

Contents

| | |
|---|--------------|
| About the Editors | xv |
| About the Authors | xvii |
| Foreword to the First Edition | xxv |
| Foreword to the Second Edition | xxvii |
| Acknowledgments | xxix |
| Introduction to the First Edition | xxxi |
| Introduction to the Second Edition | xxxv |
| Chapter 1 | |
| Structuring an Expansion to Canada | 1 |
| <i>John L. Rogers and David M. Shaw</i> | |
| I. Introduction | 3 |
| II. Options for Expansion to Canada | 4 |
| A. Branch or Subsidiary | 4 |
| 1. Branch | 5 |
| (a) Structure | 5 |
| (b) Tax considerations of a branch | 5 |
| (c) Tax advantages of a branch | 6 |
| (d) Tax disadvantages of a branch | 7 |
| (e) Registrations required for a branch | 7 |
| 2. Subsidiary | 8 |
| (a) Structure | 8 |
| (b) Jurisdiction of incorporation of a subsidiary in Canada .. | 9 |
| (c) Tax considerations of a subsidiary | 10 |
| (d) Tax advantages of a subsidiary | 10 |
| (e) Tax disadvantages of a subsidiary | 10 |
| (f) Potential shareholders' agreement for a subsidiary | 11 |
| (g) Registrations required for a subsidiary | 12 |
| B. Special Rules for an Unlimited Liability Company (ULC) | 12 |
| 1. Tax Considerations of a ULC | 12 |
| 2. Tax Advantages of a ULC | 12 |
| 3. Disadvantages of a ULC | 13 |
| C. Joint Venture | 13 |
| 1. Equity Joint Ventures | 15 |
| (a) Partnership | 15 |
| (i) General Partnership | 16 |

| | |
|---|----|
| (ii) Limited Partnership | 17 |
| (iii) Tax Considerations of a Partnership | 17 |
| (b) Corporation | 18 |
| (i) Limited Liability Corporation | 18 |
| (ii) ULC | 19 |
| 2. Co-ownership | 20 |
| 3. Contractual Joint Venture | 21 |
| D. Master Franchise or Area Development | 22 |
| 1. Master Franchise Agreement | 22 |
| 2. Area Development Agreement | 24 |
| 3. Tax Considerations | 25 |
| III. Goods and Services Tax (GST) and Harmonized Sales Tax (HST) .. | 25 |
| A. Overview | 25 |
| B. Application of GST/HST to Franchises | 26 |
| C. Registration Requirements | 27 |
| 1. Branch Operation | 27 |
| (a) Mandatory registration | 27 |
| (b) Voluntary registration | 28 |
| (c) Security | 28 |
| 2. Canadian Subsidiary | 29 |
| IV. Provincial Sales Tax | 29 |
| A. Overview | 29 |
| B. Retail Sales Tax | 29 |
| C. Québec Sales Tax (QST) | 30 |

Chapter 2

| | |
|--|-----------|
| Franchising in the Province of Québec | 31 |
| <i>Pascale Cloutier and Stéphane Teasdale</i> | |
| I. Introduction of the Province of Québec | 33 |
| II. Disclosure | 33 |
| III. The Franchise Agreement | 35 |
| A. Nature of Agreement | 35 |
| B. Adhesion Contract | 36 |
| C. Good Faith | 38 |
| D. External Provisions | 39 |
| E. Abusive Provisions | 40 |
| F. Covenants Against Competition | 41 |
| G. Termination | 42 |
| IV. Charter of the French Language (CQLR c C-11) | 42 |
| A. Office Québécois de la Langue Française | 43 |
| B. Use of Trademarks and Name | 43 |
| C. Signs and Advertising | 43 |
| D. Translation of Agreements and Other Materials | 45 |
| E. Products and Labels | 45 |

| | |
|--|----|
| F. Websites | 47 |
| G. Labour Relations | 47 |
| H. Penalties and Other Sanctions | 47 |
| V. Consumer Laws | 48 |
| A. Rules Governing Consumer Contract | 48 |
| B. Warranties | 50 |
| C. Language | 52 |
| D. Representations and Advertising | 52 |
| E. Penalties and Other Sanctions | 53 |
| VI. Security | 53 |
| A. Personal Guarantees | 53 |
| B. Movable Hypothecs | 55 |
| 1. Creation | 55 |
| 2. Registration | 55 |
| 3. Enforcement | 55 |
| C. Immovable Hypothecs | 56 |
| VII. Recent Developments and Case Law | 57 |
| A. Liability | 58 |
| B. The Obligations Contained in the Franchise Agreements | 58 |
| C. The “Intensity” of the Franchisor’s Contractual Obligations | 63 |
| D. The Application of the Business Judgment Rule | 63 |
| E. Evidence of the Franchisor’s Fault | 63 |
| F. Causation | 64 |
| G. The Releases | 64 |
| VIII. Damages | 64 |
| A. Damages for Lost Profits | 64 |
| B. Damages for Lost Investments | 65 |
| C. Significance of the Case | 66 |

Chapter 3

Other Laws Affecting Franchising in Canada 67

Edward Levitt and Clark Harrop

| | |
|--|----|
| I. Introduction | 69 |
| II. Laws Affecting the Movement of People and Goods Across the Border | 69 |
| A. Bringing Your Executives and Employees into Canada | 69 |
| 1. Temporary Work Permits | 70 |
| (a) Temporary resident visa exemptions | 71 |
| (b) Work permit exemptions | 71 |
| (c) Work permit categories | 72 |
| (d) Work permit conditions | 73 |
| (e) Hiring temporary foreign workers | 73 |
| 2. Permanent Residency Requirements | 74 |
| B. Bringing Your Existing Supply Chain into Canada | 75 |

| | |
|--|-----|
| 1. Consumer Packaging and Labelling Act | 76 |
| 2. Food and Drugs Act | 76 |
| (a) Food labeling and advertising | 77 |
| 3. Customs Tariffs | 78 |
| (a) North American Free Trade Agreement | 79 |
| (b) Other trade agreements | 79 |
| 4. Taxes on Imports into Canada | 80 |
| (a) Mandatory GST/HST registration | 83 |
| (b) Voluntary GST/HST registration | 83 |
| 5. Supply Management in Canada—Marketing Boards in Canada | 83 |
| (a) Milk and dairy-based products—Canadian Dairy Commission | 84 |
| (b) Chicken—Chicken Farmers of Canada | 85 |
| (c) Eggs—Canadian Egg Marketing Agency | 85 |
| 6. Importation and Sourcing/Sale of Alcohol | 86 |
| III. Laws Affecting How Products and Services Are Advertised | 87 |
| A. Trademarks, Trade Names and Trade Dress | 87 |
| B. Pricing and Advertising in Canada | 87 |
| 1. Competition Act and Resale Price Maintenance in Canada .. | 88 |
| 2. Advertising Sale Prices in Canada | 89 |
| (a) Bait-and-switch selling | 89 |
| (b) False and misleading advertising | 90 |
| 3. Voluntary Codes | 90 |
| (a) Canadian Code of Advertising Standards | 91 |
| (b) Broadcast Code for Advertising to Children | 91 |
| 4. Language Laws in Québec | 91 |
| C. Canada’s Anti-Spam Law | 92 |
| D. Contests in Canada | 93 |
| 1. Competition Act | 94 |
| 2. Criminal Code Provisions Governing Illegal Lotteries | 95 |
| 3. Contest Registration in Québec | 95 |
| E. Nutrition Claims | 95 |
| 1. Voluntary Codes | 96 |
| (a) Restaurants Canada—voluntary guidelines to providing nutrition information to consumers | 96 |
| (b) British Columbia Informed Dining Program | 98 |
| 2. Non-voluntary Requirements | 98 |
| (a) Ontario | 98 |
| IV. Privacy Law | 99 |
| A. Collection of Customer Data | 99 |
| 1. Federal—PIPEDA | 100 |
| (a) Canada’s ten privacy principles | 101 |

| | |
|---|-----|
| 2. Alberta | 105 |
| 3. British Columbia | 106 |
| 4. Québec | 107 |
| V. Securing Payment | 108 |
| A. Taking Security in a Franchisee’s Assets | 109 |
| 1. Provincial PPSA Legislation | 109 |
| (a) Attachment | 109 |
| (b) Online registry system | 110 |
| (c) Place of registration | 111 |
| (d) Priority | 111 |
| 2. Québec—the Hypothec | 112 |
| B. Personal Guarantees from Franchisees | 113 |
| 1. Alberta—Guarantees Acknowledgement Act | 113 |
| 2. Québec—Implications of the Civil Code | 113 |

Chapter 4

Trademark and Other Intellectual Property Issues115

Judy Rost and Bruno Floriani

| | |
|---|-----|
| I. Trademarks | 117 |
| A. Common-Law Protection of Trademarks | 117 |
| 1. Common-Law Passing-Off | 117 |
| B. Trade-Marks Act | 119 |
| 1. Types of Trademarks | 120 |
| (a) Trademarks | 120 |
| (b) Certification trademarks | 120 |
| (c) Distinguishing guises | 121 |
| (d) Official trademarks | 121 |
| 2. Registrability | 122 |
| (a) Use and Distinctiveness as Key Features | 122 |
| (b) Registrable trademarks | 124 |
| (c) Filing basis for registration | 125 |
| 3. Registration Process | 126 |
| 4. Prohibited Use and Remedies | 128 |
| (a) Statutory passing-off | 128 |
| (b) Infringement | 129 |
| (c) Depreciation of goodwill | 130 |
| (d) Other remedies | 131 |
| 5. Expungement | 131 |
| (a) Cancellation for non-use | 131 |
| (b) Invalidity | 132 |
| 6. Licensing | 133 |
| (a) What constitutes use under license | 133 |
| (b) Marking requirements | 135 |
| (c) Intercompany licenses | 136 |
| 7. Upcoming Changes to the Trade-marks Act | 137 |

| | |
|--|-----|
| 8. International Treaties | 138 |
| C. Domain Names | 139 |
| 1. Registration of .ca Domain Names | 139 |
| 2. Domain Name Disputes and Resolution | 139 |
| II. Copyright | 140 |
| A. Copyright Act | 140 |
| 1. Scope and Term of the Right | 141 |
| (a) Definition of copyright | 141 |
| (b) Types of works | 141 |
| (c) Criteria of originality | 141 |
| (d) Conditions for subsistence of copyright | 142 |
| (e) Term | 143 |
| 2. Ownership of Copyright | 143 |
| (a) Ownership and author of a work | 143 |
| (b) Employees vs. independent contractors | 143 |
| (c) Assignments and licenses | 144 |
| (d) Translation and creation of independent work | 144 |
| 3. Moral Rights | 145 |
| (a) Right to integrity and association | 145 |
| (b) Assignments and waivers | 145 |
| (c) Term | 145 |
| 4. Registration Process | 145 |
| 5. Prohibited Use and Remedies | 146 |
| (a) Infringement of copyright | 146 |
| (b) Exceptions to infringement | 146 |
| (c) Remedies | 147 |
| 6. Changes to Canadian Copyright Law | 147 |
| III. Other Intellectual Property Rights | 148 |
| A. Industrial Designs | 148 |
| B. Patents | 149 |
| IV. Confidential Information Protection | 150 |

Chapter 5

The Canadian Franchise Agreement 151*Darrell Jarvis and Edith Dover*

| | |
|--|-----|
| I. Introduction | 153 |
| A. Term and Renewal | 155 |
| B. Territory and Reservation of Rights | 159 |
| C. Non-competition Covenants | 161 |
| D. Initial Fees and Royalty Payments | 165 |
| E. Interest Rates | 168 |
| F. Location, Design and Construction | 169 |
| G. Pricing Provisions | 171 |
| 1. Unfair Business Practices | 172 |

| | |
|---|-----|
| H. Training and Operating Assistance | 173 |
| I. Advertising Fund | 174 |
| 1. Establishment of Advertising Funds | 174 |
| 2. Advertising Provisions in the Franchise Agreement | 176 |
| J. Intellectual Property Protection and Confidentiality | 179 |
| K. License to Use Trademarks | 181 |
| L. Accounting Records, Audits and Inspections | 184 |
| M. Insurance | 185 |
| 1. Liability Insurance | 185 |
| 2. Property Insurance | 186 |
| N. Assignment, Transfer and Sale | 186 |
| O. Termination | 189 |
| 1. Franchisee's Obligations upon Termination or Expiration .. | 191 |
| 2. Franchisor's Rights and Obligations upon Termination ... | 192 |
| P. Guarantor's Covenants | 192 |
| Q. Security to Franchisor | 194 |
| R. Boilerplate Provisions | 195 |
| 1. Canadian Spelling and Language Issues | 195 |
| 2. Currency Selection | 197 |
| 3. Penalty Clauses and Equitable Remedies | 197 |
| 4. Waiver of Jury | 199 |
| 5. Severability | 199 |
| 6. Entire Agreement Clause | 199 |
| 7. Governing Law and Jurisdiction | 201 |
| 8. Mediation and Arbitration | 202 |
| II. Conclusions | 204 |

Chapter 6

Franchise Disclosure Issues in Canada205

Andraya Frith and Daniel Zalmanowitz

| | |
|---|-----|
| I. History of Franchise Legislation in Canada | 207 |
| A. Introduction | 207 |
| B. Alberta | 207 |
| C. Ontario | 208 |
| D. Prince Edward Island | 209 |
| E. New Brunswick | 210 |
| F. Manitoba | 210 |
| G. British Columbia | 210 |
| H. Other Provinces and Territories | 211 |
| I. Uniform Law Conference of Canada (ULCC) | 211 |
| II. Overview of the Requirements under Canadian Provincial Franchise Legislation | 212 |
| A. Introduction | 212 |
| B. Highlights of the Provincial Acts | 213 |

| | |
|--|-----|
| C. Important Definitions under the Provincial Acts | 214 |
| 1. Franchise | 214 |
| 2. Franchise Agreement | 217 |
| 3. Franchisor’s Associate | 218 |
| III. Application of the Provincial Acts | 220 |
| A. Obligation to Disclose | 223 |
| B. Exemptions from the Obligation to Disclose | 226 |
| C. Material Changes | 228 |
| D. Delivery Mechanics | 229 |
| E. Rescission | 231 |
| F. Damages for Misrepresentation | 234 |
| G. Liability | 235 |
| H. Waivers, Jurisdiction, Venue and Forum | 235 |
| I. Financial Information Exemptions | 237 |
| J. Financial Statements | 247 |
| K. Certificate of Disclosure | 249 |
| L. Risk Statements | 250 |
| M. Alternative Dispute Resolution | 251 |
| N. Disclosure Document General Information | 252 |
| O. Disclosure Document Material Facts | 253 |
| IV. Matters of Special Interest to Foreign Franchisors | 263 |
| A. Can a Foreign Franchisor Use Its Domestic Disclosure Document in Canada? | 263 |
| 1. Ontario | 263 |
| 2. Alberta, P.E.I., New Brunswick, Manitoba and British Columbia | 265 |
| B. Can a Foreign Franchisor Use Its Domestic Law to Govern Its Canadian Franchise Documents? | 266 |

Chapter 7

Dispute Resolution and Franchise Litigation in Canada 269

| | |
|---|-----|
| <i>Geoff Shaw and Jeff Hoffman</i> | |
| I. Introduction | 271 |
| II. Legal System | 272 |
| III. Jurisdiction of Courts | 273 |
| IV. Litigation Differences Between Canada and the U.S. | 274 |
| V. Judge-Made Law | 275 |
| VI. Damage Awards | 279 |
| A. Introduction | 279 |
| B. Codified Damages in Franchise Law | 279 |
| C. Punitive Damages | 281 |
| D. Recent Developments | 282 |
| VII. Costs and Legal Fees | 286 |

| | |
|--|-----|
| VIII. Class Actions in Canada | 288 |
| A. Introduction | 288 |
| B. Procedure | 288 |
| C. Goals of Class Proceedings | 289 |
| D. Recent Developments | 289 |
| 1. Tim Hortons | 289 |
| 2. Midas Canada | 290 |
| 3. Quizno's Canada | 291 |
| 4. Pet Valu Canada | 292 |
| 5. Other Cases | 295 |
| E. Conclusion | 296 |
| IX. Right of Association | 296 |
| X. Enforcement of Foreign Judgments in Canadian Courts | 304 |
| A. General | 304 |
| B. Defences to a Foreign Judgment | 306 |
| C. Recognition of Final Money Judgments and Other Final Orders | 307 |
| D. Moving for Injunctive Relief | 308 |
| E. Québec Considerations | 309 |
| XI. Choice of Law and Forum and Waivers | 309 |
| A. Choice of Law and Choice of Forum Provisions | 309 |
| B. Non-waiver Provisions | 317 |
| XII. Duty of Good Faith and Fair Dealing in Canada | 322 |
| A. What Does the Duty Entail? | 322 |
| B. Statutory Provisions | 325 |
| C. Case Law: Interpretation of the Duty of Good Faith, and Examples of Good and Bad Faith Conduct | 330 |
| D. Damages for Breach of the Duty of Fair Dealing | 339 |
| XIII. Injunctive Relief | 339 |
| A. Types of Injunctions | 340 |
| B. Test for Injunction | 340 |
| C. Mandatory Injunctions | 343 |
| D. Damage Undertakings | 344 |
| E. Equitable Factors | 344 |
| F. Public Policy Issue | 345 |
| G. Recent Injunction Cases | 346 |
| XIV. Non-competition Covenants | 347 |
| A. Non-solicitation Provisions | 349 |
| B. Chapter Note | 349 |
| C. The Reasonableness Test | 349 |
| D. Blue Pencil Doctrine | 355 |
| E. Privity and Proper Execution | 361 |

| | |
|--|-----|
| F. Internet Sales | 365 |
| XV. Alternative Dispute Resolution, Mediation, and Arbitration | 367 |
| A. Introduction | 367 |
| B. Mediation | 367 |
| 1. Private Mediation and Arbitration Services | 368 |
| 2. Arbitration | 369 |
| 3. Conclusion | 373 |
| XVI. Conclusion | 374 |

Chapter 8

Acting for the Canadian Franchisee 375

Joseph Adler and Peter Vitre

| | |
|--|-----|
| I. Introduction | 377 |
| A. Possible Structures and the Respective Roles of the Parties in Each | 378 |
| B. Due Diligence | 379 |
| II. Additional Risks and Benefits to Purchasing a Franchise from a Non-Canadian Franchisor vs. Buying into a Canadian-Based System | 382 |
| A. How Well Does the Brand or Concept “Work” in Canada? ... | 382 |
| B. How Well Does the Business Model “Work” on This Side of the Border? | 384 |
| C. Legal Concerns | 385 |
| 1. Protection of Franchisor’s IP | 385 |
| 2. Trademarks | 385 |
| 3. Patents | 386 |
| 4. Trade Secrets | 387 |
| 5. Copyright | 387 |
| 6. Regulatory or Other Legal Barriers | 388 |
| 7. “Canadianization” and Translation of FDD and Operations Manual | 389 |
| D. The Impact of the Master on These Issues and Its Role in Managing or Supporting Them | 390 |
| III. Common Relationship Flashpoints and Red Flags Arising Out of a Disclosure Document Review | 391 |
| A. Franchisor Commitment to the Territory—Don’t Become an Orphan | 391 |
| B. Marketing Funds and Other Pooled Resources | 392 |
| C. How to Deal with Disclosure Deficiencies | 393 |
| IV. Negotiating Key Provisions of or Amendments to a Franchise or Multi-Unit Development Agreement | 395 |
| A. Territory and Expansion Rights | 395 |
| B. Development Schedules | 396 |

| | |
|---|------------|
| C. Withholding Tax Issues | 396 |
| D. Conversion of Funds and Currency | 397 |
| E. Personal Liability: Guarantees and Indemnification | 398 |
| F. Restrictive Covenants: Non-competition and Non-solicitation | 399 |
| 1. Non-competition Covenants | 399 |
| 2. Non-Solicitation Covenants | 401 |
| V. Dispute Resolution and Enforcement Issues | 402 |
| A. Statutory Requirements | 402 |
| B. Enforcement Issues | 403 |
| | |
| Appendix: Provincial Franchise Laws in Canada (as of April 2017) | |
| Table of Concordance | 407 |
| | |
| Table of Cases | 529 |
| | |
| Index | 537 |