The Enforcement of Franchisee Releases and Settlement Agreements in Light of the Tutor Time and Midas Cases

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Richard D. Leblanc[1]

Summary of Issues

Section 11 of the *Arthur Wishart Act (Franchise Disclosure)* (the "Act")[2] expressly prohibits any purported waiver or release by a franchisee of a right given under the Act or of an obligation or requirement imposed on a franchisor or its associate under the Act. Any purported waivers or releases of such rights, obligations or requirements are void.

Broadly construed, this anti-waiver provision underscores the protective intent of the Act by ensuring that franchisees cannot, intentionally or inadvertently, compromise or diminish their rights under the Act which are intended to correct the unequal balance of power between franchisors and franchisees.

In its most basic application, the anti-waiver provision invalidates attempts to contract out of the rights, obligations and requirements of the Act. A franchisor cannot, for example, enforce an agreement permitting it to sidestep its disclosure obligations and waiving the franchisee's rescission rights. Nor can a franchisee contractually agree to ignore a franchisor's general obligation to act in good faith, or to permit it to associate freely with other franchisees. Finally, a franchisee cannot contract out of its statutory rights to damages arising from a franchisor's breach of its obligations: to act in good faith, to permit association, and to comply with its disclosure obligations.

This paper surveys two Ontario decisions which have considered the scope of section 11 of the Act.[3]

Tutor Time

The well known and much discussed decision in *1518628 Ontario Inc. et al v. Tutor Time Learning Centres, LLC*[4] ("Tutor Time") concerns the application of section 11 of the Act to a release given pursuant to a settlement agreement between the franchisor, Tutor Time Learning

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[1] Richard Leblanc is a partner in the Business Law Group of Miller Thomson LLP.

[2] S.O. 2000, Chapter 3. Similar provisions are found at: s.18 of the Alberta *Franchises Act*, RSA 2000, Chapter F-23; s. 12 of the P.E.I. *Franchises Act*, Chapter F-14.1; s. 12 of the New Brunswick *Franchises Act*, Chapter F-23.5; and s. 11 of the yet unproclaimed Manitoba *Franchises Act*.

[3] This paper is provided for illustrative purposes only and is not intended to constitute legal advice. Please consult your professional advisors prior to relying on any matters contained herein.

[4] [2006] O.J. No. 3011 (S.C.J.), confirmed on appeal April 12, 2007 (Divisional Court).

Centres LLC ("TTLC") and its Burlington franchisee[5]. The relevant facts are summarized as follows:

- The plaintiff, 1518628 Ontario Inc. ("151"), acquired a Tutor Time franchise through a share purchase in December, 2003;

- TTLC provided to 151 a disclosure document in the format prepared for its U.S. franchisees, acknowledging that it was not in the format required by the Act;

- 151 suffered financial difficulties which it claimed resulted from the franchisor's inadequate disclosure of, *inter alia*, regulatory violations, accounting irregularities, royalty arrears accrued by the former operator, and inaccurate disclosures respecting the true costs of operating daycare facilities in Ontario;

- The parties negotiated certain financial concessions resulting in a Settlement Agreement signed in June, 2004 and effective May 14, 2004. The Settlement Agreement released the franchisee from the prior operator's royalty arrears, provided a credit for royalty and technology fees and reimbursed 151 the amount of USD$1000.00 relating to winter season advertising. The franchisee acted with the assistance of counsel.

- The Settlement Agreement provided the following (the "Release"):

> 7. Release the Parties do hereby fully release and forever discharge each other, all employees, directors, officers and agents, from all rights, claims, damages, causes of action of any nature they may have had, or may hereafter have against the other party by reason of any matter occurring to the dates prior to the effective date of this Settlement Agreement including but not limited to all rights, claims, damages, causes of action, arising out of the business/franchise relationship between the parties. [Emphasis added]
>
> 8. No Alteration Except as may be expressly set forth herein, the Franchise Agreement and all other ancillary documents remain in full force and effect with no alterations.

- Despite this compromise, the franchisee's business failed and the plaintiffs delivered a notice of rescission under s. 6(2) of the Act in October of 2004. Further settlement negotiations failed and the franchisee filed a statement of claim against TTLC on July 14, 2005 seeking a refund of all monies paid to the franchisee, compensation for losses incurred and other remedies pursuant to s.6(6) of the Act.

On the motion for summary judgment, Justice Cumming found that the Release constituted a valid contract which contemplated the release by 151 of any claim for damages arising from TTLC's failure to provide proper disclosure. The Court emphasized that 151 entered into the Release with the benefit of counsel's advice and with full knowledge of TTLC's failures to comply with the Act and of its resulting rights.

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[5] This case is also instrumental respecting other issues which are not discussed herein, notably the sufficiency of foreign disclosure documents for use in Ontario, and the effect of the qualification to the disclosure exemption for a franchisee sale effected "by or through" a franchisor.

The Court dismissed the plaintiff's attempts to invalidate the Release by applying section 11 of the Act. Just Cumming stated:

> "In my view, s. 11 does not have application to a release given (with the advice of counsel) by a franchisee in the settlement of a dispute for existing, known breaches of the *Act* by the franchisor in respect of its disclosure obligations, which would otherwise entitle the franchisee to a statutory rescission."

In appearing to attempt to reconcile the decision with the express wording of section 11, Justice Cummings added:

> "The settlement of a claim arising from and consequential to an existing statutory right of rescission is not in itself "a waiver or a release" of that statutory right to rescission. It is a release of the claim arising from having exercised the right of rescission or being in the position to exercise the right of rescission. In my view, if a franchisee, as in the instant situation, with full knowledge of a breach of the franchisor's obligations to disclose as required by the *Act* and regulations, and with the benefit of independent legal advice, chooses to affirm the franchise agreement as a term of a settlement of the claims that arise from the franchisor's breach, then the franchisee can no longer rescind and make a claim to the remedies afforded by s. 6(6) of the *Act*."

The decision of Justice Cummings was unanimously confirmed on appeal.

The Tutor Time principles are clearly set out above: Section 11 does not preclude parties from entering into valid and binding settlement agreements, for adequate consideration, with the advice of counsel, for existing, known breaches of the Act.

Midas

In the matter of *405341 Ontario Limited v. Midas Canada Inc.*[6], the Courts considered the enforceability of certain provisions in the Midas franchise agreement requiring a general release from the franchisee as a condition to any assignment or renewal. The issue arose in the context of a class action proceeding alleging that Midas had breached its common law and statutory duties of good faith and fair dealing by outsourcing its product supply to a third party supplier. The delivery of the release would have had the effect of disqualifying the plaintiff from the class proceeding. Section 9.3 of the Midas Franchise and Trade-Mark Agreement stated:

> **Terms of Franchise during Extension Period:** The term of the extension of the franchise relationship shall be twenty (20) years, and the franchise fee for such extension shall be one-half of the franchise fee charged new franchisees by Midas at the time of the extension. In all other respects, the form of the agreement governing the extension of the franchise relationship shall be the same as that granted to new franchisees at the time of such extension, except for special conditions, if any, which are imposed in connection with the extension. Franchisee and each of its shareholders, directors, and officers shall, as a condition for the extension of the franchise relationship, execute and deliver to Midas a general release of any and all claims and causes of action against Midas, its affiliated corporations, and their respective officers, agents, and employees. [Emphasis Added]

The related provision in respect of assignment, section 7.4(f) provided:

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[6] (2009), 64 B.L.R. (4th) 251 (S.C.J.); confirmed on appeal, 2010 ONCA 478 (CanLII).

> Franchisee and each of its shareholders, directors and officers shall have executed and delivered to Midas a general release of any and all claims and causes of action against Midas, its affiliated corporations, and their respective officers, agents and employees

The plaintiff sought a declaration that such provisions were unenforceable and void for the purposes of the class proceeding. Specifically, the plaintiff franchisee alleged that (i) since the required release would prevent a franchisee from participating in the class action (and therefore associating freely) contrary to section 4(1) of the Act, that the offending provisions were void pursuant to section 4(4) of the Act[7]; and (ii) since the required release would deprive the franchisee of its statutory right to damages for breach of the obligation of fair dealing, that the provisions were contrary to section 11 of the Act.

The Court granted the relief sought on the following basis:

- The right to associate protected in section 4(1) of the Act includes the right to participate in a class proceeding.

- The wording of section 4(4) which voids any provision in a franchise agreement which "purports" to interfere with or restrict the exercise of the right of association includes words which "have the effect of interfering or restricting the statutory right and not merely those which assert or profess an intention to do this." In other words, the fact that the requirement for the release did not directly and expressly interfere with the right of association did not prevent the provisions requiring the releases from being invalidated pursuant to section 4(4).

- The Court rejected Midas's contention that sections 4(4) and 11 of the Act could not have been intended to apply to circumstances where franchisees voluntarily decide to seek renewal or effect an assignment without coercion and thereby provide the release in accordance with past practice and pursuant to previously accepted terms. Justice Cullity held that this interpretation would subvert the effect of section 11 "if the obligations of fair dealing could be bargained away by such provisions of standard-form franchise agreements – whether or not an enquiry would be permitted into the fairness of the bargain".

- The Court distinguished the matter from Tutor Time, noting that the parties were not engaged in settling their claims and that in fact, the plaintiff's motion was made to permit it to continue asserting its claims. Cullity J. noted: "My understanding of the reasoning of Cumming J. is that, if there was a settlement that would otherwise be binding, section 11 would not apply to govern a release given pursuant to it."

- Cullity J. further emphasized that any release provided by an unwilling franchisee as a result of the franchisor's enforcement of the impugned provisions would not be given pursuant to a settlement in the sense of Tutor Time: "Such a release would not be given in connection with the settlement of claims asserted in this proceeding, and Tutor Time is, in my opinion, properly distinguishable on that ground."

In summary, the Court considered the ratio of Tutor Time and found that a release of a claim was not in every case tantamount to a settlement. Cullity J. emphasized that the release

[7] Section 4(4) of the Act provides: "Any provision in a franchise agreement or other agreement relating to a franchise which purports to interfere with, prohibit or restrict a franchisee from exercising any right under this section is void."

required by the agreement would not be given in connection with a settlement of claims under the proceeding, and thereby underscored the imbalance of consideration and unfairness of the bargain were the franchisee to provide such a release in the circumstances. The franchisee cannot possibly, at the time of entering into the franchise agreement, have received sufficient consideration for prospective claims including those which were the subject matter of the class proceeding.

The Court of Appeal also considered the matter and upheld Justice Cullity's findings. McFarland J.A. held that the Midas facts were not analogous to Tutor Time and noted that the Agreement was signed prior to the claims and without full knowledge of the breaches. The Appeal Court further held that sections 7.4(f) and 9.3 of the franchise agreement offend the clear language of section 11. McFarland J.A. also categorized Midas's attempts to distinguish between settlement of claims (which word is not found in section 11) such as that permitted in Tutor Time, and the word "right", as "artificial", holding that "the claims in the class action are derived from the rights that the class members are seeking to assert."

Discussion

Midas and Tutor Time have spawned countless debates about the scope of section 11 of the Act. While on its face section 11 would seem to have precluded the finding in Tutor Time, the Court held that the policy rationale served by permitting parties to settle existing, known claims (including claims arising from breaches of the Act) through negotiation, with the benefit of counsel, overruled a strict literal interpretation of the prohibition. Cummings J. commented that the policy rationale for upholding releases resulting from a settlement process mirror those underlying *res judicata* and issue estoppel. Notably, the parties are spared from the costly process of litigating the same matters twice, and scarce judicial resources are not squandered.

In Midas, the court merely applied the clear wording of the prohibition to give effect to the spirit and intent of the Act. The intentional use by the drafters in section 11 of the words "purported waiver or release" and in section 4(4) of the words "any provision…which purports to interfere with…" expand the Courts' latitude in finding that indirect attempts to subvert rights available to a franchisee under the Act will be prohibited and found to be unenforceable.

Fairness and Consideration

Section 11 seeks to correct a presumed imbalance of bargaining power between the franchisor and the franchisee. The Act presumes that any actual or purported waiver or release by the franchisee is obtained to the franchisor's advantage through the influence of its superior bargaining position. In Tutor Time, this presumption was rebutted and a fair bargain was struck having regard to the maturity of the claims, the franchisee's knowledge of the Act and the rights which it waived, the consideration received, and the oversight of counsel.

In Midas, the presumption of unfairness was not rebutted. The offending provisions purporting to require a release were agreed to upon entering into the franchise agreement. At that time, the franchisee cannot have quantified or anticipated the scope of prospective claims which it was indirectly being asked to release as a condition to any future assignment or renewal. And it could not have meaningfully altered the bargain at that time in order to obtain fair consideration for the concession, as franchisees rarely have the ability in mature franchise systems to negotiate material changes to the standard form franchise agreement. At the actual time of renewal or assignment, the franchisee would be required (if not quite coerced) to provide the release to satisfy the condition, and therefore compelled to enter into an improvident bargain which, as Justice Cullity noted in Midas, it would never have entered into in the settlement of its claims.

A common element of Tutor Time and Midas is the principle that any enforceable settlement or release by a franchisee of newly discovered or matured claims must be supported by fair consideration in addition to any consideration provided by the franchisor to establish the franchisee-franchisor relationship.

Scope of the Release

The precise scope of the Tutor Time principles remains to be determined. For example, it remains questionable as to whether the Courts would support the broad release including all future claims given by 151 in Tutor Time in the context of a settlement negotiated upon or immediately after entering into the franchise agreement for a breach of the Act's disclosure requirements. In Tutor Time, the claims arising from the deficient disclosure had seasoned and the franchisee could retrospectively assess its rights and its potential damages. 151 understood the scope of the release and, with the benefit of counsel, negotiated a fair bargain.

In a settlement negotiated upon or immediately after entering into the franchise agreement, the effect of the failure to disclose could not immediately be known or predicted. While a franchisee may at that time fully appreciate the breadth of rights which it is releasing, and its immediate damages on the basis of the restitution remedies in section 6(6) of Act[8], it is arguable that it would remain contrary to the spirit and intent of the Act to permit a franchisee to release a franchisor at the time of entering into the franchise agreement for prospective breaches and claims, the full extent and prejudicial effects of which may not be known until some time in the future.[9] The Court in Midas invalidated the offending provisions which would have had the effect of requiring a prospective release of claims in the context of obtaining consent to transfer or renewal.

U.S. Statutes

It is instructive to compare the anti-waiver provisions reproduced from selected U.S. state laws in Exhibit A[10]. Several of these examples (including Illinois, Michigan, Washington and Wisconsin) expressly exclude settlements of claims from the scope of the prohibition. And the relevant provision of the Washington Franchise Investment Law practically mirrors Justice Cumming's ratio in Tutor Time:

> Any agreement, condition, stipulation or provision, including a choice of law provision, purporting to bind any person to waive compliance with any provision of this chapter or any rule or order hereunder is void. A release or waiver executed by any person pursuant to a negotiated settlement in connection with a bona fide dispute between a

[8] Section 6(6) of the Act requires a franchisor, within 60 days of rescission, to refund a franchisee for all monies received, purchase inventory, supplies and equipment from the franchisee and compensate the franchisee for any losses incurred by the franchisee in acquiring, establishing and operating the franchise.

[9] It is noteworthy that the California Franchise Investment Law (Cal. Corp. Code §31125) permits a modification of a franchise agreement including a general release of all known and unknown claims by a party to the modification, provided that, *inter alia,* the release is in connection with the resolution of a *bona fide* dispute between the franchisor and the franchisee or the resolution of a claimed or actual franchisee or franchisor default, and the modification is not executed within 12 months after the date of the franchise agreement.

[10] For an exhaustive survey of release language in U.S. state laws, see Micklich, Nicole M., & Pepe, Michael V., "Can't Give it Away: Statutory Prohibitions that Protect Franchisees from Releases" in Franchise Law Journal, Vol. 30, No. 3, Winter 2011, pp.155-165. (Chicago: American Bar Association).

> franchisee and a franchisor, arising after their franchise agreement has taken effect, in which the person giving the release or waiver is represented by independent legal counsel, is not an agreement prohibited by this subsection. [Emphasis added.]

Notably, the statutes of Michigan, Washington, and less explicitly, Connecticut and Arkansas, permit such settlements only after entering into the franchise agreement or after the franchise agreement has taken effect. This is consistent with the presumption stated above that releases or waivers given upon or as a condition to entering into the franchise relationship are presumed to be tainted by the imbalance of power between the parties and therefore unfair and unenforceable by operation of the Act.

Conclusion and Practical Suggestions

It is reasonable to conclude that section 11 will be interpreted to restrict any releases or waivers which would deprive franchisees of their statutory rights, other than releases or waivers arising from bona fide, separately negotiated settlement of claims for existing known breaches with the benefit of counsel and for adequate consideration. Nonetheless, in Midas, Cullity J. did pronounce that although a release having the effect of releasing rights under the Act will be "*prima facie*" void by operation of section 11, he did "leave open the possibility of cases such as *Tutor Time*, or other circumstances in which it would be inequitable to permit a franchisee to rely on … section 11."

The unknown element as adverted to above is whether a court would enforce, even in the context of a proper "Tutor Time" release affirming the continuation of the franchise agreement, waivers and releases of any prospective future claims or rights which had not matured at the time of the settlement agreement. As suggested, the amount of time which has passed between the execution of the franchise agreement and the date of settlement may be influential in the outcome.

As a practical matter, franchisors in Ontario (and arguably all of the regulated provinces) should in light of Midas refrain from the unqualified practice of requiring release from franchisees as an express condition of renewal or assignment of their franchise rights. It is suggested that, in order to maintain the utility of any such a condition in unregulated provinces, that the relevant provision in the agreement be prefaced with "except where prohibited by law" and coupled with a governing law clause choosing the non-regulated province's laws as the proper law of contract[11].

There remains the question of how parties might, in light of Midas, resume the practice of obtaining releases to "wipe the slate clean" upon renewal or assignment. In situations such as Tutor Time where there existed known, matured claims, the prerequisites to settlement existed. The more difficult scenario exists where there are no "known" or "existing" claims but the parties wish nonetheless to manage risk and obtain general releases.

To comply with Tutor Time and Midas, the parties would be required to enter into a purely voluntary negotiation and produce a binding settlement agreement with the benefit of counsel. The failure to settle an agreement and even the refusal of the franchisee to contemplate such a negotiation in a renewal or assignment scenario should not excuse a delay in, or influence, the franchisor's obligation to act in good faith with respect to the process of renewal or assignment. The difficulty arising where there exist no known breaches or matured claims could possibly be

[11] *Midas* held that an Ontario governing law clause will result in the application of the laws of Ontario to any analysis of the validity and enforceability of a provision in the franchise agreement.

overcome with careful thought of the parties as to the quantum of consideration paid to the franchisee; with representations by the franchisor that it is not aware of any contraventions of the Act, claims or possible claims; with a mutual release binding both parties; and with judicious carve-outs favouring the franchisee respecting any direct damages which the latter may suffer as a result of a breach of the franchisor's representations and warranties.[12]

In conclusion, the following approach is illustrated:

> (i) The Franchisee shall, in connection with any request to renew or assign its rights under the Franchise Agreement, indicate whether or not it intends to negotiate terms upon which the which the Franchisee and the Franchisor would execute and deliver to the other, for valuable consideration, a mutual release and settlement agreement effective upon the date of any such renewal or assignment. Such a release, if any, shall be negotiated between the parties with the advice of counsel, and shall contain terms to the effect that (i) the parties entered the settlement agreement freely, without coercion, upon the advice of independent counsel; (ii) the franchisor represents and warrants that, except for claims previously [or presently] disclosed, it is not aware of any breaches of the Act or of any claims or possible claims which the franchisee may have against the franchisor; (iii) the franchisee will be entitled to claim direct damages arising from the breach of the franchisor's representations and warranties under this release.
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> (ii) The provisions of this section are voluntary and shall not be construed as a condition to or requirement of any renewal or consent to assignment. Nothing in this section shall be construed as derogating from or diminishing the obligation of the parties to act in good faith in the performance and enforcement of the franchise agreement, including in relation to any exercise of discretion relating to grants of renewals and consents to assignment.

Since the foregoing provisions would be purely voluntary, the franchisee would have little incentive if it did not have arrears or recorded violations on file which it wished to have eradicated. However in the latter circumstances, this approach might prove a feasible starting point.

Richard D. Leblanc,
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[12] See *Franchise Mgmt. Unltd., Inc. v. Am.'s Favorite Chicken*, 561 N.W.2d 123 (Mich. Ct. App. 1997), appeal granted, 577 N. W.2d 690 (1998) vacated and leave to appeal denied, 590 N.W.2d 570, reconsideration denied, 595 N.W.2d 843 (1999). In this Michigan appellate case, the franchisor refused to consent to an America's Favorite Chicken franchisee where the franchisee refused to execute a general release as a condition to the consent. The Court upheld the refusal under the terms of the parties' contract since the release had been modified to exclude any claims under the Michigan Franchise Investment Law (MFIL), did not deprive the franchisee of rights under that law, and it was commercially reasonable to require resolution of all non MFIL claims prior to the transfer.

Exhibit A

Select US Statutory Provisions Barring Releases

Illinois
BUSINESS TRANSACTIONS
(815 ILCS 705/) Franchise Disclosure Act of 1987.

Sec. 41. Waivers void. Any condition, stipulation, or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this Act or any other law of this State is void. This Section shall not prevent any person from entering into a settlement agreement or executing a general release regarding a potential or actual lawsuit filed under any of the provisions of this Act, nor shall it prevent the arbitration of any claim pursuant to the provisions of Title 9 of the United States Code. [Emphasis added]

Michigan
FRANCHISE INVESTMENT LAW (EXCERPT)
Act 269 of 1974

Sec. 27. Each of the following provisions is void and unenforceable if contained in any documents relating to a franchise:

(a) A prohibition on the right of a franchisee to join an association of franchisees.

(b) A requirement that a franchisee assent to a release, assignment, novation, waiver, or estoppel which deprives a franchisee of rights and protections provided in this act. This shall not preclude a franchisee, after entering into a franchise agreement, from settling any and all claims. [Emphasis added]

(c) A provision that permits a franchisor to terminate a franchise prior to the expiration of its term except for good cause. Good cause shall include the failure of the franchisee to comply with any lawful provision of the franchise agreement and to cure such failure after being given written notice thereof and a reasonable opportunity, which in no event need be more than 30 days, to cure such failure.

Washington
Revised Code of Wash. 19.100.220

Exceptions or exemptions — Burden of proof — Waivers of compliance void — Settlement release or waiver — Chapter as fundamental policy.

(1) In any proceeding under this chapter, the burden of proving an exception from a definition or an exemption from registration is upon the person claiming it.

(2) Any agreement, condition, stipulation or provision, including a choice of law provision, purporting to bind any person to waive compliance with any provision of this chapter or any rule or order hereunder is void. A release or waiver executed by any person pursuant to a negotiated settlement in connection with a bona fide dispute between a franchisee and a franchisor, arising after their franchise agreement has taken effect, in which the person giving the release or

waiver is represented by independent legal counsel, is not an agreement prohibited by this subsection. [Emphasis added]

(3) This chapter represents a fundamental policy of the state of Washington.

Wisconsin
CHAPTER 553 WISCONSIN FRANCHISE INVESTMENT LAW
553.76 Waivers of compliance void. Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this chapter or any rule or order under this chapter is void. This section does not affect the settlement of disputes, claims or civil lawsuits arising or brought under this chapter. [Emphasis added]

Iowa
523H.4 FRANCHISE AGREEMENTS
WAIVERS VOID.

A condition, stipulation, or provision requiring a franchisee to waive compliance with or relieving a person of a duty or liability imposed by or a right provided by this chapter or a rule or order under this chapter is void. This section shall not affect the settlement of disputes, claims, or civil lawsuits arising or brought pursuant to this chapter. [Emphasis added]

Connecticut
Connecticut General Statutes Chapter 739 TRADING STAMPS, MAIL ORDERS, FRANCHISES,
CREDIT PROGRAMS AND SUBSCRIPTIONS

42-133(l) (f) No franchisor, directly or indirectly, through any officer, agent or employee, shall do any of the following: (1) Require a franchisee at the time of entering into an agreement to assent to a release, assignment, novation, waiver, or estoppel which would relieve any person from liability imposed by sections 42-133j to 42-133n, inclusive; (2) prohibit, directly or indirectly, the right of free association among franchisees for any lawful purpose; (3) prohibit the transfer by will of any franchise and the rights of any franchisee under any franchise agreement to a spouse or child of such franchisee; (4) require or prohibit any change in management of any franchise unless such requirement or prohibition of such change shall be for good cause, which cause shall be stated in writing by the franchisor; (5) impose unreasonable standards of performance upon a franchisee; (6) fail to deal in good faith with a franchisee;…[.] [Emphasis added]

Arkansas
TITLE 4. BUSINESS AND COMMERCIAL LAW, SUBTITLE 6. BUSINESS PRACTICES
CHAPTER 72. FRANCHISES, SUBCHAPTER 2. ARKANSAS FRANCHISE PRACTICES ACT

§ 4-72-206. Unlawful practices of franchisors

It shall be a violation of this subchapter for any franchisor, through any officer, agent, or employee to engage directly or indirectly in any of the following practices:

(1) To require a franchisee at the time of entering into a franchise arrangement to assent to a release, assignment, novation, waiver, or estoppel which would relieve any person from liability imposed by this subchapter; [Emphasis added]

(2) To prohibit directly or indirectly the right of free association among franchisees for any lawful purpose;

California
California Franchise Investment Law (Cal. Corp. Code §31125)

(c) Any modification of a franchise agreement with an existing franchisee of a franchisor shall be exempted from the provisions of this chapter, if all of the following are met:

(1) The franchisee receives the complete written modification at least five business days prior to the execution of a binding agreement, or providing that the franchisee may, by written notice mailed or delivered to the franchisor or a specified agent of the franchisor within not less than five business days following the execution of the agreement, rescind the agreement to the material modification; provided (A) the agreement is not executed within 12 months after the date of the franchise agreement, and (B) the modification does not waive any right of the franchisee under the California Franchise Relations Act (Chapter 5.5 (commencing with Section 20000) of Division 8 of the Business and Professions Code), but the modification may include a general release of all known and unknown claims by a party to the modification.

(2) The modification meets one of the following: (A) The proposed modification is in connection with the resolution of a bona fide dispute between the franchisor and the franchisee or the resolution of a claimed or actual franchisee or franchisor default, and the modification is not applied on a franchise systemwide basis at or about the time the modification is executed. A modification shall not be deemed to be made on a franchise systemwide basis if it is offered on a voluntary basis to fewer than 25 percent of the franchisor's California franchises within any 12-month period. [Emphasis added]

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Speaker Bio

Richard D. Leblanc is a partner in the Toronto office of Miller Thomson. Mr. Leblanc specializes in corporate and commercial law with a focus on franchising, commercial lending and private company transactional and business law.

In addition to advising franchise clients, Mr. Leblanc frequently advises businesses in relation to structuring issues, business transactions, contract matters, shareholder agreements, dispute resolution, privacy, sales of shares and assets, trade matters, commercial issues and intellectual property matters.

Mr. Leblanc is a frequent speaker and contributor on commercial and franchising law issues. Most recently, Mr. Leblanc contributed a chapter on franchising in the 2010 edition of “Business Laws of Canada” published by West. Mr. Leblanc also wrote a chapter entitled “The Purchase and Sale of a Privately Held Business” for the book entitled Advanced Corporate Procedures published by Emond Montgomery Publications. He is a member of the Ontario Bar Association Corporate Law SubCommittee, the Canadian Bar Association Business Law Section and the American Bar Association Business Law Section and Forum on Franchising.

Mr. Leblanc is a registered trade-marks agent, and is fluent in French and Italian.