

Franchise Review October 2018

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Osler's Franchise Review includes legislative updates, commentaries on recent cases, some best practices and frequently asked questions as well as news on our team. In this edition, we look at a case that reaffirms that injunctive relief is difficult to obtain in the franchise context, why franchisors should clearly specify the scope of any exclusivity clauses, best practices for franchise agreements and much more. We also have updates on some other recent cases in Ontario, Québec and Western Canada.

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Legislation

Who are you calling a child? Advertising restrictions get closer to fruition *Andraya Frith, Lucas Versteegh* The proposed federal restrictions on advertising food and beverages to children are getting closer to reality. As we noted in a prior edition of the Osler Franchise Review, Senate Bill S-228 is a private Member's bill that aims to amend the *Food and Drugs Act* to prohibit certain food and beverage marketing to children. In September the bill passed

Third Reading in the House of Commons. Despite making it through both houses, however, the bill is not quite ready for Royal Assent. [Read more](#)

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Franchising in the courts

Dial-a-Franchise: *Fyfe v Vardy* confirms case law on what constitutes a “franchise”

Andraya Frith, Lucas Versteegh In Fyfe v. Vardy (cob Dial-a-Bottle), a recent summary judgment decision of the Ontario Superior Court, the plaintiffs sought rescission on the basis that no disclosure was provided by the defendant. The plaintiffs also sought damages for misrepresentation based on financial projections provided in pre-contractual communications. While the case hinged on whether the business relationship between the parties constituted a “franchise” relationship, the Court also touched more generally on the use of disclaimers in financial representations. [Read more](#)

Print Three offers glimpse of a post-Raibex world *Dominic Mochrie, Paul Kotschorek* In this post-*Raibex* case, a request for summary judgment on a rescission claim was refused because the evidentiary record was insufficient to determine whether the disclosure document was fatally deficient. [Read more](#)

Extreme circumstances: injunctive relief still difficult to obtain in franchise context

Gillian Scott, Paul Kotschorek The Supreme Court of Newfoundland and Labrador decision in *MTY Tiki Ming Enterprises v Azmy Enterprises Inc*, 2018 NLSC 169 reminds franchisors of the uphill battle in enforcing post-termination restrictive covenants by way of injunction. [Read more](#)

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Québec

Québec Superior Court reaffirms importance of franchisors keeping their invoices

Éric Préfontaine, François Laurin-Pratte, Valérie Dupont-Ferlatte In *Mise en marché Marketech inc. v. Plante*, 2018 QCCS 2799, the Québec Superior Court looked at the value of an account statement issued by a franchisor to prove what the franchisee owed. The case illustrates how important it is for a franchisor to properly document the goods and services it supplies to its franchisees in case it will have to prove them in court. [Read more](#)

Québec Superior Court interprets exclusivity clause in shopping mall lease narrowly

against franchisor *Éric Préfontaine, François Laurin-Pratte, Véronique Paré* In *Second Cup Ltd. c. 8702934 Canada inc. (Café Vasanti)*, 2018 QCCS 2064, the Superior Court of Québec narrowly interpreted an exclusivity clause in a commercial lease between the owner of a shopping mall and a franchisor. This case reminds franchisors to clearly specify the scope of any exclusivity clauses in order to prevent competitors from moving in nearby. [Read more](#)

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British Columbia/Manitoba

Franchisor-friendly motions results (British Columbia and Manitoba) *Thomas Gelbman, Catherine Hammill* Two recent summary judgment decisions in Manitoba and British Columbia provide more certainty and positive results for franchisors in Western Canada in the context of franchise agreement terminations and the definition of a franchise agreement. [Read more](#)

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Best practices

Is it time for your franchise agreement to have a tune-up? *Dominic Mochrie, Paul Kotschorek* Adopting the practice of regular franchise agreement reviews ensures franchisors are in compliance with relevant laws and operating their franchise systems in accordance with applicable commercial law requirements. The time, effort and costs involved are relatively insignificant and failure to do so may have critical consequences at a later date. [Read more](#)

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Frequently asked questions

Check out our [answers](#) to these common franchising questions:

1. Will my U.S.-style non-compete clause be enforceable in Canada?
2. Do I have to disclose to renewing franchisees?

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Kudos

Speaking Engagements

Upcoming

American Bar Association's 41st Annual Forum on Franchising, Nashville, Tennessee, October 10-12, 2018

- Jennifer Dolman will co-present the Intensive Fundamentals Workshop, "The Most Common Post-Relationship Disputes"
- Gillian Scott will be a panelist in the workshop "In Sync: What In-House Counsel and Business Clients Expect from Their Outside Counsel"

Canadian Franchise Association's Franchise Canada Show, Toronto, Ontario, October 13, 2018

- Paul Kotschorek will be presenting "Franchising Your Business: Legal Aspects" The Advocates' Society, October 23, 2018

- Jennifer Dolman will Co-Chair a program on "Mastering Winning Discovery Techniques"

Ontario Bar Association's 18th Annual Franchise Law Conference, Toronto, Ontario, November 13, 2018

- Andraya Frith will be moderating the plenary session on "Disclosure Errors: Assessing the Impact"
- Jennifer Dolman will co-present the workshop, "Territory protection — Is it a fallacy in the Internet Age?"

Past

2018 CFA Annual National Franchise Convention, Ottawa, Ontario, April 22-24, 2018

- Dominic Mochrie presented on "Assisting Struggling Franchisees — Ensure Your Good Deed Goes Unpunished"

International Franchise Association Legal Symposium, Washington, D.C., May 6-8, 2018

- Jennifer Dolman co-presented the workshop, "Stop Invading My Space: Encroachment Issues in Franchising"

Advocates' Society Summary Judgment Motions Program, Toronto, Ontario, May 25, 2018

- Jennifer Dolman co-presented on "Effective Use of Summary Judgment Motions in Civil Cases"

Women Get on Board, Osler Toronto Office, June 7, 2018

- Jennifer Dolman hosted a "Board Resume Writing Workshop" session Canadian Franchise Association Law Day, September 27, 2018

- Paul Kotschorek hosted a roundtable on franchise manuals

Media

Jennifer Dolman was quoted in "Court decision in IBM case clarifies minefield in enforcing termination clauses" from July 19, 2018 in *Benefits Canada*

Gillian Scott was quoted in "Responding to changing litigation demands" from April 30, 2018 in *Canadian Lawyer*

Recognition

Acritas Stars™, 2018

- Dominic Mochrie is recognized as a Star Lawyer
- Jennifer Dolman is recognized as a Stand-Out Talent
Best Lawyers in Canada, 2019

- Andraya Frith, Dominic Mochrie, Jennifer Dolman, Gillian Scott, Larry Lowenstein, Evan Thomas and Christine Jackson are recognized in the area of Franchise Law
Canadian Legal Lexpert Directory, 2018

- Andraya Frith, Jennifer Dolman and Dominic Mochrie: Most Frequently Recommended for Franchising Law — Franchisor
- Larry Lowenstein, Colin Feasby, Gillian Scott and Tamara Prince: Repeatedly Recommended for Franchising Law — Franchisor
- Tamara Prince: Repeatedly Recommended, Franchise Law — Franchisee
- Franchise Group rankings: Ontario, Most Frequently Recommended, Franchise Law practice Alberta, Consistently Recommended, Franchise Law practice Québec, Repeatedly Recommended, Franchise Law practice
Chambers Canada: Canada's Leading Lawyers for Business, 2019

- Andraya Frith was ranked in Band 1 for Franchise
 - Andraya is described as a "leading practitioner" by market commentators with clients highlighting her "ability to thoughtfully approach the legal and business issues in a methodical way, and with a sincere desire to find a solution that meets the needs of all stakeholders."
- Jennifer Dolman was ranked in Band 1 for Franchise
 - Lauded as a "highly skilled litigator with significant industry experience within franchising and contract law." Other interviewees report: "She's very knowledgeable and very practical"
- Dominic Mochrie was ranked in Band 2 for Franchise
 - Singled out by clients as "absolutely outstanding" by interviewees and particularly lauded as "an amazing draftsman" with the ability to "think on his feet"
- Franchise Group is ranked in Band 1
Chambers Global: The World's Leading Lawyers for Business, 2018

- Andraya Frith was ranked for Franchising — Global-Wide (one of only two Canadians earning this ranking)
 - "She is very detailed, very timely, very good at client relations and at interpreting alternative arrangements"
- Franchise Group is ranked for Franchising — Global-Wide
Franchise Times, 2018
- Andraya Frith, Jennifer Dolman, Dominic Mochrie and Gillian Scott were recognized as "Legal Eagles" by North American franchise peers for Franchise Law by the *Franchise Times Who's Who Legal*
- Jennifer Dolman is recognized by *Who's Who Legal: Thought Leaders — Global Elite 2019*
- Andraya Frith, Dominic Mochrie, Jennifer Dolman and Gillian Scott were recognized in *Who's Who Legal: Franchise*

Legal Community Involvement

- Andraya Frith is a Member of the ABA Forum on Franchising Publications Committee (2016-2020)
- Jennifer Dolman is Past Chair of the Ontario Bar Association Franchise Law Section for the 2018-2019 term
- Jennifer Dolman is a member of the International Franchise Association Legal Symposium Task Force for the 2018-2020 term
- Jennifer Dolman was recently appointed as University College representative on the University of Toronto College of Electors
- Jennifer Dolman was recently invited to join the McGill Faculty of Law Toronto Engagement Subcommittee

Publications

- Jennifer Dolman and Lindsay Rauccio co-authored "Ontario Court of Appeal reaffirms principles of contractual interpretation in upholding a termination clause," Osler, Hoskin & Harcourt LLP, July 11, 2018