therefore is not subject to GST or HST. However, such a franchisor may decide to voluntarily register for GST or HST to enable it to claim a refund for GST or HST paid by it in the course of carrying on its business. This might be attractive if the franchisor, in the course of its business, will be incurring significant expenses in Canada that are subject to GST or HST.

Whatever structure a non-resident franchisor selects to expand its operations into Canada, unique tax consequences will arise and professional tax advice is recommended.

E. Privacy of Personal Information (Lawrence ("Larry") Munn)

Privacy of personal information is an important consideration for franchisors intending to operate in Canada. The federal *Personal Information Protection and Electronic Documents Act* ("**PIPEDA**") applies to personal information and its collection, use and disclosure in the course of commercial activities across Canada in the private sector. British Columbia, Alberta and Quebec have enacted personal information legislation that has been deemed "substantially similar" to PIPEDA, allowing the provincial legislation to apply in place of the federal legislation. A fourth province, Manitoba, will have "substantially similar" legislation once it comes into force on a date to be fixed by provincial government proclamation.

Additionally, certain provinces have enacted legislation specifically targeted at the protection of health information. These provinces include Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Newfoundland and Labrador and Nova Scotia.

PIPEDA defines "personal information" to include "information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization." Note that the legislation applies only to individuals and not corporations. The definition allows for the protection of a wide range of information including, but not limited to: financial transaction histories, photographs, video footage and audio recordings. Franchisors need to be aware of the following requirements contained in PIPEDA and substantially similar provincial legislation:

- A franchisor and each franchisee should designate an individual as a privacy officer within its organization. The privacy officer will be charged with ensuring the organization complies with the relevant personal information legislation. The privacy officer will be governed by a privacy policy that the organization must establish.
- When collecting personal information from an individual, a franchisor or franchisee must explain to the individual the purpose behind the collection and how the information will be used. Unless authorized by the applicable privacy law, the individual whose personal information is being collected must consent prior to such collection.
- A franchisor or franchisee needs to be prepared to make available to individuals specific information about its practices and policies concerning the collection and management of personal information, which need to be included in a written privacy policy.
- Information collected must be protected against theft, loss, and unauthorized access. PIPEDA does not expressly mandate particular security measures. Instead, the franchisor or franchisee must ensure that personal information it collects receives the proper protection.
- Individuals have a general right to access their personal information held by a franchisor or franchisee.

F. Canada's New Anti-Spam Legislation (Lawrence ("Larry") Munn)

Canada's anti-spam legislation, commonly referred to as "CASL", came into force on July 1, 2014. It regulates the sending of specified types of commercial electronic messages ("**CEMs**"). A CEM is defined as any electronic message that has as one of its purposes to encourage participation in a commercial activity. (This includes, for example, the purchase of a product from the sender of a CEM.)

The sending of a CEM is permitted where express or implied consent has been provided by the recipient. The onus is on the person alleging to have received consent to prove it was given. For that reason, it is wise to obtain written consent. CASL also regulates the content of CEMs mandating that an "unsubscribe" mechanism and the sending party's information be included. There are exceptions where the sender and recipient have a personal relationship and where CEMs are sent between employees, representatives or franchisees of an organization or of another organization within which there is an existing relationship. These exceptions are, however, quite narrow.

Penalties for committing an infraction under CASL are up to $1,000,000 for individuals and, for corporations, up to $10,000,000. The Canadian Radio-Television and Telecommunications Commission ("CRTC"), one of two bodies responsible for administering CASL, has begun imposing significant penalties against companies failing to comply with CASL. Further, on July 1, 2017, a private right of action will come into force allowing non-consenting recipients of CEMs to seek damages. This private right of action could lead to potential class action lawsuits should there be a contravention of the CASL requirements.

It is important to note that CASL does not apply to non-commercial activity. Voicemails, faxes or broadcast messages through media such as blogs or Twitter are not covered. However, franchisors looking to promote their systems by building customer bases through electronic means must be keenly aware of CASL's provisions. Traditional customer database lists may prove mostly inadequate to prove that the sending party has the recipient's consent. A franchisor, therefore, should ensure that its messages fall within an exception or that there is implied or express consent. Express consent is obviously preferable for proof purposes and franchisors should keep records which adequately show CEM recipients have provided express consent. Implied consent will arise if there is an existing business relationship (arising from the sale or lease of a product or service, a contractual relationship within the previous two years or an inquiry or application in the previous two years). If implied consent is to be relied upon, franchisors must be able to track when the consent expires. Building a customer list that is CASL compliant will require careful planning for both franchisors and franchisees who use CEMs in their businesses.

CASL applies to franchisees as well as franchisors, as indicated above.

G. Packaging and Labelling/Emballage et l'étiquetage

Packaging and labelling requirements in Canada will differ depending on the nature of the product involved. However, there are some standards that all labelling and packaging must abide by, for example, the federal *Consumer Packaging and Labelling Act* requires that any pre-packaged product sold or imported into Canada must have a label providing the package's net quantity in metric measurement. Additionally, the label must not contain any "false or misleading" representation that may be regarded as reasonably related to the product.

Regulations to the *Consumer Packaging and Labelling Act* make it mandatory that all information included on a label be shown in both English and French, except for the name of the vendor and its address. There are limited exceptions to this general rule for local, specialty or test products. A franchisor should note that Quebec has its own requirements regarding use of the French language in packaging and labelling for goods sold within that province. (**See IIIB.4.**)

H. Immigration (Larry Yen)

Franchisors wishing to enter Canada must consider whether they need to apply for visas or work permits for the activities they intend to carry on in Canada. Generally, U.S. citizens, along with citizens of about 60 other countries, are visa exempt. This means they can present themselves at a Canadian border or airport without having to apply in advance for a temporary resident visa at Canadian Consulates or High Commissions overseas. At the port of entry, they can simply present their passports and receive an entry stamp on them, which is an implied visitor permit for a period of six months. However, this implied visitor permit usually only allows visitors to conduct activities such as sightseeing, shopping or other leisure activities in Canada.

If proposed activities in Canada are business related, visitors need to consider whether they may be characterized as “work” and therefore require a work permit. Business activities will be considered as “work” if they are of the types that a reasonable person would expect to be remunerated for.

If a level of business activity is not substantial enough to be considered as “work”, a foreign person who is visa exempt may be admitted under the “Business Visitor” category without having to obtain a work permit. Examples of business activities that are eligible for admission under the Business Visitor category are: attending industry conferences, meeting with business associates, identifying and researching potential business locations, meeting with potential suppliers, meeting with potential investors, and providing after sale services when certain conditions are met. Typically, a foreign person who is visa exempt and seeks entry under this category would present himself or herself at a Canadian port of entry with his or her passport and supporting evidence, such as a letter from their foreign employer or a conference registration. As with Visitors for Leisure, Business Visitors most often receive an entry stamp on their passports allowing them to conduct proposed business activities in Canada for a period of up to six months. Those seeking entry as Business Visitors may not be paid for their business activities in Canada from a source within Canada and may not sell any products or provide any services in Canada for which they will be paid in Canada.

If a foreign person’s proposed business activities in Canada exceed the scope of activities allowed under the Business Visitor category, he or she must apply for a work permit before entering Canada. For example, if a person is coming to Canada to open a new office, then he or she must apply for a work permit before entering Canada. Depending on the nationality of the foreign person and the type of work he or she will be performing, there are several options to obtain a work permit in Canada:

If the foreign person is a U.S. citizen, one of the more straight forward options would be to qualify under the NAFTA professionals category. Under NAFTA, Canada, the United States and Mexico allow each other’s citizens reciprocal rights to apply for work permits at a port of entry if proposed jobs fall within a list of professions such as accountants, computer systems analysts, economists, engineers, lawyers, management consultants, scientists and teachers. Like foreign persons seeking entry as Business Visitors, Americans applying for NAFTA professional work permits would present themselves at the port of entry with their passports and supporting evidence showing they qualify as NAFTA professionals.

Under NAFTA, Americans may also apply for work permits to work for related companies in Canada. These are called Intra-Company Transferee work permits. Under this category, a “related company” means a company that is a parent or subsidiary of the company for which the foreign person intends to work or a company that is controlled by the same group of shareholders that control the company for which the foreign person is working. The foreign person must have worked for the foreign company for a minimum of one out of the last three years in an executive or senior managerial position or in a position that requires specialized knowledge. Executive and senior managerial positions require the person to have the responsibility to manage an important function of his or her company or the authority to hire and fire employees. Specialized knowledge means the type of knowledge relating to the company's products or processes that are proprietary in nature and that one would not possess except through working for the company. Americans can apply for NAFTA Intra-Company Transferee work permits by presenting themselves at a Canadian port of entry with their passports and supporting evidence to show that they are qualified as NAFTA Intra-Company Transferees. If a foreign person's country of nationality is not on the list of visa-exempt countries, then the foreign person must apply for a temporary resident visa together with an Intra-Company Transferee work permit first. The Canadian visa application process is now becoming more computer based, whereby applicants submit their application forms and supporting documents online to the Citizenship and Immigration Canada web portal.

Under NAFTA, an American can also apply for a work permit as a Treaty Investor. To qualify for a work permit under this category, the U.S. citizen must demonstrate that:

(1) the Canadian enterprise is owned or controlled by one or more U.S. citizens;

(2) U.S. citizen(s) have a significant amount of capital at risk in the Canadian enterprise;

(3) the Canadian enterprise is operational (or will be operational shortly after issuance of the work permit);

(4) the Canadian enterprise is not marginal nor is it only for the livelihood of the foreign investors; and

(5) the applicants are in a position to direct or manage the Canadian enterprise.

All of the above categories are options to expedite the applications of foreigners for Canadian work permits. If a foreign person's fact pattern does not fit within any of such categories, then it would be necessary to obtain a Labour Market Impact Assessment showing that the Canadian enterprise has recruited for the position and has found there is no eligible Canadian worker available.

In conclusion, there are many options available for a foreign person to enter Canada to conduct their business activities. It is important to review Canadian immigration requirements beforehand and select the proper option so as not to be restricted from entering Canada to carry out work duties. Thereafter, it is important that proper documentation be assembled or prepared. If it is possible to select an option without the requirement of obtaining a Labour Market Impact Assessment, the work permit application process will be streamlined. As mentioned, for the first few exploratory trips to Canada, a foreign person can enter Canada under the Business Visitor category without having to apply for a work permit. Once business activity ramps up, however, it will be time to select one of the foregoing work permit options.

III PROVINCIAL LAWS (John L. Rogers)

A. Franchise-Specific Legislation (5 Provinces)

Canada has 10 provinces. Five of them, namely Alberta, Manitoba, Ontario, New Brunswick and Prince Edward Island, have enacted franchise legislation which is similar, but with important differences (for example, taking of deposits (or not), electronic disclosure and whether a "substantially complete" disclosure document will be sufficient).

All 5 of the legislating provinces require a franchisor to provide a disclosure document to each prospective or renewing franchisee when the franchised business of the prospective or renewing franchise is to be located wholly or partly in a legislating province. The disclosure document must be provided at least 14 days before the franchise agreement is signed. No mandatory form of disclosure document is required by any of the 5 provinces, but each requires a disclosure document to include those matters specified in the relevant statute and its regulations. For example, recent financial statements of the franchisor, a copy of the franchise agreement and contact lists of current and former franchisees must be included.

All 5 provinces also provide a franchisee with a right of termination and a claim for damages if the franchisor does not provide a disclosure document at all or provides one too late. Additionally, all 5 provinces require franchisors and franchisees to deal with each other in good faith.

A sixth province, British Columbia, is proposing franchise legislation, on which it has solicited public input, but it is unlikely to become law until 2016 or even later.

B. Québec – A Civil Code Province

While Québec does not currently have franchise legislation, there are various Québec-related issues of which franchisors considering an expansion into the province of Québec must be aware. The following five issues in Québec are the most relevant:

1. Duty to Act in Good Faith

The Civil Code of Québec (the "**Code**") governs franchising as it does all business relationships in the province. (Québec is the only province of Canada to be governed by a civil code.) The Code imposes a duty of good faith upon parties to any type of contract and forbids any party from exercising a contractual right primarily to harm another party. The duty to act in good faith may require a franchisor to reveal material facts to a franchisee in certain circumstances, for example, when the franchisor becomes aware of a negative circumstance specifically affecting a proposed franchise location.

2. Contracts of Adhesion

The Code's treatment of "contracts of adhesion" is particularly relevant to franchisors. A contract of adhesion is one in which the essential terms are drafted and imposed by one party upon the other without being subject to negotiation. Most franchise agreements are contracts of adhesion because, with the possible exception of minor changes, they are non-negotiable as drafted by the franchisor and for the franchisor, and the franchisee generally must "take it or leave it".

When a franchise agreement is considered to be a "contract of adhesion", the Code requires it to be drafted in clear and understandable language. Moreover, any external terms not contained in the franchise agreement, but not expressly brought to the attention of the franchisee, as well as any "abusive" or overly onerous terms, risk being deemed unenforceable by a Québec court.

3. Franchisor Liability for Goods

Pursuant to the Code, manufacturers, distributors and suppliers of goods are all required to warrant the quality and ownership of goods sold. On this basis, a franchisee buying goods from a franchisor or its nominee may seek redress against the manufacturer and all parties involved in the chain of distribution, including the franchisor or nominee-supplier. The Code and the *Consumer Protection Act* of Québec may limit the extent to which franchisors are able to disclaim warranties in respect of such goods, for example warranties that protect end consumers.

4. Charter of the French Language (the "Charter")

The Charter establishes French as the official language of Québec and requires the use of French in a variety of circumstances. Of particular note are requirements relating to commercial advertising. Pursuant to the Charter, all commercial advertising, including all catalogues, brochures, folders, commercial directories and similar publications, must be drawn up in French. An English translation of such advertising may be included so long as the French version appears no less prominently.

The Charter has traditionally been interpreted by Québec courts as covering the websites of entities doing business in Québec. Accordingly, if a franchisor outside of Québec is found to be carrying on business in Québec, the Charter may require the franchisor to translate its website (or a portion thereof) into French.

The Charter states that employees in Québec have a right to carry on their verbal and written activities using French. Accordingly, every employer is required to draw up its written communications to Québec employees in French and to publish offers of employment or promotion in French. On this basis, Québec jurisprudence suggests that all corporate policies and procedures, employment handbooks and miscellaneous written communications addressed to employees generally must be drafted in French. The French version of these documents may be accompanied by an English version, provided the French version appears at least as prominently as the English one.

Québec has recently increased fines imposed on individuals and businesses found to have violated the Charter. A distinct offence has also been created for those persons (including directors and officers) who assist, advise, encourage or incite an individual or a business to violate the Charter.

5. Taking Personal Property Security in Québec

The Code also governs personal property interests in Québec and establishes the "hypothec" (similar to a mortgage) as the primary form of personal property security available. A hypothec creates a general or specific charge or lien on any kind of property which may secure a legal obligation. The hypothec must be registered at the Québec Register of Personal and Movable Rights (the "**RPMR**") to be enforceable against third parties and will rank according to the date and time when registered at the RPMR.

Instalment sale agreements (the Québec equivalent of conditional sale agreements) and personal property leases are other commercial instruments that could be used by franchisors to secure their interests.

C. Personal Property Security in nine of ten Canadian Provinces (Quebec is the exception: see B.5 above) (Rosemary John and Kevin MacDonald)

A franchisor can incur considerable expense in providing the necessary materials and resources for a franchisee to establish its business, which expense it expects to be reimbursed for by initial fees and royalties paid by its franchisees. One way a franchisor can protect itself from a potential failure by its franchisees to pay amounts owing from time to time is to take a security interest in the franchisees' personal property. Provisions establishing the security interest may be included in the franchise agreement or, more typically, in a separate security agreement.

All Canadian provinces have personal property security legislation. While the purposes of the different statutes are similar, the requirements and actual wording of provisions in such statutes varies slightly and franchisors need to ensure that their agreements intended to create security interests in personal property reflect the requirements in each province in which their franchisees operate.

In British Columbia, for example, the governing legislation is the *Personal Property Security Act* (the "**BC PPSA**"). Like the personal property security statutes in other provinces of Canada (except Quebec – see B.5 above), the BC PPSA establishes a regime governing the validity, attachment and perfection of a security interest. Although there are exceptions, in order to perfect a security interest:

- the franchisor's security interest in the franchisee's personal property must "attach": i.e., (1) value must be given, (2) the franchisor must have rights in the collateral, (3) the franchisor's security interest must be set out in the franchise agreement or a separate security agreement in such a way that the asset(s) intended to be subject to the security interest are adequately described; and (4) there is no agreement to postpone the time of attachment; and
- a financing statement that complies with the requirements of the BC PPSA must be registered in the British Columbia Personal Property Registry (the "**PPR**").

Registration of a financing statement in the PPR may be done before or after the security agreement is signed or the security interest attaches. It is usually advantageous for an intended security holder to register as soon as it has been agreed that it will obtain a security interest in personal property because the priority given to a secured party against other secured parties is generally determined based on who registered its security agreement first.

An exception to the "first to register" rule is a purchase-money security interest ("**PMSI**"). A PMSI allows the secured party to bypass the first to register rule so long as the requirements for a PMSI in the relevant legislation are met. The PMSI requirements are in addition to those for normal registration of a security interest. The BC PPSA defines a PMSI as:

- a security interest taken in collateral, other than investment property, to the extent that it secures payment of all or part of its purchase price;
- a security interest taken in collateral, other than investment property, by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire the rights;
- the interest of a lessor of goods under a lease for a term of more than one year; or
- the interest of a person who delivers goods to another person under a commercial consignment, but does not include a transaction of sale by and lease back to the seller and, for the purposes of this definition, "purchase price" and "value" include credit charges or interest payable for the purchase or loan credit.

The nature of the relationship between franchisor and franchisee often satisfies the statutory definition of a PMSI. The PMSI is a valuable tool, as well as the entire PPSA legislative regime, to ensure that franchisors are able to mitigate the financial risks involved in incurring expenses and granting credit to franchisees for which the franchisors expect to be reimbursed.

D. Leasing Premises to be Franchised (Jyotika Reddy)

In a franchise situation, the franchise location is normally leased in one of two ways:

1. Lease by Franchisor: In this scenario, a franchisor enters into a head lease directly with the landlord and then sublets the leased premises to a franchisee pursuant to a sublease agreement. This structure allows the franchisor to retain "location control", namely its own leasehold interest in the premises, even if the franchisee's interest in the franchise is terminated, expires or is transferred. As there is no direct relationship between the landlord and the franchisee in this structure, the downside to the franchisor is that any default of a franchisee under a sublease may result in liability for the franchisor under the head lease. To deal with this risk, a franchisor will typically require that the principal(s) of a franchisee provide a guarantee to the franchisor. This head lease model is generally preferable to landlords, as the franchisor is normally more financially sound than one of its franchisees and, therefore, a more attractive tenant. A franchisor may favour this structure when specific premises are particularly desirable to maintain.

2. Lease by Franchisee: Here, a franchisee directly enters into a lease with the landlord and is solely responsible for all obligations as tenant. Although this structure eliminates any liability under the lease on the part of the franchisor, it also means that the franchisor may have no control over the premises and must rely entirely upon the franchisee to keep the lease in good standing.

To address this issue, the franchisor might agree to be joined as a party to the lease or might be able to negotiate a separate agreement with the landlord and franchisee which provides the franchisor with a right, in the case of a default by the franchisee, to "step in" and assume the obligations of the franchisee under the lease, temporarily, cure the default and later replace the franchisee with a different franchisee as tenant. It is important to note that, unless the franchisee has a strong financial statement, a landlord may not agree to lease directly to the franchisee without some recourse against the franchisor.

Some provinces of Canada (notably British Columbia) are land title jurisdictions under which leases and subleases must be registered on title to bind third parties subsequently registering, such as mortgagees who might later start a franchise action. In such cases, a lease and sublease which are registered prior to a mortgage may not be foreclosed on by the mortgagee (absent the lessee and sublessee signing a priority agreement in favour of the mortgagee).

E. Employment Law (Andrea Raso)

Employment law in Canada is governed by both statute and common law. Employment is typically governed by provincial law, except where the business concerned is a federal one, such as telecommunications or inter- provincial transportation.

For franchisors to help eliminate the possibility of liability as "co-employer" to the employees of their franchisees, franchise agreements should explicitly provide that the franchisee is an independent contractor and that all responsibility for the franchisees' employees lies with the franchisee. This includes responsibility for recruiting, hiring, training and managing employment relationships, as well as disciplinary action and termination of employment. The franchisor should ensure that, in its conduct, it remains at arm's length from its franchisees' employees and decision-making related to them. Further, the franchise agreement should limit the overall control that the franchisor has over its franchisees as much as is practical.

In addition to provisions of the applicable franchise agreement and any connections of the franchisor to its franchisees' employees, administrative tribunals will consider their enabling statutes when deciding whether co-employer status (with its franchisees) should be extended to the franchisor. Human rights legislation and workers' compensation legislation in particular are given broad interpretation both by labour tribunals and the courts since they are designed to protect human rights and health and safety, respectively, and in some cases a co-employer relationship has been extended to the franchisor under those statutes.

In the United States, the National Labor Relations Board ("NLRB") has determined that McDonald's Corp. could be considered a joint employer with its franchisees, so that McDonald's could be held jointly responsible for the working conditions of their franchisees' employees. If this determination withstands appeal by McDonald's, not only could franchisors be made liable for their franchisees' violations of employment standards, it could upend franchisors' long-held defense to unionization, namely that franchises are independently owned and operated by their franchisees and, as such, that franchisees are independent employers.

On the other hand, the NLRB has recently determined that the franchisor Freshii's is not a co-employer. In that case, the Franchisor was careful in drafting its franchise agreement and careful in its conduct to leave all employment related matters in the control of its franchisees.

F. Litigating Franchise Disputes (Brendan Morley)

Some disputes are so fundamental to the operation of a franchise system that they may require litigation to resolve. The most common disputes giving rise to franchise litigation involve serious breaches and subsequent terminations of franchise agreements. Whether a franchise agreement has been seriously breached, or whether termination is warranted in a particular situation, will often depend on an interpretation of the default and termination provisions of the franchise agreement involved. These provisions will be examined by a court alongside Canadian case law and any relevant provincial franchise legislation.

As previously mentioned, five Canadian provinces have franchise legislation dictating disclosure obligations on the part of franchisors operating there. These disclosure obligations themselves may give rise to considerable litigation. For example, under Ontario's *Arthur Wishart Act (Franchise Disclosure)*, any misrepresentation in a disclosure document, or tardiness by a franchisor in delivering one, may give rise to a right of a franchisee to terminate the franchise agreement and advance a claim for rescission (termination) and damages.

Every franchise agreement should contain both a forum selection clause and a choice of law clause. The forum selection clause will determine the jurisdiction where a dispute between the parties would be litigated or arbitrated. The choice of law clause will determine what jurisdiction's law applies to the interpretation of the agreement. Although foreign franchisors may instinctively wish to make their home jurisdiction the selected forum, they must keep in mind that jurisdictional issues may effectively assist or hinder enforcement using a particular court order, such as an injunction granted in another jurisdiction. For this reason, parties to a franchise agreement should normally select the Canadian province and court system naturally applicable to a dispute occurring under the agreement.

A "no class action" provision in a franchise agreement will not be upheld by the court of a regulated province because its franchise legislation gives franchisees the right to "associate with other franchisees" and provides that any provision in a franchise agreement that purports to interfere with this right is void. The courts have held that this right of association includes the right of franchisees to participate in a class action for the purpose of enforcing rights against a franchisor.

Franchisors and franchisees involved in litigation should bear in mind that certain aspects of their franchise system and conduct may become a part of public record through pleadings filed in the Canadian courts. Additional information may become publically available through a discovery process, where a party has the right to examine under oath the other party's representatives and documents. On the other hand, alternative dispute resolution methods such as arbitration or mediation (see G. below) will provide the often desired confidentiality.

G. Alternative Dispute Resolution

1. Arbitration (John L. Rogers)

In Canada, it is common practice to include an arbitration clause in a franchise agreement. Each province has arbitration legislation that governs, to varying degrees, commercial matters. In British Columbia, for example, the *Arbitration Act* applies to arbitration clauses contained in commercial agreements made in British Columbia. This *Act* deals with a number of issues that arise pursuant to an arbitration including, but not limited to, appointment of arbitrators, production of documents, evidentiary procedures, subpoena of witnesses, costs and appeal procedures. An important provision in the *Arbitration Act* requires that a matter be adjudicated according to legal principles unless, as a term of the arbitration clause, the parties have agreed that the dispute may be decided on equitable grounds, grounds of conscience or on some other less formal basis.

When a province where a particular franchise is located has adopted the Model Law on International Commercial Arbitration (formulated by the United Nations Conference on International Commercial Arbitration), disputes related to its franchise agreement may be made the subject of international commercial arbitration. The arbitrator may properly require a hearing in the franchisor's foreign home jurisdiction, if provided in the franchise agreement. If, however, the franchise is located in a province with franchise legislation, remedies provided in that legislation will likely need to be decided by the local court.

It is noteworthy that franchise legislation in five Canadian provinces restricts the application of law or venue of adjudication to any place outside of the regulated province. Such legislation provides consistently that any such provision in a franchise agreement providing for adjudication outside of a regulated province will be void "in respect to a claim otherwise enforceable under this Act." Consider the case of a franchise agreement for a franchise (to be) located in Ontario, a regulated province, which requires disputes to be arbitrated in B.C., an unregulated province. Will the Ontario courts subsequently recognize the B.C. arbitrator's decision? The answer may well turn on whether the claim was a statutory one enforceable under the Act or whether it was purely a contractual claim.

A class action relating to franchise agreements which contain an arbitration provision could create an interplay between an arbitration statute, a franchise statute and a class proceedings statute. Although Canadian courts see value in enforcing parties' agreements to resolve disputes through arbitration, they also respect a competing interest in “access to justice” concerns which led to the enactment of class proceedings legislation in the first place. The result has been the use of a “preferable procedure” criterion, a critical part of a class action certification motion, as being the analytical tool by which the court determines whether to exercise its discretion and assert jurisdiction over the dispute or defer to an arbitrator. Accordingly, the inclusion of an arbitration provision in a franchise agreement will not necessarily preclude a class action suit against the franchisor.

It is an open question whether a franchisee may insist on commencing litigation even if its franchise agreement requires arbitration of a dispute with the franchisor. Generally speaking, however, courts will respect a provision requiring arbitration, but subject to resolution of the issues expressed in the previous three paragraphs.

2. Mediation (Marion J. Allan)

Mediation offers many benefits for parties to a franchise dispute. The successful resolution of disputes through mediation is quicker and cheaper than through litigation in the courts or arbitration. Mediation allows the parties to participate in crafting a solution that is acceptable to all of them. Perhaps the most important benefit of mediation for both franchisors and franchisees is confidentiality. Any information presented at, or prepared for, the mediation is privileged and confidential. It cannot be used in any subsequent proceeding.

In Canada, mediation is only mandatory in New Brunswick. However, legislation in some provinces allows a party to a court action to serve a notice to mediate on the other party.

As a mediator, I have found that mediation is a powerful tool to resolve commercial disputes. Litigants who are engaged in a franchise dispute should consider the benefits of mediation. Litigation is significantly more expensive and slower and a trial is open to the public and the media. When a trial is finished, the judge may reserve his or her decision for several months and the outcome is both uncertain and subject to appeal.

The parties to any dispute have “litigation risk”. No matter how strong a franchisor or franchisee considers its case, litigation leading to a trial will always have the following risks:

- The presiding judge may or may not be familiar with franchise law;
- The judge may find some witnesses credible and others not credible;
- The law may change during the course of the litigation;
- If one party makes a written offer to settle and achieves a better result after trial, the losing party may have to pay double the winning party’s costs incurred after that offer was made as well as their own costs; and
- Regardless of who wins at trial, the other party may appeal the decision to the Court of Appeal (and, perhaps the Supreme Court of Canada).

Many franchise agreements contain provisions requiring the parties to engage in mediation before proceeding to arbitration or to court. However, agreements may also have a “carve-out” that permits the franchisor to bring an application in court for an injunction to restrain a breach of a covenant in the franchise agreement by the franchisee.

In contrast to the adversarial nature of courtroom litigation or arbitration, mediation requires the parties and their lawyers to engage in a co-operative process with a neutral mediator. At a mediation, no result is reached until all the parties are in agreement with the result. In some cases, the ongoing relationship between the franchisor and the franchisee may be restored or even improved as a result of the parties having an opportunity to discuss their interests in a comfortable forum.

At the end of a successful mediation, the parties sign minutes of settlement which are contractually binding and are not subject to appeal in court. As part of the settlement, the parties agree to both a consent dismissal order with respect to any court action that has been initiated and mutual releases. This assures finality.

The British Columbia government has stated that it intends to enact franchise legislation in the future. The British Columbia Law Institute has prepared a "Report on a Franchise Act for British Columbia," (see: www.bcli. org/publication/report-on-a-franchise-act-for-British-Columbia). The report recommends against legislating a provision for mandatory mediation. As mentioned above, of the five provinces which currently have franchise legislation, only New Brunswick's legislation provides for mandatory mediation. While British Columbia is not likely to enact a provision requiring mandatory mediation, the parties themselves can initiate mediation of their franchise disputes. If one party is reluctant to mediate, the other party can issue a notice to mediate requiring a mediation to be held in a timely fashion.

IV FRANCHISE CASE LAW

A. Recent Trends (John Rogers)

1. Changes to the Franchise System

In *Fairview Donut Inc. v The TDL Group Corp* ("**Tim Hortons**"), a class of franchisees of the popular Tim Hortons franchise system alleged breach of their franchise agreements and breach of Ontario's statutory duty of good faith by the franchisor making allegedly uneconomical changes to the franchise system.

The court dismissed the allegations, finding that the changes to the system were commercial decisions that the franchisor was allowed to make under the franchise agreement and that the decisions were made reasonably and in good faith. Specifically, the Tim Hortons decision states that there is no obligation on a franchisor to ensure that every item sold by its franchisees makes a profit. Instead, what the franchisor is obligated to do is to abstain from changes that would render the franchisee's investment unprofitable generally. Overall, the Tim Hortons franchises were very profitable.

2. Duty to Act in Good Faith

The duty of good faith which is imposed by franchise statutes in 5 provinces of Canada is likely not meant to override the contractual agreement between franchisor and franchisee. In the Tim Hortons case, the Superior Court of Ontario stated:

> [I]n assessing whether a party has demonstrated good faith and fair dealing in the performance of the agreement, the party's conduct must be considered in the context of and in conjunction with the contract [franchise agreement] that the parties have made. It is not a stand-alone duty that trumps all other contractual provisions…

Where there is a breach of good faith, courts have recently awarded general damages that are independent of any compensatory damages meant to remedy the breach of contract. Typically, these situations are ones where the conduct of the franchisor is truly egregious. Such was the case in *Salah v Timothy's Coffees of the World Inc.* where the franchisor purposely concealed dealings which directly harmed its franchisee.

A 2014 decision of the Supreme Court of Canada in *Bhasin v. Hrygnew* found that parties to a contract must act in good faith and honestly towards each other. The case applies in all provinces of Canada including those without franchise legislation.

3. Protection of the Franchisee

Ontario court franchise decisions, many of which will likely apply in the other 4 franchise-legislated provinces, generally favour franchisees. For example, Ontario courts have held that:

The *Wishart Act* is *sui generis* remedial legislation which deserves a broad and generous interpretation. The purpose of the statute is clear: it is intended to redress the imbalance of power as between a franchisor and franchisee; it is also intended to provide a remedy for abuses stemming from this imbalance. An interpretation of the statute which restricts damages to compensatory damages related solely to proven pecuniary losses would fly in the face of this policy initiative… The purpose of the Act is to protect franchisees.

Courts may choose to favour extrinsic evidence (conduct of the parties) over contractual language in a franchise agreement, "especially in the franchise situation where contracts are not negotiated between the parties but are "standard forms" imposed by the franchisor."

B. Potential Vicarious Liability of Franchisors – Employment Issue (See also IIIE)

Whether a franchisor will be vicariously liable for the acts or omissions of its franchisees and their employees will depend upon the relationship between the franchisor and franchisee as expressed in their franchise agreement and conduct (especially the conduct of the franchisor). The Federal Court of Appeal in Canada recently discussed the employee vs independent contractor issue. In particular, it examined whether a franchisee is in business on its own account. To answer this question, the court first looked to the subjective intent of the parties, asking whether they intended [in their franchise agreement] to be independent contractors. Secondly, the court objectively evaluated the reality of the relationship to see whether it reflected the subjective intent. At this second stage, the court examined objective facts such as the degree of control the franchisor exercises over the activities of the franchisee and its employees, whether the franchisor provides equipment, whether the franchisor is involved in hiring some workers, where the financial management and risk lies, and whether there is an opportunity for the franchisee to profit reasonably from performing its tasks.

Again, franchise agreements should state clearly that the relationship between franchisor and franchisee is one of independent contractors, to establish at the outset the subjective intent of the parties. On the other hand, the reality of the franchisee's operation will determine an objective evaluation of the situation. Where a franchisor exercises a significant degree of control over its franchisee and its business, the likelihood of finding an employer-employee relationship will substantially increase.

C. Protecting the Brand - *Bertico v. Dunkin' Donuts* - Québec Decision

Prior to the decision of the Quebec Court of Appeal *Bertico Inc. v. Dunkin' Brands Canada Ltd.* (the "**Dunkin' decision**") in 2015, the responsibilities of franchisors with respect to brand protection and promotion in Québec were unclear at best. Historically, franchisors had been under no obligation to guarantee the success of their franchisees, for whom they had neither been considered as guarantors nor insurers. Now, according to the Dunkin' decision, franchisors have a general responsibility to act competently to enhance their brands and to ensure their systems are viable as going concerns.

The Quebec Court of Appeal upheld the decision of the Quebec Superior Court. The lower court found the following as facts:

In the early 1990's, Dunkin' Donuts was the market leader in coffee and donut sales in Québec; it had by far the greatest number of coffee and donut locations in the province. This dominance changed dramatically once Tim Hortons entered the Québec market. Even though many Dunkin' Donuts franchisees expressed their concerns to the franchisor, little was done about the loss of sales to Tim Hortons and by 1996, Dunkin' Donuts had lost its position as market leader in Québec to Tim Hortons. Things got worse for Dunkin' Donuts from there.

Twenty-one plaintiff franchisees sued Dunkin' Donuts for negligence and breach of contract and claimed $16.4 million in damages. They argued that the franchisor had (mis)managed its system in such a way as to severely damage the brand, and that changes it had made in product offerings were unsuitable for the Québec market. Furthermore, they claimed that the franchisor had failed to address the competition provided by Tim Hortons, had allowed Tim Hortons to capture the market and had driven many Dunkin' Donuts franchisees into insolvency.

Dunkin' Donuts denied any breach of its obligations, alleging instead that the franchisees were responsible for the demise of their brand in that they had failed to operate clean and modern facilities. It also took the position that it was not a guarantor of the franchisees' success. The franchisor also pointed to a "Quittance générale" [general release] that franchisees had signed when they renovated their stores as a complete bar to their right to bring a lawsuit against the franchisor.

The Superior court ruled that the franchisor had breached implied and express contractual obligations it owed to its franchisees and awarded the full $16.4 million in damages claimed to the franchisees. Since franchise agreements are almost always characterized as "contracts of adhesion" in Québec, its Code requires a franchise agreement to be drafted in clear language, failing which a clause "is [to be] interpreted in favour of the adhering party". The court found that the most important obligation assumed by the franchisor in its franchise agreements was protecting and enhancing its brand, that this was "an ongoing, continuing and successive obligation" of the franchisor and that Dunkin' Donuts failed to do so in the Québec market. Moreover, the "Quittance générale" was not upheld by the court because of Dunkin' Donuts' failure to protect and enhance the brand for more than a decade.

Although the Dunkin' Donuts decision is based on an unusual set of facts, it still represents a significant expansion of the duties franchisors owe to their franchisees with respect to brand promotion and protection, as well as liability for failure to discharge such duties, at least in Québec. Justice Tingley, who decided the Dunkin' Donuts case for the Superior Court, noted that "although not the insurer of the franchisees nor a guarantor of their success, [the franchisor] is nevertheless responsible to them for the harm it has caused by its civil faults." Moreover, Justice Tingley held that all franchise agreements contain an "underlying assumption" that "the brand will support a viable commerce". The Dunkin' Donuts decision highlights a lack of communication between the parties and sends a clear message to franchisors that they should have meaningful consultations with their franchisees when they raise valid concerns and that franchisors should move to redress such concerns in a timely manner.

V METHODS OF EXPANDING TO CANADA (John L. Rogers)

Once an international franchisor has decided to expand its system to Canada, the first question to be decided is which of the following expansion methods to use:

A. Direct Franchising

By this method, the franchisor will use its existing office and staff to grant franchises directly to Canadian franchisees. This method avoids many of the start-up costs that would be incurred if, for example, the international franchisor established and staffed a branch office in Canada. However, it would not shield the franchisor from potential liability if the Canadian operation failed.

B. Canadian Branch

Here, the international franchisor could still grant franchises directly, but recruitment, qualification and training of franchisees, administration and franchisee support would be provided in Canada. The presence of an office and staff in Canada would also provide more "comfort" to Canadian franchisees. Here again, though, the foreign franchisor would not be shielded from potential liability by having a branch.

[Methods **A** and **B** have special income tax consequences attached to them – see Section **IID.**]

C. Canadian Subsidiary

Many international franchisors elect to set up a Canadian subsidiary to operate as franchisor-delegate in Canada. One reason this method is popular is that it may insulate the international franchisor parent from potential liability in the Canadian operation (for example, from any operating losses or lawsuits) and it establishes a Canadian presence for prospective Canadian franchisees. A Canadian subsidiary may be incorporated federally or provincially.

D. Canadian Representative

Rather than being directly involved in a Canadian expansion, a franchisor may decide to contract with a Canadian master franchisee or area developer who is knowledgeable about the Canadian marketplace, recruitment of franchise prospects in Canada and has an established business network in Canada.

VI SETTING UP THE CANADIAN OPERATION (John L. Rogers)

A. "Canadianizing" a Franchise Agreement

An international franchise agreement and franchise disclosure document must both be revised for use in Canada, to comply with Canadian laws and customs.

There are several key issues to keep in mind when making revisions. (See also the commentaries at **IIA**.)

1. Trade-marks

The international franchisor is well-advised to register its trade-marks in Canada as early on as possible, to protect and license them in Canada. Only Canadian registrations of marks will protect their use in Canada. The franchise agreement must give the Canadian franchisee a license to use those of the franchisor's Canadian trade- marks, copyrights and any patents or other intellectual property that are part of the franchise system, either in an exclusive or non-exclusive territory of Canada. It must expressly reserve to the franchisor direct or indirect control over the character and quality of those goods and services offered by franchisees which are identified by the franchisor's Canadian trade-marks.

The franchise agreement should allow the franchisor to establish standards, policies and rules governing all products and services sold in association with licensed trade-marks and to enter the franchisee's premises and inspect the way the franchisee is actually using the marks. The franchisee should be prohibited from challenging the validity of the marks or claiming or using any other trade-mark that is confusingly similar to any of the franchisor's marks. The agreement should also deal with graphic standards and other rules governing how the franchised marks and other proprietary rights of the franchisor may be reproduced and used. It should also address ownership issues, potential lawsuits, potential infringements by third parties, assignments and sublicensing and "de identification" with marks and the franchise system by the franchisee upon a default and termination.

The franchise agreement should require the Canadian franchisee to display notices on the franchised premises that the franchisor owns marks and has licensed use of the marks to it. Under the *Trade-marks Act*, such notification gives the franchisor the benefit of a presumption at law that the franchisee's use is licensed and that the character or quality of the related goods or services is under the franchisor's control.

If the trade-marks are only pending for registration in Canada when the Canadian franchise agreement is prepared, the franchise agreement should state this and should give the franchisor the right to substitute different trade- marks if any Canadian registration application proves to be unsuccessful. The franchise documentation should also address the possibility and costs of changing signage and other branded items where such change(s) become(s) necessary.

2. Domain Names

Internet, intranet and extranet websites are ways for franchisors to communicate with their franchisees, potential franchisees, and the public. The franchisor's ability to maintain an effective online presence will depend largely on the domain names the franchisor has registered compared to those which third parties have registered. Therefore, the franchise agreement should specifically prohibit or limit the franchisee's ability to register domain names incorporating any material part of the franchisor's trade-marks.

3. Applicable Law/Courts

The franchise agreement should state clearly which jurisdiction's laws and courts will apply to any litigation that may occur between the franchisor and franchisee.

A franchisor expanding to Canada should think carefully before naming its home jurisdiction (laws and courts) as the exclusive jurisdiction for litigation. By way of illustration, if a franchisee breaches the franchise agreement, the franchisor may need a local injunction to prevent the franchisee from misusing intellectual property, competing or otherwise behaving inappropriately and the franchise agreement should allow for this. It is difficult to “transport” an injunction from a foreign jurisdiction to Canada since a Canadian court will still want to rule on whether the injunction is enforceable within a Canadian jurisdiction. It is also easier to enforce payment obligations in Canada through Canadian courts.

As noted earlier, the Canadian provinces with franchise statutes all require that the laws and courts of their own provinces be used for claims enforceable under such statutes and franchise agreements should reflect this fact for franchises located in one of those provinces. However, franchise agreements for franchised businesses (to be) located outside of such provinces may provide otherwise.

4. Non-Competition and Confidentiality

Canadian franchise agreements include restrictive covenants (non-competition clauses) to prevent franchisees from competing with the franchisor both during the term (and any renewal) of their franchise agreements and for a period of time after expiration or termination. Canadian courts interpret restrictive covenants strictly and will not enforce them when they go further than is reasonably necessary to protect the legitimate business interests of the franchisor. If any one of the three key elements of a restrictive covenant (i.e., territory, duration and scope of restricted activity) is held to be excessive by a Canadian court, then the whole restrictive covenant will typically be declared unenforceable. Accordingly, it is wise for franchisors to act reasonably when drafting all three elements of such covenants.

Also, Canadian franchise agreements normally include clauses by which franchisees agree to maintain the confidentiality of their franchisor’s proprietary information, such as trade secrets, many of which may be contained in the franchisor’s operations manuals. Again, these clauses will only be enforceable in Canada if they are found to be reasonable.

5. Statutory Warranties and Conditions

Most provinces and territories in Canada have laws which imply specific warranties and conditions into contracts regarding the sale of goods. If a franchisor does not expressly disclaim these warranties and conditions, it may be sued if any products that the franchisor supplies do not meet statutory standards of quality. Some of these warranties and conditions may not be disclaimed, depending upon which province’s laws apply and whether the sale is a commercial transaction or a consumer transaction.

6. Alternative Dispute Resolution

It is an open question as to whether a franchisee may insist on a court action if its franchise agreement requires arbitration of a dispute with the franchisor. However, generally speaking, courts will respect a provision requiring arbitration.

As discussed in G above, many franchise agreements contain a provision requiring the parties to engage in mediation before proceeding to an arbitration or litigation. Often, however, such a provision includes a “carve-out”, permitting the franchisor to resort immediately to litigation, when it wishes to seek an injunction to restrain a breach of a trade-mark covenant by a franchisee, for example.

7. Operations Manual

In addition to the franchise agreement, the franchisor will need to revise its operations manual to reflect relevant federal and provincial laws of Canada. Examples are provincial employment laws, federal income tax laws, GST, HST, PST and in Québec, the Code and French language laws. Converting weights and measures of products to metric must also be done, if necessary.

8. Miscellaneous

There are several other considerations to keep in mind in 'Canadianizing' a franchise agreement. For example, the international franchisor will have to decide how to structure an advertising fund in Canada. Will contributions from Canadian franchisees be combined with those in an international fund, perhaps with a portion of such fund being used for Canadian advertising? Or will a separate fund be set-up for Canada? Canadian franchisees will normally prefer the second option. In the province of Québec, French language advertising will have to be used.

The franchise agreement should also specify whether monetary amounts are expressed in Canadian dollars or a foreign currency. If payments are to be made in a foreign currency, the agreement should describe how and when currency conversion will occur and who will bear the cost of conversion.

Converting the franchise agreement to allow for some differences between Canadian spelling and customs is another factor. For example, in Canada "labor" is spelled "labour", an "attorney" is a "lawyer" a "check" is a "cheque" and a "felony" is an "indictable offence".

An annual interest rate for late payments must be expressed or the franchisee will only be required to pay a federal statutory rate of 5% per year.

Provision also needs to be made for any non-resident withholding tax on payments which are made on account of initial fees, royalties or interest. The agreement should specify whether such payments are net of withholding tax or whether the payments are to be "grossed up" to include withholding tax. Moreover, the agreement should separate the types of payments which are clearly subject to withholding taxes (i.e.: royalties) from those which are not; if they are not separated, withholding tax may be applicable to total amounts admitted. (See further, **IID.**) The agreement must provide for the franchisee to pay withholding tax and obtain receipts for the franchisor which can often claim the receipted amounts as expenses on its own tax returns.

B. Preparing a Franchise Disclosure Document (See further, III.A) (John L. Rogers)

It is noteworthy that there is no federal franchise legislation governing franchising in Canada (again, only legislation in 5 of its 10 provinces).

In the 5 legislating provinces, a detailed franchise disclosure document must be prepared by the franchisor and given to each potential franchisee at least 14 days before a franchise agreement is signed. Franchise disclosure documents used in jurisdictions outside Canada will not comply with provincial franchise legislation without substantial amendment.

None of the Canadian franchised provinces require registration of the franchisor or review of franchise documents.

In Canada's franchise-regulated provinces, no special form of franchise disclosure document is required and every franchise law firm has established its own format. What is mandatory is that all requirements of the franchise statute of the province concerned, and its regulations, be covered. Important requirements are particulars about the franchisor and its directors, itemization of start-up costs, a copy of current financial statements of the franchisor, details of any court, administrative or bankruptcy proceedings involving the franchisor or any of its directors, contact details for current and past franchisees and any "material facts" not specified in franchise legislation.

VII CLOSING REMARKS

The intent of this paper is to provide international franchisors and their legal advisors with a general overview of those laws of Canada and its provinces which affect franchising as of September, 2015. It is not meant to be definitive of any legal aspect of franchising in Canada at such time.

Nothing in this paper should be taken as legal advice by any reader. However, the writers contributing to this paper would be pleased to provide legal advice in the respective areas about which they have written, including any legislative action or court decision that may arise after September, 2015.

The following **Section VIII** provides the professional biographies of each of the contributing writers, including their email addresses and telephone numbers.

John L. Rogers, editor and contributor.

(September, 2015)

VIII PROFESSIONAL BIOGRAPHIES OF CONTRIBUTORS

[BRENDAN MORLEY BIO TO BE ADDED]

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Neil Melliship is a partner of the firm and the Chair of the Intellectual Property Group. He is also a member of the firm's Technology and Health Care Groups.

Neil has a background in commercial law and his practice is focused on complex intellectual property and other legal issues arising out of the development, licensing, implementation and use of information technology. His clients include a wide array of computer software developers, hardware and electronics manufacturers, major financial and insurance service providers, public bodies and other businesses involved in developing, commercializing, acquiring and implementing information technology-based products and services.

Neil has written a number of articles on intellectual property matters, including a summary of the Canadian trade-mark registration process, a review of the licensing provisions under the *Canadian Trade-Marks Act*, a guide to choosing enforceable trade-marks, and the .ca Domain Registry. He has also been a presenter on intellectual property law for the Centre for Digital Media, Masters of Digital Media Program at Great Northern Way Campus, on Ecommerce in Canada for Insight, on technology licensing issues for the BC Continuing Legal Education and on advanced trade-mark law issues for Law Seminars International.

Based on peer selection, Neil has been recognized as one of the *Best Lawyers in Canada* since 2011 for Intellectual Property Law and Technology Law, as well as being named the *Best Lawyers' 2014* Vancouver Technology Law "Lawyer of the Year." Neil was recently named to the 2014 World Trademark Review (WTR) 1000, an annual listing of the World's Leading Trademark Practitioners, in the category of Individuals: Prosecution and Strategy.

Neil is a co-founder of and regular contributor to the Canadian Trademark Blog (trademarkblog.ca). He is regularly called on by the media to comment on current trade-mark, domain name and other intellectual property matters.

Neil graduated from the University of British Columbia Faculty of Law in 1985. He is an active volunteer in the community.

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Michael Roman is Associate Counsel to the firm and a member of the Higher Learning and Intellectual Property Groups. He has diverse experience in technology law, helping clients to secure, commercialize, and defend their intellectual capital, and advising them on related business matters.

In addition to being a lawyer, Michael is also a Registered Patent Agent and a Registered Trade-mark Agent, qualified to practice before the Canadian Intellectual Property Office and to represent Canadian-resident clients before the United States Patent and Trademark Office.

Michael lectures widely and has taught intellectual property law at the post-secondary level, including at the University of Victoria Faculty of Law, Simon Fraser University Management of Technology MBA program, the University of British Columbia Faculty of Law and Faculty of Commerce, and the British Columbia Institute of Technology Venture Program. Michael currently teaches the graduate course Intellectual Property Management and Technology Commercialization at the University of British Columbia Faculty of Applied Science.

Michael obtained a Bachelor of Applied Science degree in Electrical Engineering with honours from the University of Toronto in 1988 and a Bachelor of Laws degree from the University of British Columbia in 1991.

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Richard Weiland is a partner of the firm and a member of the Tax & Estate Planning, Wealth Preservation, Taxation, Private Company Transactions, Corporate & Commercial and Pensions & Benefits Groups. His practice has an emphasis on providing tax advice in the context of corporate reorganizations, commercial transactions, and estate planning. He also assists business clients with many general corporate and commercial matters.

Richard has completed all three parts of the Canadian Institute of Chartered Accountants' In-depth Tax Course. He authored a new chapter on Probate Fees for the 2007 edition of the BC Probate and Estate Administration Practice Manual published by the Continuing Legal Education Society of British Columbia. He is also a contributing author for updates to several chapters in the British Columbia Estate Planning & Wealth Preservation manual also published by CLE.

Richard earned a Bachelor of Arts degree in Communications from Trinity Western University in 1997, and a Bachelor of Laws degree from the University of Victoria in 2001. He was called to the Bar of British Columbia in 2002.

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Larry Munn is a partner of the firm and Chair of the Privacy Law Group. He is also a member of the Business Litigation, Higher Learning, Intellectual Property and Insurance Groups. His practice focuses on administrative and regulatory issues and complex litigation.

Larry works with various clients providing advice on legislation and policy development matters. He is counsel to the Insurance Bureau of Canada and appears before the British Columbia Utilities Commission in respect of the ICBC rates and regulation.

His business litigation practice focuses on a variety of commercial matters, with particular emphasis on trade-mark and licensing issues. Recent assignments include a complex trade-mark dispute, numerous opposition proceedings and ongoing advice regarding the development of an extensive trade-mark program. Larry also provides advice on freedom of information, privacy and personal information.

Larry has both a Diploma in Legislative Drafting and an LL.M. from the University of Ottawa. He received his LL.B. from McGill University. Before moving to Vancouver and joining Clark Wilson, he practiced with a large Toronto law firm.

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Lien Kuan Larry Yen is a partner of the firm and a member of the Corporate Finance & Securities, United States Law, Immigration and Aviation Groups.

Larry advises public and private companies on private securities offerings, initial public offerings, regulatory requirements under the United States federal securities statutes and business succession strategies through buy-sell arrangements and shareholders' agreements.

He also advises public and private companies on acquisitions, mergers, and reverse takeovers, and assists clients from the United States, Europe and Asia in establishing new businesses in Canada in areas such as consulting, information technology, and manufacturing.

Larry speaks, reads and writes Mandarin Chinese fluently. He received his Bachelor of Science, Mathematics and Biology, from Boston College and his Juris Doctor, magna cum laude, from Seattle University. He was called to the British Columbia Bar in 2000.

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Rosemary John is a partner with the firm's Financial Services Group and Private Company Transactions Group.

Rosemary has a broad range of international and domestic finance experience and has acted for lenders, borrowers, arrangers, originators and issuers on all types of debt financing including project finance, asset backed loans, real estate finance, leveraged finance, securitizations and other commercial transactions.

Rosemary started her career as a lawyer as an associate at a national law firm in Vancouver before moving to London, UK, to join the capital markets, banking and finance groups of Clifford Chance LLP, a top-tier international law firm.

During her five years in London, Rosemary worked closely with a number of the world's largest investment banks, including The Royal Bank of Scotland, Barclays, Credit Suisse and Citigroup. She handled a variety of transactions (most of which were multi-jurisdictional), including syndicated loans, commercial and residential mortgage-backed securitizations, covered bond programmes, bridge financings, restructurings and leveraged buy-outs. Rosemary has also previously worked for a leading offshore law firm in the British Virgin Islands where she provided advice to international clients and lead counsel on all aspects of BVI corporate and finance law issues.

Since returning to Vancouver and joining Clark Wilson, Rosemary has worked closely with financial institutions, private lenders and borrowers on a wide variety of debt finance transactions.

Rosemary received her Bachelor of Arts Degree with distinction from the University of Victoria and her Juris Doctor from the University of Toronto. She is a solicitor of the Senior Courts of England and Wales and is admitted as a member of the Eastern Caribbean Supreme Court. Rosemary was called to the Bar of British Columbia in 2004.

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Kevin MacDonald is a partner of the firm and Chair of the Commercial Lending Group. He is also a member of the Commercial Real Estate and Insolvency & Restructuring Groups, and Chair of the Students Committee.

Kevin acts for various financial institutions, including domestic banks, foreign banks, trust companies, life insurance companies, pension funds and private lenders. He also acts on behalf of a number of real estate developers.

He obtained his Bachelor of Arts degree in History and English from Whittier College, California in 1982, his Bachelor of Laws from the University of British Columbia in 1987. He was called to the Bar of British Columbia in 1988.

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Jyotika Reddy is a partner with the firm's Commercial Real Estate Group.

Jyotika's practice focuses on real estate development and transactions. She regularly advises clients on the buying, selling, leasing and financing of real property, including shopping centres, hotels, office buildings and industrial properties. She has been involved with the development, financing and marketing of commercial, residential and mixed use developments.

Jyotika also has extensive experience acting for Canadian chartered banks and other local and national lending institutions in connection with the structuring and documentation of credit facilities and secured transactions, including construction financing, project financing and syndicated loan transactions. She regularly acts as a guest instructor on secured transactions as part of The British Columbia Law Society's professional legal training course.

Jyotika obtained her Bachelor of Arts degree in 1996 and her Bachelor of Laws degree in 2000, both from the University of British Columbia. She was called to the British Columbia Bar in 2001.

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Andrea Raso is a partner of the firm and Chair of the Labour & Employment Group. Andrea's practice includes acting for employers in defence of wrongful dismissal and related tort claims; disability benefits litigation; human rights complaints; privacy complaints; injunctions; class actions; employment standards complaints; labour board hearings; rights arbitration and workers compensation; and health and safety matters. She has developed significant expertise acting for a broad range of private and public sector employers and has appeared before all levels of court including the Supreme Court of Canada.

Andrea provides her clients with proactive strategies for all human resources matters such as employment contracts, executive compensation, restrictive covenants, policy development and M&A and restructuring. She has significant expertise in privacy matters, both in the employment setting and also in respect to commercial transactions.

Andrea obtained *the Lexpert* Zenith Award: Celebrating Leading Women Lawyers in 2013 and is also a recipient of a Diamond Jubilee Medal for Diversity and Inclusion Initiatives.

Andrea obtained her Bachelor of Arts degree from the University of Toronto in 1989 and her Bachelor of Laws degree from the University of Windsor in 1992. She was called to the Bar of Ontario in 1994, British Columbia in 2008 and Northwest Territories in 2011. She also obtained a Mediation Certificate from the University of California at Los Angeles in 2002.

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The Honourable Marion J. Allan is a mediator and arbitrator who serves as Associate Counsel to the firm. She is a member of the Alternative Dispute Resolution, Wealth Preservation, Estate & Trust Litigation and Business Litigation Groups.

Marion offers a wealth of strategic advice, insight and dispute resolution assistance to our clients and lawyers. She has a particular interest in helping clients resolve disputes in the areas of wills and estates, insurance coverage, personal injury and employment, as well as in connection with strata property, real estate and construction matters. She has completed mediation and conflict resolution training at the Continuing Legal Education Society of British Columbia (CLEBC) and the Justice Institute of BC (JIBC).

Marion practiced civil litigation for 10 years. She was an adjunct professor of civil litigation from 1984-1988 prior to her appointment to the County Court of Vancouver in 1988 and elevation to the Supreme Court of BC in 1990. She retired from the Supreme Court in April 2012.

Long regarded as a hard-working and highly respected member of the judiciary, Marion earned praise for her decisions in response to complex legal issues, presiding as a justice of the Supreme Court of British Columbia and a Deputy Judge of the Supreme Court of the Yukon Territory. She elected supernumerary status in August 2007. During her time on the bench, she participated in many educational programs for judges and lawyers for the National Judicial Institute, Canadian Bar Association, Continuing Legal Education and Trial Lawyers Association, on topics such as evidence, family law, civil procedure, fiduciary obligations, personal injuries and elder law. Marion chaired the Supreme Court Rules Revision Committee from 1994-1999. She has devoted considerable attention to elder law issues and has been engaged in research with the Canadian Centre for Elder Law Studies. Marion was awarded the Trial Lawyers Association of BC Judge of the Year Award in 2012 and was appointed to the BC Law Institute's Board of Directors in August, 2013.

Marion obtained her Bachelor of Arts from the University of British Columbia in 1967, a Master of Arts in International Relations from the University of Alberta in 1970 and a Bachelor of Laws from UBC in 1977. She was called to the Bar of British Columbia in 1978.

John L. Rogers | Partner | Phone: 604 891 7758 | Email: JRogers@cwilson.com

John Rogers is Associate Counsel to the firm, Chair of the Franchise Law Group and a member of the Corporate & Commercial Group. He is a leading lawyer in the field of franchising and is knowledgeable in the preparation of a range of contracts required by various commercial enterprises.

In over 30 years of practice, John has developed expertise in a wide variety of corporate and commercial practice areas, including incorporation and organization of simple and complex corporations for Canadian and international clients, preparation of shareholders' agreements and joint venture agreements, planning, structuring and implementing contractual relationships on a local or cross-border basis, providing opinions on Canadian commercial legal issues and ongoing representation of Canadian and international clients.

John completed a four-year term as General Counsel, Director and Secretary of the Canadian Franchise Association (CFA) in April 2011. He is now a member of CFA's Government Relations and Legal & Legislative Affairs Committees. He is recommended by the *International Who's Who of Business Lawyers*, by *The Canadian Legal Lexpert® Directory* and by *Franchise Times* as a "Legal Eagle".

John's practice takes him throughout Canada and the United States and into Mexico.

John is a contributing editor to the *Franchise Distribution Journal*. He is also an author and lecturer for the International Bar Association, International Franchise Association, American Bar Association, Canadian Franchise Association, The Canadian Institute, Ontario Bar Association and Continuing Legal Education Society.

He received his Bachelor of Laws degree from the University of British Columbia in 1976. John was called to the British Columbia Bar in 1977 and to the Ontario Bar in 2005.