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FOR MORE INFORMATION
For more information on Dickinson Wright's Franchise and Distribution practice, visit http://www.dickinson-wright.com/practice-areas/franchise-and-distribution. Dickinson Wright is a full service firm with over 300 lawyers and officers in offices in Toronto (Canada), Arizona, Michigan, Nevada, Ohio, Tennessee and Washington DC.

NEW FRANCHISE LEGISLATION IN CANADA

by Christopher G. Graham, Toronto Office

British Columbia, which presently does not have a franchise specific statute, recently took one step closer to implementing such legislation when the British Columbia Law Institute ("**BCLI**") recommended the passage of a franchise act in its recent report titled *Report on a Franchise Act for British Columbia* (March 2014) (the "**Report**"). This was a follow-up to the *Consultation Paper on a Franchise Act for British Columbia* (March 2013) (the "**Consultation Paper**") and took into consideration the feedback generated by the Consultation Paper.

The BCLI stressed the positive response received to the implementation of British Columbia franchise legislation, noting that all respondents to the Consultation Paper saw benefits in the introduction of franchise legislation in British Columbia and none opposed the enactment of franchise legislation in principle.

As a result, the Report recommends that British Columbia enact legislation (the "**Proposed Act**"), based on the Law Reform Commission of Canada's Uniform Franchises Act, similar to that which other Canadian provinces have adopted.

Passage of legislation by BC would further harmonize the regulatory regime in Canada and the recommendations of the BCLI appear to improve upon the existing provincial statutes. Of course, recommendations by the BCLI may not result in the passage of legislation soon or ever. Although, the odds are that the British Columbia legislature will take up the suggestions of the BCLI and sooner than later.

The Report also recommended that the Proposed Act:

- should not include an exemption from disclosure requirements for investments below a prescribed amount;
- should not require location assistance for the exemption from disclosure requirements for grants of a franchise agreement with a term of less than one year that do not involve non-refundable franchise fees;
- provided other criteria are met, should not require franchisors with a minimum net worth of $5,000,000 (or $1,000,000 if the

franchisor is controlled by a corporation with a net worth of at least $5,000,000) to disclose their financial statements to prospective franchisees;

- should not include compulsion for mediation of franchise disputes;
- should provide that disclosure documents are valid if they are in substantial compliance with the legislation and regulations (minor defects should not to lead to consequences such a right of rescission);
- should permit fully refundable deposits to be paid to a franchisor prior to disclosure;
- should require that the disclosure documents specify whether or not an exclusive territory will be granted under the franchise being offered;
- should require that the disclosure documents specify if a franchisor is reserving any rights to sell goods and services directly by such franchisor and specify the intended distribution channels;
- should permit delivery of a disclosure document by electronic means;
- should include a statutory right to sue for misrepresentation for misleading statements made in financial projections supplied by the franchisor before a franchise agreement is signed unless cautionary language is included in the projection;
- should permit wrap-around disclosure documents (being disclosure documents that comply with the legislation of a different jurisdiction and which are supplemented with additional information required by the Proposed Act);
- should specify that the application of the Proposed Act cannot be avoided in respect of both claims arising under the Proposed Act and claims arising from a franchise agreement by including a jurisdiction clause or foreign law clause. This section should also expressly state that it applies to arbitration;
- should specify that any statutory right of rescission does not bar the franchisee from pursuing statutory damages provided that double recovery does not occur;
- should clarify that any statutory presumption deeming reliance on a misrepresentation in a disclosure document by a franchisee cannot be used by a franchisor to assert that the franchisee would have entered into the franchise agreement even if the franchisee had been aware of the trust facts; and
- should specify that any statutory bar to waiving or releasing a right under the Proposed Act does not prevent a waiver or release that is part of a post-dispute settlement.

The report can be found at http://www.bcli.org/wordpress/wpcontent/uploads/2014/03/Franchise_Act_ReportwithCover-forPrint-FINAL.pdf and provides a detailed review of the proposed legislation.

HEADS UP: CANADA'S ANTI-SPAM LEGISLATION (CASL) TAKES EFFECT ON JULY 1ST

by Wendy G. Hulton, Toronto Office

Once CASL takes effect, you will need express or implied consent before you (or your franchisees) can send a commercial electronic message (CEM). While franchisors are well aware of the pending impact of CASL and have been diligently ensuring that their organizations are ready, the bigger question that looms on the horizon is what are they doing to help their franchisees understand and comply with CASL's requirements. Franchisors will typically be able to rely on implied consent under the B2B CASL provisions to communicate electronically with their franchisees. The bigger concern will be the B2C communications between franchisees and consumers. There is a lot of information on CASL available and while seemingly straightforward, the actual implementation for both franchisors and franchisees may prove to be more difficult. Ask yourself:

1. Do your franchisees send CEMs?
2. Do you know whether they are aware that they need to have consent to send CEMs?
3. Do you know whether they understand the difference between implied or express consent to send CEMs?
4. Do their CEMs satisfy the CASL content requirements?
5. Do they know that the consents need to be recorded, in case they have to prove they had consent to send a CEM?
6. Do you know if they have an unsubscribe mechanism for their CEMs?

Enforcement of CASL will be undertaken jointly by three regulators: the Canadian Radio-Television Commission, the Competition Bureau and the Office of the Privacy Commissioner. These enforcing bodies will have authority to impose a wide variety of sanctions on individuals and businesses that contravene CASL. While the regulators will probably be lenient initially, individuals may be fined up to $1,000,000 per violation and corporations may be fined up to $10,000,000 per violation. CASL also creates a private right of action, that takes effect in 2017 that permits an individual to take civil action against anyone who violates CASL. If your franchisees are not prepared for CASL, it is not the risk of significant fines that you should be worried about, but rather the potential backlash through social media.

UNITED STATES: THE "TOP TEN" THINGS FOR A SUPPLIER TO CONSIDER IN TERMINATING A DISTRIBUTOR

by Ken McIntyre, Detroit Office

Regardless of labels like "dealer," "distributor" or "reseller," there are some fundamental issues that demand attention whenever a supply relationship is involuntarily terminated. Dickinson Wright works with suppliers in planning and implementing decisions to terminate. We also successfully defend these decisions through negotiation, litigation or alternative dispute resolution. We have litigated termination disputes under various state and federal laws and have appeared in state and federal courts and before arbitration panels throughout the United States to successfully defend termination decisions.

Based on our "battle experience" we offer the following ten areas of concern to bear in mind when contemplating an involuntary termination:

1. **Keep termination planning communications confidential.** Generally, all documents and communications, including e-mails, within a company regarding the performance of a distributor and the decision and plan to end the relationship are subject to discovery. The only effective way to maintain confidentiality is to work with attorneys who can give advice within the protective shield of the attorney-client privilege.

2. **Drill down to determine the actual reason for the termination.** Even if written agreements provide for termination "without cause," understanding the motivation and rationale for the decision to terminate is critical. Nothing can undermine your prospects in litigation more than a revelation during the course of a lawsuit that the "real reason" for the termination is other than the stated one. Evaluate whether the termination decision is made pursuant to objective, non-discriminatory criteria. Examine the adequacy of the "paper trail" that confirms the termination decision. Senior management personnel making the ultimate decision should be interviewed, but perhaps more important are interviews of mid-management and "area reps" who are the primary contacts. Not only should corporate finance and contract distributor relationship files be reviewed, but so should the files and records of all relevant field personnel.

3. **Carefully review the contract documents and agreement.** Do you have the actual signed current agreement? Are there any "updates" or letter amendments and have they been signed or acknowledged? What's the standard for termination? Is "good cause" required? Is notice required and how much time? Is there a cure requirement? If the contract is "at will," are there state law obligations of "good faith and fair dealing" that apply? If the distributor breached the agreement, what evidence exists to prove the breach? Does the agreement contain provisions for choice of law or place of litigation or arbitration and are they enforceable?

4. **If there is no integrated express written contract, what defines the relationship?** Is there a contract by virtue of express oral agreement or communications showing a course of performance? Is there a basis for implying contractual commitments arising out of company policies, manuals or statements of procedure? Is it a purchase order by purchase order relationship? If so, what terms and conditions will determine the "battle of the forms"?

5. **Despite the contract, what other laws may apply to the termination?** Even express written contract provisions may be overridden by other laws. Many states have "fair dealership laws" that apply if there is a "community of interest" which would invoke the policy of a state statute for the protection of a dealer who resides in the state. Such statutes frequently require and delineate what constitutes "good cause" for termination and prescribe notice and a right to cure. These statutes may also provide for easier injunctive relief standards and the shifting of the burden of proof.

   Some state statutes govern specific supply relationships, like motor vehicle, petroleum, farm implements, beer, wine, light industrial equipment, independent sales representatives, liquor, marine boats and motors, motorcycles, RVs, soft drinks, and swine and poultry marketing.

   Some states have "inventory buy back" laws requiring purchase of inventory. Others have case law which follows the so-called "Missouri Rule" that, as a matter of equity and restitution, the terminated distributor must be given a fair opportunity to recoup its development investment.

   Lastly, check for applicable federal statutes, including the Petroleum Marketing Practices Act, 15 USC §2801, the Federal Automobile Dealer Day in Court Act, 15 USC §1221, the Sherman Antitrust Act, 15 USC §1, and FTC Franchise Rules 16, CFR §4-36 (1997).

6. **What counterclaims or defenses may the distributor assert?** Determine whether the distributor may respond with some allegation of wrong doing or retaliation by the supplier. Ask about complaints from other distributors or other channels of distribution. For example, have there been complaints about the distributor's violation of a minimum advertised price policy or suggested retail price policy? Have there been complaints against the distributor for selling outside its assigned area of primary responsibility or unauthorized product or "grey goods" sales overseas? Has the distributor made prior complaints, including those about alleged lack of support, discrimination, unfair discounts and pricing policies or billing mistakes? Was the decision to terminate made in response to concerns of a "dealer counsel" or another group of dealers which could open the company to allegations of conspiratorial boycott? Also, investigate the possible assertion of oral or partially integrated promises or agreements and whether the distributor may claim a right to cure or for a lesser sanction in lieu of termination.

7. **Consider whether there will be any post-termination issues that need to be addressed.** Does the dealer exhibit trade or

service marks of the supplier? Are there license agreements as to the limited authority to do so and the requirement of cessation of activity and the return of signage? Are there issues pertaining to the return of proprietary information and trade secrets? Does the written agreement provide for injunctive relief in the event of a refusal to comply with post-termination obligations?

8. **Will there be allegations of an "implied franchise"?** Generally speaking, a franchise may be express or implied in writing or orally. The elements usually include the right to sell goods or services under a "marketing plan," that the goods or services are "substantially associated" with a trademark and the payment of a direct or indirect franchise fee. Consequently, you should examine the facts to see if these elements are arguably present under the elements of the specific state Franchise Investment Act. Pay special attention to any fees paid by the distributor for services or equipment and if such fees were inflated.

9. **Avoid the temptation to have a meeting with the terminated distributor to explain where it went wrong.** Once the decision to terminate is made, there should be nothing to talk about. "Heart to heart" discussions frequently end up being the source of debate in litigation as to whether or not they were educational attempts to "dissuade" the terminated distributor from its inappropriate activity or whether they were illegal threats and coercion. Usually such discussions should be avoided. Further, any potential discussion should be carefully contemplated with knowledge that everything stated may be the subject of post-termination repetition and embellishment.

10. **Formulate a post-termination notice strategy.** Once the terminated distributor receives notice, it will likely contact representatives of the company to determine what's "really" going on. It may also use such inquiries as an opportunity to engage in a "set up" strategy of its own. It is not unheard of that recording devices are employed in such communications. The client needs to have a set procedure for handling any inquiries after the termination notice. The notice should state exactly to whom any inquiries should be directed. The company representative fielding these inquiries should be well educated on what to expect and, like the author of the termination letter, should be someone who can do a good job in explaining the company's position if testimony becomes necessary. Other persons who may receive contact from the terminated distributor should be instructed that they should engage in no substantive dialogue and that they should refer any inquiries to the designated company representative. Usually, the best advice is to respond that there is nothing to discuss beyond that which is contained in the letter.

IN THE NEXT ISSUE...

Be sure to watch for our next issue, which will discuss your obligations as a franchisor or franchisee under the *Accessibility for Ontarians with Disabilities Act*. Requirements in respect of franchisors and franchisees took effect on January 1, 2012 and are ongoing. As failure to comply can result in significant penalties, our next issue is one that you don't want to miss.

CASE NOTE

In the recent string of cases where deficiencies in disclosure documents were held to have triggered the two year right of recession (based on such disclosure being so deficient that it didn't amount to disclosure at all), franchisors can draw some comfort from the Ontario Superior Court of Justice's approach in the recent decision of *Caffé Demetre v 2249027 Ontario Inc.* In this case, the franchisee commenced an action alleging that the disclosure document failed to disclose "all material facts" about the franchise. Of the alleged failure to disclose various material facts, the court held that only the failure to disclose litigation with a previous franchisee (that operated the same location) would constitute a material fact (the others related to matters that had arisen after the date of the disclosure). Having determined that, the Court held such deficiency to be a "content deficiency" and furthermore there was no basis for inferring that the litigation could have any economic impact on the prospective franchisee's business. Accordingly, the deficiency only gave rise to the 60 day recession right. The Court's pronouncement – that only "stark and material" deficiencies in disclosure will permit a court to conclude that there was no disclosure at all – together with the judgment in the case (which appeared to consider the economic impact as a measure) – provide some guidance on the bounds of the two year recession.

PRACTICE NOTE

Take The Risk Out Of Franchise Disclosure Documents

To avoid unnecessary risks in complying with the Canadian provincial franchise legislation, adopt the following valuable steps:

1. Appoint a compliance officer and have everyone report to that person any matters which could possibly affect the content of, or process associated with, disclosure documents.
2. Update the company's pro-forma disclosure document with every change or addition as and when it occurs.
3. Have your pro-forma disclosure document thoroughly reviewed by your lawyer at least once a year.
4. Keep complete records of every delivered disclosure document, more particularly, the specific version of the disclosure document and the date on which it was delivered, together with the original certificates and receipts.
5. Adapt the company's disclosure document for re-sales by franchisees, renewals and sales of corporate units.