Distribution Agreements: Avoiding the Pitfalls

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Distribution Agreements: Avoiding The Pitfalls

Presented By: Mark Stinson, Darrell Jarvis, Steven F. Rosenhek

November 22, 2011

Practical Tips on Drafting Distribution Agreements

Mark Stinson

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Types of Distribution Agreements

- Sales Agency Agreements
  - sales representative solicits sales
  - payment by commission
- Distribution Agreements
  - typically, defined territory
  - distributor purchases products from manufacturer
- Dealer Agreements
  - typically, specific location
  - dealer purchases products from manufacturer

Forms of Distribution Agreements

- Oral
  - What are terms?
  - Unsigned terms and conditions – purchase order
  - “Battle of the Forms”
  - Termination – is reasonable notice required?
- Written distribution agreement
  - Grant of rights
  - Delivery of Products
  - Prices and change in prices
  - Payment
  - Other terms of purchase and sale
  - Distributor obligations and duties
    - Marketing
    - Quota or minimum purchase requirements
    - Personnel
    - Facilities
    - Reporting-disclosure of customers
• Duties of manufacturer
  • Marketing support
  • Other obligations
• Discontinuance of Products
• Warranty – back-to-back or flow through warranty
• Exclusion of liability
• Indemnity
• Term and termination
• Renewal - full or substantial compliance?
• Trade marks
• Insurance
• Force majeure
• Entire agreement
• COD in advance of delivery; cash in advance of delivery
• No set-off

Exclusive and Non-Exclusive Territories

• Exclusive territories
  • Can lead to loss of control and flexibility
  • Problems when franchise systems merge
  • If possible, smaller territories in urban areas – city blocks versus radius
  • Quota or minimum purchase requirements not met – provide for right to become non-exclusive rather than termination
  • Can the appointment of a distributor/dealer outside the exclusive territory constitute a breach of contract by manufacturer?
• Non-Exclusive territory
  • What can manufacturer do in non-exclusive territory?
  • Be specific re options available to manufacturer
    • Appoint other distributors
    • Sell itself in non-exclusive territory
    • Reserve specific or “National Accounts”
  • Impact study

Warranty

  • Sample clause:
    • Seller warrants to the Customer that (list typical categories of items) (the "Products"), acquired from Seller, will be free from defects in material or workmanship during the period of or such longer period as may be provided in a Seller warranty delivered with the Products (the "Warranty Period") subject to the following limitations, conditions and exclusions in this section (the "Warranty").
    • Seller will, at its option, repair or replace at no charge any Product which proves to be defective during the Warranty Period, but only if the Customer advises Seller of the defective product before the Warranty Period that applies to that product expires. The Customer is responsible for returning, at its cost, the defective product to Seller. Replaced Products will become the property of Seller.
    • The foregoing sets forth Seller’s sole obligations and liability under the Warranty. The Warranty is an exclusive remedy and is in lieu of all other representations, collateral agreements, conditions or warranties of any nature or kind, express or implied, statutory or otherwise, with respect to the Products including, without limitation, any condition or warranty as to merchantable quality, fitness for a particular purpose, durability, suitability, quality or condition or any condition or warranty arising by statute or otherwise in law or in equity or from a course of dealing or usage of trade.
    • "Statutory or otherwise" – include words to avoid statutory liability; Hunter Engineering Co. v. Syncrude Canada, [1989] 1 SCR 426
Limitation Of Liability

- **Sample Clause:**
  - **[except to the extent provided in this warranty],** seller shall not be liable in contract, tort or otherwise for any loss, damages, costs, claims, expenses or repairs resulting from any such defect or failure to conform to specifications or any breach hereof whether such damages are direct, indirect or consequential. Seller's liability hereunder shall be limited, in all circumstances, to the invoice price paid by buyer for the products purchased hereunder. The foregoing limitation of liability is a condition of sale of the products at the price or prices quoted and shall apply notwithstanding any defect in or failure of, including total failure of, any product. Seller shall not be liable for any claim unless (a) such claim is made promptly following delivery of the product and, in any event, not later than 12 months after delivery, and (b) seller is given a reasonable opportunity to investigate such claim and such product.

- **Consequential damages – not a defined concept in common law; clearer language recommended**

Indemnities And Allocation Of Liability

- **Sample Clause:**
  - Supplier shall indemnify and hold **●** and its affiliates harmless from, and against, any and all loss, expense, or liability (including legal fees on a full indemnity basis) on account of (i) any and all damage to or loss or destruction of any property (including, without limitation, the Products covered hereby and property of Supplier, any subcontractor, **●** or **●**’s affiliates); (ii) any injury to or death of any persons (including, without limitation, employees of Supplier, any subcontractor, **●** or **●**’s affiliates); or (iii) any breach by Supplier of any provisions of this agreement arising directly or indirectly out of or in connection with the performance of this agreement.

- **Negotiating conflict – Seller does not want open-ended liability to its customers; in distribution agreements manufacturer often has bargaining power**

- **Distributor wants manufacturer to be responsible for its actions or omissions given that the Product is manufacturer’s and distributor is simply “conduit” for sale to ultimate customer**
• Possible solutions:
  • Leave to common law
  • Discussion and apportionment of risks:
    • manufacturer responsible for IP/patent indemnity
    • each party responsible for its own actions re personal injury or property damage (usually manufacturer re product defect)
    • each party responsible for breach of confidentiality
    • each party responsible to indemnify the other re third party claims (usually manufacturer re product defect)
    • contractual disputes between parties subject to a maximum cap and possibly a basket
    • no consequential damages or it is subject to cap above
  • Importance of indemnifier maintaining control over legal proceedings

Arbitration and Dispute Resolution

• Technical disputes:
  • Consider the use of an "expert" instead of arbitration
• Mediation:
  • The use of neutral third party to assist the disputing parties achieve a resolution
• Arbitration:
  • The use of a neutral third party(ies) to determine a dispute between parties
  • Ability to structure procedure on consensual basis
  • Confidential
  • Cost effective? (i.e. is arbitration preferable to going to court?)
  • Unintended consequences
• What types of disputes to exclude from an arbitration regime
  • Where time is of the essence
  • Injunctions and mandatory orders
  • Trade-mark disputes
  • Payment of money
Canadianization Of US Agreements

- **Interest Act**
  - 2% per month vs. 24% per annum
  - "maximum rate permitted by law" – include specific rate
- Sales of Goods Legislation – implied conditions vs. warranties
- Governing Law: what laws should the agreement be governed under?
- Jurisdiction of legal proceedings: if exclusive jurisdiction in foreign court, the foreign court may not give judgment in rem (with respect to property) or grant an injunction
  - Should there be a dispute, where should the litigation occur? Generally, where is the "nexus" of the agreement
- UN Convention on Contracts for the International Sale of Goods may be applicable to the agreement, unless it is specifically excluded
- French Language requirements
- Applicability of privacy laws

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The Accidental Franchise

Darrell Jarvis
November 22, 2011

Agenda

• Accidental franchises
• Why is this important?
  • Rights and obligations
  • Consequences

• Definition of a franchise
  • Part I
  • Part 2

• Exemptions

• Best practices
Accidental Franchise

- Similarities between distribution arrangements & franchises
- Five provinces have legislation
- If it walks like a duck…
- You will only find out when there is trouble

Why is This Important?
Rights and Obligations

- Obligation to disclose
- Duty of good faith and fair dealing
- Right of association
Why is This Important?

Consequences

- Misrepresentation

- Right of rescission
  - 60 days and 2 years
  - Refund money received from franchisee
  - Purchase inventory at full value
  - Purchase equipment and supplies at original price
  - Compensate for any losses in set up or operation

Definition of a Franchise: Part I

Overview

- Requirement for payment and
- Goods or services substantially associated with trade-mark and
- Exercise of significant control or
- Offer of significant assistance
Definition of a Franchise: Part 2

Overview

• Representational or distribution rights to sell or distribute goods or services

• Supplied by franchisor or designated supplier

• Need not involve a trade mark

• Location assistance

Requirement for Payment

• To the franchisor or franchisor’s associate

• Whether required by contract or practical necessity

• Single payment or ongoing payments

• Upfront as a condition of acquisition or in the course of operating
Requirement for Payment (Cont’d)

• Could include payment for purchase of inventory

• All provinces except Ontario provide for an exclusion of the purchase of a reasonable amount of goods at a reasonable / bona fide wholesale price

Substantial Association of Trademark

“...right to sell, offer for sale or distribute goods or services that are substantially associated with the franchisor’s, or the franchisor’s associate’s, trade-mark, service mark, trade name, logo or advertising or other commercial symbol”

• Little Canadian case law

• Substantial association with business?
Exercise of Significant Control

- Exercise of significant control over method of operation
- Control under *Trade-Marks Act* not sufficient

Examples include:
- Site selection, building design, furnishings
- Hours of operation
- Production techniques

Exercise of Significant Control (Cont’d)

Examples include:
- Accounting policies; H.R. policies
- Participation in marketing and promotions
- Sales area restrictions; restriction on customers
- Manual
- Pricing
- Right of Audit and inspection
Offer of Significant Assistance

- Significant assistance in method of operation
- Offer is sufficient (e.g. contained in agreement)
- Examples of Assistance:
  - Training (in operation, sales, business, repair vs. single product)
  - Advice (marketing, management, H.R.)
  - Site selection
  - Detailed operations manual
  - Accounting system

Significant Control and Assistance

- Principals Applied in U.S.:
  - Reliance
    - Sophistication of franchisee
    - Financial risk (threat to economic health)
    - Investment level
  - Scope of Control (entire operations? single product?)
Exemptions

- Sale by a franchisee
- Sale to an officer or director
- Additional sale to an existing franchisee
- Trustee
- Fractional franchise

Exemptions (Cont’d)

- Renewal or extension
- Small investment ($5,000 maximum)
- Short duration
  - Excluding Alberta
  - Location assistance required, except in Ontario
- Large investment ($5M, only Ontario)
Exemptions (Cont’d)

• Retail operation

• S. 55 *Competition Act*

Best Practices

• Avoid indirect fees

• Manage control and assistance

• Monitor changes
The End of the Road: Termination of Distribution Agreements

Steven F. Rosenhek
November 22, 2011
How Difficult is it to Terminate for Cause?

- Express contractual conditions can provide for the termination of the contract upon breach of those conditions.

- What if there is no termination provision in the contract?
  - **General Principle:** the contract can only be terminated upon reasonable notice - *Hillis Oil & Sales v. Wynn’s Canada* (1986) - S.C.C.

  - UNLESS there has been a fundamental breach of the contract - *11934430 Ontario Inc. v. Boa-Franc* (2005) – Ont. C.A.

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**Shelanu Inc. v. Print Three Franchising Corp.** (2003) – Ont. C.A.

- Whether a breach amounts to a fundamental breach depends on:
  - the ratio of the party’s obligation not performed to the obligation as a whole;
  - the seriousness of the breach to the innocent party;
  - the likelihood of repetition of the breach;
  - the seriousness of the consequence of the breach; and
  - the relationship of the part of the obligation performed to the whole obligation.
What Happens When the Agreement is Unwritten?

• Unwritten agreements are enforceable

• Where no provision for termination of the distribution agreement or ambiguity: Court will imply term of reasonable notice
  • *Hillis Oil & Sales v. Wynn’s Canada* (1986) - S.C.C.

• However, the party seeking to rely on an unwritten contract will need to prove its existence where challenged

Consequences of Failing to Prove an Unwritten Agreement

  • too many essential terms of a distribution agreement were not dealt with between the parties
  • relationship was more like vendor and purchaser
  • plaintiff not entitled to reasonable notice

  • no evidence led to establish a distribution agreement beyond the assumptions of the plaintiff
  • Each contract was an independent sales contract with no obligation to contract for future purchases

Preferable to have written agreements with express termination provisions
What Constitutes Reasonable Notice?

- Courts will look to the circumstances of each case to determine what is reasonable

- Factors to consider when determining reasonable notice:
  - the length of association between the parties;
  - the dependency of the distributor on the principal’s line of conduct;
  - the level of investment made by the distributor to distribute the principal’s product and the volume of business derived from the sale of the principal’s product; and
  - the established practice, if any, in the trade or business.


- Unexecuted draft agreements with termination provision may be useful in determining what is reasonable

Is there an Obligation of Good Faith?

- Duty of good faith implied in a variety of contractual relationships

  - The court will impose a duty of good faith when there is an inherent vulnerability or a power imbalance; or
  - A duty of good faith may arise out of the parameters of the parties contractual relationship and conduct
Is there an Obligation of Good Faith –
Inherent Vulnerability & Power Imbalance

  - Distribution contract is typically not the result of a bargain between equals
  - Weaker party is typically unable to bargain for specific or unique terms
  - Power imbalance between the parties continues to affect the relationship
  - Court implied a duty of good faith in the performance of the distribution contract

Is there an Obligation of Good Faith –
Parameters of the Relationship

  - Court of Appeal affirmed trial judge’s finding that parties were under a duty of good faith towards each other
  - Duty of good faith was justified because “the nature of the contract in this case is an ongoing relationship rather than a one-time performance obligation.”
But…Duty of Good Faith Cannot Alter Express Terms of the Contract

  - “the implication of a duty of good faith has not gone so far as to create new, unbargained-for, rights and obligations. Nor has it been used to alter the express terms of the contract reached by the parties.”
  - “trial judge erred by using the implied duty of good faith to alter the express terms of the contract, including the right to terminate on notice.”

Where are we Left?

- Duty of good faith likely applies in the context of distribution agreements
- The termination of a distribution agreement on bad faith premises has the potential to attract judicial scrutiny
- However, if the distribution contract is terminated in accordance with the terms of a written termination clause, likely protected from bad faith allegations
When is an Injunction Available?

  - Is there is a serious issue to be tried?
  - Will the party seeking the injunction suffer irreparable harm if the injunction is not granted? and
  - Does the balance of convenience favour granting an injunction?

Injunction - Serious Issue to be Tried

- Mandatory or permissive injunction?
  - Different standards
  - Mixed jurisprudence in the context of distribution agreements

    - Mandatory injunction when forces parties to continue to do business
    - Applicant must demonstrate a strong *prima facie* case

    - Prohibitory injunction because simply a continuation of the rights that had been agreed to under the contract
    - Lower threshold of "a serious issue to be tried"
Injunction - Irreparable Harm?

- Harm that cannot be quantified in monetary terms

  considered the following factors:
  - distributor’s entire business reliant on manufacturer’s product;
  - damaged credibility with customers or suppliers;
  - high level of inventory on hand;
  - renewed warehouse lease;
  - hired new sales manager;
  - declined offers from other manufacturers;
  - substantial investments to develop market for manufacturer; and
  - lay-offs.

Injunction - Balance of Convenience

- Which party will suffer the greatest harm if injunction granted or denied?

- Courts are reluctant to bind a manufacturer to a distribution contract when relationship has deteriorated

- However, significant harm to the distributor may warrant the continuation of a long-standing relationship
REFERENCE MATERIALS
CANADIANIZATION OF US AGREEMENTS

The following is a description of some of the “Canadianization” issues that typically arise in connection with US agreements being adapted for use in Canada. The list is not exhaustive of all of the possible issues that may arise in the context of review of a specific agreement. Although this memo covers relevant issues in all Canadian common law provinces and territories, it is directed principally to Ontario law issues (and the federal laws applicable to that province). If, therefore, jurisdictions outside of Ontario are relevant then we will consult with our firm colleagues in those jurisdictions. This is particularly true with respect to the Province of Quebec which is a civil law regime. This memo is directed to contracts between commercial parties only and not with consumers, where consumer legislation will also apply.

1. **Interest.** Pursuant to the *Interest Act* (Canada), interest must be stated as a yearly rate. If interest is to be calculated on the basis of a period less than a calendar year, the equivalent rate calculated on the basis of a calendar year must also be stated. This often arises in connection with statements in agreements such as “two percent per month”. Such a provision would not comply with the *Interest Act*, and a deemed interest rate of five percent would apply by statute. This can be fixed by simply referring as well to the annual rate of 24% per annum in the agreement.

The second issue arising under the *Interest Act*, as alluded to above, arises if the rate is calculated on a 360 day year basis, which is common in the US. Pursuant to the *Interest Act*, interest must be calculated on a calendar year (ie. 365 or 366 days). In applicable cases, the following type of clause is included, although the clause may need to be changed, depending on the specific language of the agreement:

For the purposes hereof, whenever interest is calculated on the basis of a year of 360 days, each rate of interest determined pursuant to such calculation expressed as an annual rate for the purposes of the *Interest Act* (Canada) is equivalent to such rate as so determined multiplied by the actual number of days in the calendar year in which the same is to be ascertained and divided by 360.

A third issue arising relating to interest is wording sometimes found in US agreements such as “Interest on late payment shall be charged at the maximum rate permitted by law”. In Canada, this rate would be a criminal rate of interest contained in our federal Criminal Code, approximately 60% per annum. This is rarely what is intended by the parties. If other fees and amounts are payable under the agreement, this may well result in the agreement being in violation of the Criminal Code. In that case, the interest provision would be void as being in violation of public policy, and therefore unenforceable. Criminal proceedings may also result. A specific interest rate or a rate tied to the prime rate is preferable.
2. **Sale of Goods Legislation.** US agreements often provide for limitations in warranty coverage such that implied “warranties” are excluded. Under the sale of goods legislation in our common law provinces, “merchantability” is an implied “condition”, not an implied warranty. There are some other implied “conditions” under our laws. It is therefore important to revise the clause to exclude not only implied warranties but also implied conditions, otherwise the exclusion will not be valid. We typically exclude “representations” as well. It is also important to include in the exclusionary language the words “statutory or otherwise” to ensure that the implied conditions and warranties in sale of goods legislation are expressly excluded, and not just those which may be implied by the wording of the agreement.

3. **Limitation of Liability.** The typical limitation of liability clause will exclude liability for all types of damages including consequential damages. In addition to “indirect damages”, we typically exclude “loss of revenue or profits”, given the case law which suggests that these may constitute “direct” rather than “indirect” damages.

4. **Governing Law.** Detailed discussion of governing law and jurisdiction is beyond the scope of this memo. This memo generally assumes that the governing law of an agreement will be Canadian provincial and federal law. Governing law is usually addressed in US agreements and some US companies insist that their agreements be governed by the laws of a particular state. Many US clients, on the other hand, do not have a problem with the laws of a province in Canada and the laws of Canada applicable in that province applying. If there is a desire to use US law, for the sake of convenience or because the US law offers some substantive advantages to Canadian law, there are some practical and legal difficulties to this approach that should be considered. First, if an action is commenced in Canada, it is necessary for the contracting party to provide expert evidence at a trial as to the law of a particular state, in addition to whatever evidence is required to deal with the merits of the dispute itself. This typically involves an experienced US attorney appearing as a witness at the Canadian trial. Second, it may be difficult for the Canadian contracting party to obtain good legal advice on an agreement unless they obtain a US lawyer, which may be expensive and onerous. Finally, there may be Canadian public policy provisions which may override the laws of the particular state. Accordingly, even if US law is the governing law, it is recommended that most of the Canadianization changes recommended in this memo be made to be on the safe side.

5. **Jurisdiction** US agreements often provide that a court located in a particular state will have exclusive jurisdiction with respect to litigation arising out of the agreement. A judgment of a court in the US, made in accordance with an agreement, which requires a fixed sum of money to be paid, would ordinarily be enforceable in a Canadian court. Typically, the practice would be to commence an action in the courts of the US jurisdiction and rely upon that judgment as conclusive evidence of a debt owing. Under
such circumstances, there are very few defences available and the usual procedure is to move quickly for summary judgment in a Canadian court.

However, our courts may not be willing to enforce a judgment from a US court which purports to require specific performance of a provision of an agreement or which grants some form of injunctive relief. There may also be some reluctance to enforce a judgment from a US court which declares or affects ownership of property (which we refer to as a judgment “in rem”). Accordingly, exclusive jurisdiction of a US court to entertain such matters may not be advisable. One possible approach is to provide for a non-exclusive jurisdiction of the US court, which permits the other party to commence an action in a Canadian court because the US court does not have exclusive jurisdiction. Each situation has to be reviewed on its merits and a key threshold question, to the extent it can be answered, is which party is likely to commence litigation and for what relief.

6. **UN Convention.** If goods are being sold by a US entity to a Canadian entity or vice versa, then the *United Nations Convention on Contracts for the International Sale of Goods* would apply (if it is not excluded), because both the US and Canada are signatories to that Convention. The conventional wisdom of North American lawyers is to specifically exclude the Convention because it is a code for the sale of goods established by a UN committee and therefore contains a number of negotiated provisions which may be desirable. The clause we typically use is as follows:


7. **Security Interests.** The common law provinces of Canada have enacted their own Personal Property Security legislation. Quebec has its own regime of securing personal property. The procedure to take security in the common law provinces is similar to the procedure under the *Uniform Commercial Codes* in the US and involves security agreements, purchase money security interests and financing statements. The procedure to take security can be complicated; simply stating in the agreement that a security interest is granted is not sufficient to assert priority of a security interest over a trustee in bankruptcy or secured party that has perfected its security interest by registration of a financing statement.

8. **Canadian Sales Taxes.** A discussion of taxes is beyond the scope of this memo but Canada imposes a federal value-added tax (“GST/HST”) on virtually all types of property and services, and the GST/HST varies in rate from 5% to 15% depending on the provincial jurisdiction in which the property or service is supplied. In most cases the purchaser of such property or services is entitled to an “input tax credit” to recover the GST/HST payable. In addition, the province of Quebec imposes its own value-added tax at a rate of 7.5% on most goods and services, and the provinces of PEI, Manitoba and
Saskatchewan impose retail sales taxes at rates ranging from 5% to 10%. In connection with Canadianizing the agreement it is typically advisable to ensure that sections dealing with sales taxes account for the various types of sales taxes imposed in Canada.

9. **French Language Clause.** It is typical to include the following French language clause if the other party to the agreement is a Quebec resident:

   The parties have expressly required that this Agreement and all documents and notices relating hereto be drafted in English. Les parties aux présentes ont expressément exigé que la présente convention et tous les documents et avis qui y sont afférents soient rédigés en anglais.

   It is important to note that if the use of agreements in the province of Quebec is more than a “one off” situation, then it may be necessary for the agreement to be translated into French, and the above clause should not be relied upon. This is particularly important if the client has a significant number of employees in the province of Quebec (i.e. more than 50), as regulatory requirements for conducting business in French in that province will apply. Our colleagues in our Quebec office can elaborate on these matters if required.

Please contact me if you have any questions or comments on this memo or if you require additional information.

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MS/ef

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BIOGRAPHIES
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Mark Stinson is engaged in a general business law practice with an emphasis on mergers and acquisitions, joint ventures, corporate reorganizations, franchising, product distribution and supply and general corporate and commercial matters. Mark provides general counsel and transactional advice to a wide variety of the firm's clients including those involved in manufacturing and distribution, automotive, retailing, food and dairy and cemetery and funeral services.

Mark is the Practice Group Leader of the firm's Asia Pacific Practice Group and represents several leading Japanese and other Asian companies which involves frequent travelling to Asia. Mark is also a member of the firm's Automotive Practice Group and regularly advises automotive manufacturers, part suppliers, dealers and other industry participants. Mark is a past Leader of the firm's Retailing, Distribution and Franchising Practice Group and has an active practice in these areas.

Representative Experience

- **Silgan Holdings completes $1.4 billion financing**
  Advised Silgan Holdings Inc.

- **DENSO announces US$63 million investment for major expansion of Canadian manufacturing facility**
  Advised DENSO Corporation

- **Veritas acquires Pearson Government Solutions**
  Advised Pearson plc

- **Silgan Holdings acquires Cousins-Currie for $48.3 million**
  Advised Silgan Holdings Inc.

- **Pliant Corporation completes plan of reorganization**
  Advised the Pliant Group with respect to the pre-filing and exit financing credit facilities

- **Toyotetsu Canada to build $50 million Canadian automotive parts plant in Simcoe, Ontario**
  Advised Toyotetsu Canada, Inc. in its plans to build a $50 million Canadian automotive parts plant in Simco, Ontario

- **Grafton-Fraser purchases Tip Top Tailors Group from Dylex**
  Advised Grafton-Fraser Inc.

- **Arbor Memorial Services and affiliated companies complete transactions**
  Advised Arbor Memorial Services and its affiliated companies, Memorial Gardens Canada and Trillium Funeral Services

- **Parker Hannifin acquires Denison International for over US$244 million**
  Represented the Canadian affiliate of Parker Hannifin Corporation
Mark Stinson

Presentations

- Distribution Agreements: Avoiding the Pitfalls, November 22, 2011
- Tips for Drafting Commercial Agreements, The Japanese Chamber of Commerce and Industry, May 19, 2010
- Let's Make a Deal: Mergers and Acquisitions in Franchising, Co-presenter, Ontario Bar Association Fifth Annual Franchise Law Conference, September 2006
- The Emerging Good Faith Doctrine in Commercial Contracts, Presenter, the Law Society of Upper Canada, the Return of the Six Minute Business Lawyer, May 2000

Publications

- "Fasken Martineau Provides Overview of 2009 Federal Budget", Canada Report, January 27, 2009
- "Doing Business in Canada", Coordinating Author, Franchising Chapter, published by Lexis Nexis, Continuing
- "Let's Make a Deal: A Legal Primer on Doing Business in China", Co-author, June 2006

Memberships and Affiliations

- Canadian Bar Association
- American Bar Association
- Inter-Pacific Bar Association (IPBA)
- The Japan Society
- Canada-Japan Society
- Asia Pacific Foundation
- Forum on Franchising
- Retail Council of Canada
- Canadian Franchise Association

Community Involvement

- Advises a number of charities and not-for-profit corporations at both the federal and provincial level on a pro bono basis
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Darrell Jarvis practises business law with a focus on franchising, leasing, construction and mergers and acquisitions, particularly in the hospitality and retail sectors.

Darrell has extensive experience in the drafting and review of franchise agreements and disclosure documents, default enforcement, dealing with insolvent franchisees, workouts, and in the purchase and sale of franchised businesses. Darrell has been involved in the co-branding of franchised businesses, master franchise arrangements, the franchise of products within another business, the establishment of franchised businesses within big box stores, and the conversion of company operated units to franchised businesses.

Darrell’s leasing experience relates particularly to restaurant and retail businesses. He has been involved in ground and build-to-suit leases for free-standing buildings and CRU space in shopping malls, big box centres and street front locations as well as in non-traditional locations such as airports, hospitals and universities.

He has been involved in the acquisition and divestiture of a number of companies with large franchise systems.

Prior to joining Fasken Martineau in 2009, Darrell held a number of executive positions at Cara Operations Limited, where he led the Legal, Franchising, Real Estate Development, Construction and Design Departments. Cara is the operator and franchisor of Swiss Chalet, Montana’s, Kelsey’s, Harvey’s, Milestones, and formerly, Second Cup, and was a multi-unit franchisee of several national brands including Tim Hortons and Outback Steakhouse.

Representative Experience

- **Tanger Factory Outlet Centers and RioCan REIT announce $1 billion joint venture**
  Counsel to Tanger Factory Outlet Centers, Inc. in its joint venture with RioCan Real Estate Investment Trust to acquire, develop and lease sites across Canada suitable for development as outlet shopping centres, with an overall investment anticipated to be as high as $1 billion

Presentations

- **Distribution Agreements: Avoiding the Pitfalls**, November 22, 2011
- **Franchising in the Electronic Age**, Ontario Region Legal Day, Canadian Franchise Association, March 2, 2011
- **Legal and Business Issues Affecting Franchise Transfers**, 10th Annual Franchise Law Conference: What We Can Expect in the Next Decade, Ontario Bar Association, November 4, 2010
BIOGRAPHY
Darrell Jarvis

- Rebates in Franchising, Franchise Law Conference, Ontario Bar Association, October 14, 2009
- Efficiently Managing the Paper and Dealing with Complex Franchise Issues In-House, Franchising: Latest Legal and Business Strategies, Insight Seminar, October 8-9, 2003
- Retail Where Retail Isn’t King, Canadian Shopping Centre Law Conference of the ICSC, March 1-2, 2001
- How to Prepare an Effective and Safe Disclosure Document, Everything You Need to Know About the New Ontario Franchise Legislation, November 30, 2000
- Co-Branding, 8th Annual Canadian Franchise Association Convention, November 16-18, 1997

Publications

- “New Site Development”, The Franchise Voice, Canadian Franchise Association, Winter 2011
- “The Freedoms of Franchising: How Much Flexibility Will You Have as a Franchisee?”,Franchise Entrepreneur, January/February 2011
- “What Should a Prospective Franchisee Expect to Learn From a Disclosure Document?”, Ask a Legal Expert, Franchise Canada, September/October 2010
- “Dealing with Deposits”, Ask the Expert, Franchise Entrepreneur, September/October 2010
- “Developing the Franchised Facility”, Focus on Franchising Newsletter, Vol. 2, No. 1, Ontario Bar Association, October 2010
- “Territory Protection”, Ask the Expert, Franchise Entrepreneur, January/February 2010

Memberships and Affiliations

- Legal and Legislative Committee member, Canadian Franchise Association
- Chair, Arthur Wishart Act Sub-Committee of Canadian Franchise Association Legal and Legislative Committee (formed to develop proposals to amend the Arthur Wishart Act)
- Executive of Ontario Bar Association Franchise Law Section, Public Affairs Liaison
- Ontario Bar Association Franchise Law Section Sub-Committee to Develop Proposed Amendments to Arthur Wishart Act (member)
- Ontario Bar Association Franchise Law Section Planning Committee for 2010 Franchise Law Conference
BIOGRAPHY
Darrell Jarvis

- Sub-Committee of Canadian Franchise Association Legal and Legislative Committee to review and make submissions to Province of New Brunswick in relation to its draft franchise legislation (2009), member
- American Bar Association Forum on Franchising
- Board Member, OTEC (a not-for-profit organization providing training and consulting to the hospitality and tourism industries)
A leading Ontario litigator, Steven Rosenhek has broad experience before all levels of Court and a wide range of provincial and federal administrative tribunals. His practice encompasses all aspects of civil and administrative litigation, including complex commercial litigation, class actions, commercial arbitrations, shareholder disputes, securities, antitrust/competition law, product liability and insurance. He has handled both prosecution and defence briefs before a wide array of professional disciplinary, regulatory and administrative bodies.

Steven has written and lectured extensively in numerous areas, including commercial litigation, class actions, advocacy and dispute resolution, and professional liability.

He is a well-known instructor in trial advocacy, whose teaching credits include:

- Special Lecturer, Trial Advocacy, Faculty of Law, University of Toronto, 1987 to 2000
- Instructor, Advanced Trial Advocacy, Osgoode Hall Law School Part-time LLM in Civil Litigation and Dispute Resolution
- Instructor and Team Leader, Intensive Trial Advocacy Workshop, Osgoode Hall Law School, 1988 to present

Steven is a Past-President of the Ontario Bar Association and currently chairs its Paralegals Task Force. In 2010, Steven received the OBA Award for Distinguished Service. The award recognizes exceptional career contributions and achievements by an OBA member to the legal profession, jurisprudence, or the residents of Ontario.

Presentations

- Distribution Agreements: Avoiding the Pitfalls, November 22, 2011
- Litigation on a Budget - Managing the Case, the Cost and Outside Counsel, Canadian Corporate Counsel Association Annual Conference, August 2011
- Natural Health Products in Canada: Key Legal Issues, Life Sciences Group Seminar, January 26, 2011
- Medical Devices in Canada: Hot Legal and Regulatory Issues, Life Sciences Group Seminar, April 6, 2010
BIOGRAPHY
Steven F. Rosenhek

Year of Call
Ontario, 1984
England and Wales, 2009

Languages
English
French

- Legal Issues in the New Economic Order, Presented in conjunction with the Italian Chamber of Commerce of Toronto, October 22, 2009
- Turn Adversity Into Advantage, Fasken Martineau/Deloitte Joint Seminar, May 21, 2009
- Addressing Patient and Staff Safety Issues in Your Hospital, Hospitals and Foundations Seminar Series, May 14, 2008
- Divine Discoveries: Building a Great Case; and Preparing Yourself for Discovery: The Basics, Ontario Bar Association, December 2006
- Flexible Fee Arrangements with External Counsel - What's Out There?, Canadian Corporate Counsel Association programme, November 2006
- Mastering Mediation: What You Need to Know for a Successful Mediation, Ontario Bar Association (Young Lawyers Division/Alternative Dispute Resolution Section Joint Programme), May 2006
- Divine Discoveries: Building a Great Case; and Preparing Yourself for Discovery: The Basics, Ontario Bar Association, December 2005
- Winning Advocacy Skills, Demonstrator (cross-examination), Canadian Bar Association Annual Conference, August 2005
- Presentation of Evidence in Chief, Young Lawyers Nutshell Programme on Trial Skills, Toronto Lawyers Association, October 2004
- Essential Tips and Techniques for Today's Corporate Counsel, Joint Programme of the Canadian Corporate Counsel Association and Ontario Bar Association, June 2004
- Insurance Claims: Learn from the Pros, Ontario Bar Association, April 2004
- The E-Counsel Primer - Going Boldly Where Your Practice Did Not Go Before, Corporate Counsel Programme, OBA Annual Institute, January 2004
- Keeping One Step Ahead: The Latest in Shareholder Disputes and Remedies, Ontario Bar Association, May 2003
- The In-House Essentials, OBA Institute of Continuing Legal Education, Counsel Association Programme, 2003
- An Overview of Employer Liability and Legal Responsibilities, Ontario Public Health Association, November 2002
- Mass ADR: Class Actions and Settlement, Essential ADR Seminar, ADR Institute Conference, October 2002
BIOGRAPHY
Steven F. Rosenhek

- Multi-Jurisdictional Class Actions, Canadian Corporate Counsel Association Annual Meeting, August 2002
- Litigating Class Actions, The Canadian Institute, May 2002
- The Determination of Class Counsel Fees in Different Jurisdictions, The Canadian Institute, May 2002
- Troublesome Business Torts, Ontario Bar Association, April 2002
- Business Host Liability: Practical Tips, Insight Information Seminar, 2002
- The Duty of Good Faith, Canadian Bar Association Annual Meeting, 2002
- Bringing Evidence from American Litigation into Canada: The Vitapharm Litigation, Insight Information Class Action Litigators Conference, January 2002
- Troublesome Business Torts, Ontario Bar Association, November 2001
- Evidence Pitfalls in Complex Litigation, Metropolitan Toronto Lawyers Association, May 2001
- Class Actions: Exploding onto the Scene, Ontario Bar Association, April 2001

Publications
- "Ontario Court of Appeal Overturns Canada's Largest Environmental Class Action Judgment", Litigation and Dispute Resolution | Environmental Bulletin, October 18, 2011
- "The Death of Indirect Purchaser Claims in Canada?", Antitrust/Competition & Marketing and Class Actions Bulletin, October 18, 2011
- "Disgorgement of Profits Where No Injury? Canadian Court Considers "Waiver of Tort" Doctrine in Medical Devices Class Action", RX for the Defense, DRI Drug and Medical Device Committee, Vol. 19 Iss.2, October 14, 2011
- "Class Action Compendium - Canadian Chapter", Defence Research Institute, 2011
- "Canadian Medical Device Class Actions: A Work in Progress", Featured Article, RX for the Defense, October 1, 2010
- "Canada's Largest Environmental Class Action Judgment Based on Pollution: Nickel Refinery to Pay $36M to Homeowners", Litigation Bulletin, September 15, 2010
- "Canada Enacts New Natural Health Products Regulations", Life Sciences Bulletin, August 31, 2010
- "Medical Device Litigation North of the 49th Parallel: A Primer", DRI, Rx for the Defence, May 5, 2010
- "Canada Targets State Sponsors of Terrorism", IBA Litigation Committee Newsletter, September 2009
- "Mastering Mediation: What You Need to Know for a Successful Mediation", Ontario Bar Association (Young Lawyers Division/Alternative Dispute Resolution Section Joint Programme), 2006
BIOGRAPHY
Steven F. Rosenhek

- "Class Counsel Fees and Costs Awards in Canadian Class Actions", Author, Class Action Reports, Vol. 27, September 2006
- "Multi-Jurisdictional Class Actions: Emerging Issues and Future Dilemmas", Canadian Corporate Counsel Association Annual Meeting, August 2002
- "The Determination of Class Counsel Fees in Different Jurisdictions", The Canadian Institute's Litigating Class Actions: The Roadmap for Bridging and Defending Class Actions in Western Canada Conference, May 2002
- "Bringing Evidence from American Litigation into Canada: The Vitapharm Litigation", Insight Information's Class Actions - The Litigators' Conference, January 2002
- "Class Actions: Exploding onto the Scene", Ontario Bar Association Conference, April 2001
- "Class Actions Across the Border - A New Kind of Litigation Comes to Ontario", Business Law Today, January/February 2001

Memberships and Affiliations
- Executive member, Ontario Bar Association (OBA) Class Actions Section, 2011- 2012
- President, Ontario Bar Association, (1998 to 1999) and Chair, Paralegals Task Force (1999 to present)
- International Association of Defence Counsel
- Defence Research Institute
- l'Association Internationale des Jeunes Avocats
- l'Association des Juristes d'Expression Française de l'Ontario
- The Advocates' Society

Rankings and Awards
- Ontario Bar Association Award for Distinguished Service, 2010
- Dean's Key, University of Toronto Law School, 1982