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## Expanding your franchise business into Canada

As franchising continues to penetrate new markets, the time has never been better to explore international expansion into Canada. With nearly half of all new retail businesses in Canada being franchised businesses, Canada has established itself as a leader in the franchising industry. Whether franchisors are considering expanding into Canada for the first time, or are seasoned international franchisors, there is much to learn about successful franchising in Canada, including a variety of business and legal issues relating to: cultural challenges; disclosure compliance; anti-trust laws; and intellectual property protection, to name but a few.

Canada is a confederation made up of ten provinces and three territories. Franchisors operating in Canada are subject to both federal and provincial law, which may vary from province to province. The province with the most notable differences is Quebec. Quebec is predominantly French-speaking, and while the majority of Canada is governed by the common law, all contractual relationships in Quebec are governed by its Civil Code. In addition, all public signage, posters and commercial advertising must be either solely in French or in French and another language with the French wording being markedly predominant. In addition, all employees in Quebec have the right to carry on their activities in French. Thus, a franchisor intending to operate in Quebec must take the necessary steps to adapt its system so that it can be successful in a unique legal, linguistic, and cultural environment.

Currently only two provinces in Canada, Alberta and Ontario, require a franchisor to deliver a prescribed form of disclosure document to a prospective franchisee before it can execute a franchise agreement. The disclosure documents do not have to be registered with a regulatory body, and the franchisors enjoy substantial freedom in structuring their contractual agreements and selling their franchises. However, it should be pointed out that many business practices customary in franchising are subject to regulation by both federal and provincial laws of general application. The remainder of this article will touch on some of the more significant issues that impact generally on franchising.

Alberta's franchise law allows for a "wrap-around" document to a disclosure document prepared in accordance with the laws of another jurisdiction (for instance a UFOC) to conform to Alberta's requirements. Ontario, however, does not provide for this type of disclosure document, and a foreign disclosure document would require modification to comply with Ontario franchise legislation.

Language, cultural, judicial and legislative practices and requirements in Canada often require changes to standard foreign jurisdiction franchise agreements before they can be used effectively in Canada. The list below, while not exhaustive, illustrates a number of common items to be considered by

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Canadian counsel:

- Language differences between foreign franchisor's country and Canada;
- Currency selection and exchange rate controls;
- Repatriation of funds and withholding taxes;
- Pricing of supplies and inventory;
- Trade-mark and software protection;
- Termination procedures and dispute resolution procedures;
- Non-Competition restrictions;
- Operating Manuals; and
- Governing law.

It is obviously critical that a foreign franchisor should obtain protection of its intellectual property in Canada. A franchisor contemplating international franchising should not assume that its trade-marks will necessarily have the same degree of distinctiveness in Canada. The federal government has jurisdiction over trade-mark matters in Canada. Under the Trade-marks Act, an application for registration of a trade-mark may be based on use in Canada, proposed use in Canada, or registration and use abroad. The Trade-marks Act provides that registration of a trade-mark gives the registrant the exclusive right to use the trade-mark across Canada.

Generally, a foreign franchisor wishing to expand into Canada can do so through a number of structures, including: franchising directly from the foreign-based franchisor corporation to franchisees in Canada; establishment by the franchisor of a branch or subsidiary in Canada; joint venture partner in Canada; master franchise agreement; and development agreement. It is essential that the foreign franchisor consider all business and tax implications for each model as well as such commercial considerations of: income tax; withholding tax; and repatriation of funds. There are additional legal considerations in determining the business structure, such as providing notification to the federal government of the establishment of Canadian business by foreign based entities.

A franchisor must make certain that labels on products to be sold in Canada are accurate and meaningful; in both French and English; and express all measurements in metric units. There are also special labelling requirements for the sale of food, drugs and medical services. Foreign franchisors whose franchisees are required to sell pre-packaged products to consumers must be certain that such products are properly marked and labelled for sale in Canada.

Canada's anti-trust laws are found in the federal Competition Act, which sets out certain offences reviewable and that are criminal in nature. In connection with franchising, and in particular the Canadianization of foreign franchise documents, changes should be made to these documents to reflect specific Canadian anti-trust laws dealing with tied-selling, market restriction, exclusive dealing and price maintenance. Franchisors in virtually every country are now devoting an increasing portion of their resources and energies to expanding beyond their base to growing markets abroad. Canada has a well established tradition of franchising and it may well be that Canadian expansion is the next logical step for many successful franchisors. Not only does Canada offer a strong economic environment, but the legal framework for franchising is very encouraging for foreign franchisors. However, in the planning and implementation phases, it will be important to seek advice from a Canadian franchise lawyer who is experienced in dealing with international franchise systems.

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