



CANADIAN FRANCHISE ASSOCIATION WELCOMES NEW CEO

Several months ago, Lorraine McLachlan joined the CFA as a Director, President and Chief Executive Officer, replacing the well-known Richard Cunningham.

A native of Toronto, Lorraine spent eight years as Vice-President of the Canadian Marketing Association prior to joining the CFA. Lorraine feels that marketing and leadership skills acquired during her time with CMA have prepared her well for her new position with the CFA.

Now that Lorraine has held her CFA post for a number of months, she has a much better idea of what the position entails: She tells us:

During my 5 months with CFA, I have met many members and I feel even more positive about the job than I did coming in. I have travelled across Canada, into the United States and to France and everyone I met has given me a great reception. I have attended several discovery days in smaller centres of Canada and feel that that program is going very well.

Ken Pattenden, Chair of the CFA, led a selection committee which interviewed Lorraine McLachlan last fall and recommended her to the CFA Board. Ken reports: "Within a short period of time, our decision to select Lorraine from over 70 applicants has been strongly affirmed. She has provided a fresh, professional perspective on how we can grow the CFA brand in Canada."



Lorraine McLachlan, CEO
Canadian Franchise Association

Both Lorraine and Ken attended the International Franchise Association's AGM in Las Vegas in late February. There they met with a number of IFA officials, including President Matt Shay and Vice-President Scott Lehr. Matt Shay says:

We had the opportunity to meet Lorraine at the recent IFA convention and we are very impressed with her background and interest in working closer with the IFA in projects of mutual interest such as Membership, Programs and our Certified Franchise Executive Program.

The CFA membership is reacting well to their new CEO. They see her as a strong leader, with lots of good ideas and the energy to carry them out. Lorraine will make her debut before many members at the CFA's annual general meeting to be held in Montreal from April 28th to May 1st. We look forward to seeing her there.
- John Rogers, Davis & Company LLP

QUÉBEC FRANCHISE LAW



Pablo Guzman
Davis & Company LLP
t: 514.392.8406
e: guzmanp@davis.ca

Québec does not yet have franchise specific legislation, like Alberta's *Franchises Act*, Ontario's *Arthur Wishart Act* or PEI's *Franchises Act*.

However, Québec civil and statutory laws govern franchise relationships, often with very similar results to other North American jurisdictions but sometimes, not surprisingly, with distinct and specific local

requirements. Below are some of the local requirements a franchisor should consider in anticipation of doing business in Québec.

The Charter of the French Language

Québec's "language laws" are viewed by some with trepidation. This is understandable given that the core principle behind franchising, which is the standardized process of delivery of services and goods, cannot be implanted in Québec without some tweaking. Québec law generally requires the use of French in documents, services and work environment and this means that existing franchise systems must be reviewed and modified to be in conformity with the law. These requirements affect the relationship/obligations between a franchisor and its franchisees.

The Québec Charter of the French Language and its Regulation Respecting the Language of Commerce and Business, in conjunction with Canada's *Trade-Marks Act*, include general rules regarding the use of the French language in documents supplied with products and services or packaging inscriptions. Generally, the rule is that every inscription on a product, on its container or on its wrapping, or on a document or object supplied with it, including the directions for use and the warranty certificates, must be drafted in

French. This rule also applies, in certain circumstances, to websites on the Internet.

However, there are several exceptions to that general rule. For example, in some documents the French language may be accompanied with a translation or translations, but no inscription in another language may be given greater prominence than that in French (they may be equal).

These and other exceptions, together with the business-oriented approach of the *Office québécois de la langue française*, the government agency in charge of enforcing the Charter of the French Language, usually facilitate the ease and set up of a franchise in Québec.

The direct implications of the Charter and its regulations and other Québec statutes on a franchisor will vary depending on its business model: will the franchisor maintain a place of business in Québec or have employees in Québec? A franchisor with a Québec operation will have to consider issues like the adoption of a Québec business name, French language trade-marks, and use of French at work with its own employees, to name a few.

Good Faith and Fair Dealing

Québec's civil law obligation to act in good faith was codified with the coming into force of the Civil Code of Québec in 1994 (the "CCQ"). Thus the historical civil law norm of good faith governing the behaviour of contracting parties was enshrined in the CCQ, forbidding a party from using a contractual right just to harm its contracting party, from using its rights negligently or for purposes that are alien to the purpose of the contract. This norm will necessarily temper the franchise relationship.

A franchise agreement cannot grant abusive powers or rights to franchisors; even proper rights and powers must be exercised in good faith.

Moreover, a franchise agreement will almost always be deemed to be a "contract of adhesion" in Québec, since its essential terms are imposed and drawn up

by the franchisor. According to the CCQ's good faith principles, in case of doubt, the franchise agreement will be interpreted against the franchisor and any clause in it that is deemed incomprehensible to a reasonable person would be deemed null, if the adhering party (i.e. the franchisee) suffers any injuries therefrom. Likewise, an abusive clause would be deemed null or a Court could reduce the obligations contained therein.

The CCQ also imposes pre-contractual obligations on the franchisor, including good faith negotiations and disclosure obligations with respect to risks and certain types of products. Franchisors may be held liable for pre-contractual misrepresentations or disclosure omissions; limitation of liability or "entire-agreement" type clauses in the franchise agreement may not effectively protect the franchisor.

Taking of Security

The 1994 CCQ aligned Québec a little closer to the rest of North America with respect to the U.S. Uniform Commercial Code ("UCC") and the *Personal Property Security Act* ("PPSA") used in the majority of Canadian provinces. While there are other security instruments available, in Québec, franchisors will generally use different types of "hypothecs" to secure their rights by charging the franchisee's movable assets (personal property) as collateral.

Franchisors are well advised to obtain counsel on the particularities of Québec's hypothecary regime, since the creation, registration and enforcement rules are significantly different from those of other jurisdictions. These rules are generally of public order and cannot be contractually waived.

Consumer Protection

Québec's consumer protection legislation will allow the consumer, in most circumstances, to have recourse against the franchisor. The impact of such legislation will depend of the nature of the franchise and the risks associated with its products or services. It is noteworthy that Québec law does not allow a contractual limitation or exclusion of liability for bodily injury. ■

BUSINESS IMMIGRATION FOR FRANCHISORS



Craig Natsuhara
Davis & Company LLP
t: 604.643.6498
e: cnatsuhara@davis.ca

Persons who are neither Canadian citizens nor Canadian permanent residents, referred to as "foreign nationals", do not have the right to work in Canada unless properly authorized. The requirements most applicable to foreign franchisors establishing Canadian operations, their executives and other employees who will be involved in the

start up of (or a later transfer to) the new Canadian operation, as well as new foreign national employees hired to work in the Canadian operation, are described below.

1. Working in Canada

Employees who are foreign nationals must, unless exempted, obtain work permits to "work" in Canada. "Work" is defined as "an activity for which wages are paid or a commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market". Note that the duration of the work is not a factor, so even if an employee will be working in Canada for a very short period of time, a work permit may be required.

Employees of franchisors who are carrying out pre-operational activities in Canada may be allowed to enter Canada as temporary "business visitors". Later, when business in Canada is commencing, however, work permits must be obtained (see (d) below).

(a) Temporary Resident Visas

Before determining whether a work permit is required, it must be determined whether a foreign national employee needs to obtain an underlying visa, called a "temporary resident visa", before travelling to Canada.

A visa must be applied for at a visa office outside Canada. Having to obtain a temporary resident visa can add processing time of up to several weeks, depending on the visa office, the nationality of the applicant and whether the applicant needs to conduct a medical examination.

Certain nationalities are exempted from the need to obtain a temporary resident visa to travel to Canada. A visa-exempt foreign national can apply to enter Canada at a port of entry.

(b) Work Permit Exemptions

Business visitors and other specific categories of foreign nationals are authorized to work in Canada without a work permit. A “business visitor” is defined as a foreign national “who seeks to engage in international To be considered a business visitor, a foreign national generally must not receive any remuneration from any Canadian sources and his/her main place of employment must be outside of Canada. In practice, if there are Canadian operations as well as the foreign operations, it may be difficult to enter as a business visitor because the officer may consider the business activities to be benefitting the Canadian operations primarily.

Employees of a foreign franchisor who will be carrying out the following types of activities in Canada are permitted to do so without a work permit:

1. key employees (e.g., senior management or specialists) assisting in establishing the Canadian operation, until such time as the Canadian operation is up and running; and
2. employees providing training to other employees of a Canadian branch or subsidiary so long as any production of goods or services that results from the training is merely incidental.

(c) Work Permit Categories

There are several different categories under which a work permit may be obtained. Each category will dictate the requirements and procedures for applying and the location at which the application can be made

which in turn will affect the processing time, the length of the work permit and whether the work permit is extendable.

Under the standard category, the employer must obtain a positive Labour Market Opinion from Service Canada before the foreign national can apply for a work permit. A positive Labour Market Opinion confirms that the employment of a foreign national is likely to have a neutral or positive economic effect on the labour market in Canada.

Some common work permit categories that do not require a Labour Market Opinion are:

- intra-company transferees - persons being transferred at least 25% of the time to the Canadian operations who are either executives or senior managers or have specialized knowledge regarding the foreign operations; and
- NAFTA Professionals - persons qualified for one of the prescribed occupations, e.g., management consultants and hotel managers.

(d) Work Permit Conditions

A work permit is issued for up to 3 years, but generally may be extended.

A work permit is both employer specific and occupation specific according to specific occupations based on a National Occupational Classification (“NOC”). For example, the President of a franchise business may be classified as a “Senior Manager – Trade”, NOC 0015. As well, a work permit is location specific. If an employee will be spending significant time working in more than one province, this should be reflected on the work permit.

(e) Applying for a Work Permit

For foreigner nationals who require a temporary resident visa to enter Canada, an initial work permit must be applied for at a visa office outside Canada. The processing times vary amongst visa offices, with some able to process straightforward applications the same day; others offices may take several weeks.

For visa-exempt foreign nationals, an initial work permit can be applied for at a port of entry or at a visa office outside Canada. The advantage of applying at the port of entry is that a straightforward application may be processed on the spot. The advantage of applying at a visa office abroad is that it may provide certainty of approval before the foreign national plans to enter Canada.

(f) Accompanying Family Members

Family members of a foreign national worker include a spouse or common-law partner and dependent children of the foreign worker or of the spouse or common-law partner. Unless the foreign worker is working in an occupation considered “low skill”, spouses and common-law partners are eligible for their own work permits which will allow them to work. Dependent children are eligible for study permits.

2. Permanent Resident Status

If an employee is anticipated to work in Canada for several years, obtaining permanent resident status may be beneficial. A permanent resident is not constrained by the conditions regarding employment as a foreign worker holding a work permit (i.e., conditions regarding length of authorization, employer, occupation and location).

There are several different categories under which permanent resident status can be obtained. Each category has different requirements, with some categories being more appropriate for persons who work for arm’s length employers and other categories more appropriate for entrepreneurs or persons who have strong business and management backgrounds. ■

RUNNING CONTESTS IN CANADA: RULES APPLYING TO FRANCHISORS



David Spratley
Davis & Company LLP
t: 604.643.6359
e: dspratley@davis.ca

Franchisors frequently offer contests to promote brand awareness and increase sales. However, franchisors who do so in Canada should be aware of potential liability, including criminal liability, for improperly-organized and ill-managed contests. Put bluntly, contests in Canada can either be perfectly legal or they can give rise to a criminal offence complete

with jail time. Even if a particular contest is legal, a wide variety of rules regulate how the contest can be run and advertised. Franchisors should seek legal advice with respect to each specific contest they run in Canada to ensure compliance with such rules.

1. Canadian Criminal Law

The Canadian *Criminal Code* creates an indictable offence (with a maximum two-year prison term) for offering certain prohibited contests and games. Some of the prohibited activities include making or advertising any scheme, or selling any tickets or other devices, for disposing of any property by any mode of chance.

In general, Canadian courts have ruled that a contest is only illegal if it contains all three of the following elements: consideration, prize and chance.

- **Consideration.** Consideration includes payment of money to participate in the contest as well as the purchase of products or services as a prerequisite to participating. Accordingly, franchisors are often able to avoid the applicability of criminal law by allowing anyone to participate in a contest for free (i.e., with “no purchase required”).

The law is unsettled as to whether other forms of activity could constitute “consideration”. For example, requiring a potential contestant to fill out an information form or a questionnaire with personal information before participating might amount to sufficient consideration.

- **Prizes.** Most of the prohibited activities include the disposition of “property”, which includes all real and personal property of every description. The Criminal Code prohibits both an actual disposition of property and an intention to dispose of property. Even if an actual disposition of property has not yet occurred, therefore, a franchisor may still be convicted if there was an intention to convey the property to the contestant.
- **Chance vs. Skill.** This element of the offence can be avoided by requiring some skill to win the prize (a “mode of chance” involves the absence of any skill). There must be some element of skill present, even if contest participants are initially selected by random chance. It must actually be a test of skill rather than mere sham (for example, a 1902 decision held that having to shoot a turkey at 50 yards was not a genuine test of skill).

Franchisors often require contestants to answer a mathematical skill-testing question before obtaining a prize. Courts generally consider such questions from the perspective of a normal person with no special interest in the matter who possesses ordinary intelligence and an ordinary knowledge of everyday living to determine whether they are a genuine test of skill. For example, the question “228 times 21 then add 10,824, divide this answer by 12, then subtract 112” has been held to be genuinely skill-testing. Franchisors should at least use double digits in any mathematical question and should allow a fair but limited time period within which to answer. Allowing a participant

Put bluntly, contests in Canada can either be perfectly legal or they can give rise to a criminal offence complete with jail time.

to use a calculator would likely neutralize the skill element.

One specific section of the *Criminal Code* applies regardless of whether the contest involves an element of skill. That section creates an offence for disposing of any “goods, wares or merchandise by any game of chance or any game of mixed chance and skill in which the contestant or competitor pays money or other valuable consideration”. This section only applies to “games”, which are defined elsewhere in the *Code* as “game of chance or mixed chance and skill”. It is not clear how a “game” is different from any of the other contests prohibited by the other sections of the *Code*.

There are a few ways of avoiding this section. For example, the easiest solution is to ensure that no money or consideration is paid to participate in the contest. Another option is to award a prize that is not “goods, wares or merchandise”, as there is an argument that “goods, wares or merchandise” is more limited than “property”. For example, this section may permit franchisors to offer services as a prize. Where the line is drawn is not clear—for example, a trip essentially involves services, but corresponding airline or cruise ship tickets might very well constitute “goods, wares or merchandise”.

2. Contest Disclosure Rules

Franchisors must also comply with contest disclosure rules across Canada. The primary rules are set out in the Federal *Competition Act* and Québec’s Lottery Legislation.

(a) *Competition Act*

The *Competition Act* imposes additional rules on contests and games. A person who engages in conduct contrary to these provisions may be ordered to cease such conduct, publish a corrective notice and pay a monetary penalty.

The *Competition Act* makes it a reviewable practice, for the purpose of promoting the sale of a product or any business interest, to conduct a contest, lottery or game of chance and/or skill, or to dispose of any product or other benefit by any mode of chance, skill or mixed chance and skill, unless:

- the contest or game would otherwise be lawful (e.g., does not contravene the *Criminal Code* or other legislation);
- the selection of participants and the distribution of prizes is made on the basis of skill or on a random basis;
- there is a fair disclosure of the conditions for entering the contest, the prizes, the method of awarding the prizes, the number and approximate value of retail value of the prizes, whether any purchase is required, whether there is a skill-testing question, the chances of winning, the contest closing date, and the place where full contest rules may be obtained (all such information must appear in all advertisements, points of purchase materials, product packaging and contest rules); and
- the distribution of prizes must not be unduly delayed.

Promoters who do not adequately and fairly disclose information about a contest are often prosecuted for misleading advertising (under another section of the *Competition Act*) or breach of the section outlined above, or both.

The Competition Bureau has released an Information Bulletin (see <http://competition.ic.gc.ca>) regarding the contest disclosure requirements in the *Competition Act*. For example, the Information Bulletin includes the following points:

- Disclosure should be made in a reasonably conspicuous manner before the potential entrant is inconvenienced in some way or commits to the product or the contest.

- It is not “fair and adequate” disclosure to put the onus on consumers to obtain further details which the advertised is required by statute to disclose.
- Any regional allocation of prizes (e.g., if there will be one winner from Atlantic Canada, two each from Ontario and Québec, and four from the Western Provinces), that allocation should be clearly disclosed.

With respect to the distribution of prizes, franchisors should carefully estimate the number of prizes needed. If the number of contestants entitled to prizes exceeds the number of available prizes, franchisors may be liable for violating the *Competition Act* provision that prohibits undue delay in distribution.

(b) Québec Lotteries Legislation

Quebec legislation regulates how contests are conducted and the information which must be provided to participants. It applies to any contest or game which results in the awarding of a prize, if it was carried on to promote commercial interests.

If the value of the prizes exceeds \$2,000, the contest provider must notify the Québec Government of the rules and any advertisement of the contest. The applicant must also pay a fee and, in certain instances, post security to ensure payment of prizes. Also, the legislation contains additional disclosure requirements, including post-contest reporting obligations.

3. Final Thoughts

Contests are an important and useful method of generating business and building brand awareness for a franchise system. However, there is more to running a successful contest than picking the right prizes and incentives. As has been explained, there are many different legal requirements for contests, and violating any of them may result in monetary fines or even imprisonment. Franchisors therefore should consult with knowledgeable legal counsel before beginning any new promotional contest of any scale in Canada. ■

Davis & Company LLP – Who Are We?

Our law firm was founded in Vancouver, B.C. in 1892 and today has seven offices in Canada and one in Japan. Our Franchise & Distribution Group has 15 lawyers who serve the franchise industry. Some lawyers work in specialized fields such as taxation and immigration. The core lawyers in our group are:

Toronto:

John Rogers, Chair	jrogers@davis.ca
Susan Friedman	sfriedman@davis.ca
Sarah Dale-Harris	sdale-harris@davis.ca

Québec:

Pablo Guzman	guzmanp@davis.ca
--------------	--

Calgary

Dana Schindelka, Vice Chair	dschindelka@davis.ca
-----------------------------	--

Vancouver

Chris Bennett, Vice-Chair	cbennett@davis.ca
David Spratley	dspratley@davis.ca
Kevin Wright	jkwright@davis.ca

One of our strengths is assisting franchisors to expand within or into Canada. It is important for foreign franchisors to deal with essential matters quickly, for example registering their trade-marks in Canada;

obtaining corporate structuring and corporate tax advice; ‘Canadianizing’ franchise agreements and disclosure documents; applying for immigration visas for staff, if required; obtaining business licences, where required; complying with privacy laws; and dealing with any competition law issues.

If you are considering an expansion within or entering the Canadian market, we invite you to take advantage of our expertise.

Davis & Company LLP’s Experience

Our firm has experience in many different types of franchise, licensing and distribution matters, including corporate organization; franchise documents; licensing agreements; distribution agreements; intellectual properties (trade-marks, copyrights and patents); leasing; litigation; immigration and taxation. Advice in these various areas is customized for our individual clients.

Contact Us

Please e-mail us with your questions to:
jrogers@davis.ca.

Subsequent Issues

This newsletter will be published every 2 months and we hope you will enjoy receiving it. If you have received this notice by email, and for any reason you do not wish to receive further issues, please e-mail us at tcastle@davis.ca and indicate your choice. If you would like to subscribe, please also e-mail us at tcastle@davis.ca.

This bulletin is intended to provide our general comments on developments in the law. It is not intended to be a comprehensive review nor is it intended to provide legal advice. Readers should not act on information in the bulletin without seeking specific advice on the particular matter. The firm will be pleased to provide additional details or discuss how this information is relevant to a specific situation.

Davis & Company LLP has utilized its contact information for you and its knowledge of your potential legal services needs or interests in order to place you on our distribution list for this publication. We have provided this publication because we felt that it may be of interest to you. If you would prefer not to receive our publications in future, please contact our Privacy Officer at 604.687.9444 or speak to your main contact person at Davis & Company LLP. We value your privacy and invite you to review our Privacy Policy which is available on our website at www.davis.ca

DAVIS
LEGAL ADVISORS since 1892
& company
LLP

www.davis.ca

VANCOUVER TORONTO MONTRÉAL CALGARY EDMONTON WHITEHORSE YELLOWKNIFE TOKYO