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Franchisor “Squeezed” for Rescission Damages Arising from Improper Disclosure

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Introduction

In *2611707 Ontario Inc. et al v Freshly Squeezed Franchise Juice Corporation, et al.*, 2021 ONSC 2323 (“***Freshly Squeezed***”), the Court provided further guidance on the level of detail that franchisors are required to include in a disclosure document provided to prospective franchisees pursuant to section 5(1) of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c.3 (“*Act*”).[1]

Pursuant to section 6(2) of the *Act*, a franchisee can rescind their franchise agreement within two years, if the franchisor failed to provide the prospective franchisee a disclosure document. As the case law has articulated, the failure to provide includes circumstances in which the disclosure document was so deficient that it was tantamount to there being no disclosure document thereby impairing the franchisee’s ability to make an informed investment decision.

Background Facts

2611707 Ontario Inc. (the “**franchisee**”) received what was alleged to be a disclosure document on or about December 18, 2017 (the “**Disclosure Document**”). The franchisee and Freshly Squeezed Franchise Juice Corporation (the “**franchisor**”) entered into a franchisee agreement on January 8, 2018 (the “**Franchise Agreement**”). The franchisee issued a Notice of Rescission on September 10, 2018 for “non-disclosure” (a revised Notice of Rescission was also subsequently provided). The franchisee claimed statutory compensation in the amount of $370,849 pursuant to section 6(6) of the *Act*.

The Alleged Deficiencies

The franchisee claimed that the Disclosure Document that was provided had four fatal flaws that they deemed “material deficiencies” and validated their rescission, including:

1. The franchisor’s certificate, required under section 5 of the *Act*, only had the signature of one of the two officers of the franchisor (the “**Certificate**”);
2. The financial statement disclosure report was missing the referenced notes;

[1] This analysis would also likely apply to franchise legislation in other Canadian provinces, as well as arguably in the Province of Quebec.

3. The Disclosure Document did not have information regarding the fact that there had been no head lease, and further, there was no escape clause provided to the franchisee to terminate the agreement if they were not agreeable to the subsequent lease; and

4. Disclosure was made in piecemeal fashion.

As further evidence that the Disclosure Document was deficient, the franchisee also claimed that the following material facts were absent:

1. Failure to disclose a negotiated Agreement to Lease between Landlord and Franchisor, including clauses pertaining to the right of the landlord to terminate the lease early, without compensation; and

2. Failure to advise that the designated location (in the food hall of a hospital) was the first ever non-mall retail location for this franchise business.

The Court was required to determine whether any of these deficiencies, either alone or in combination, constituted material deficiencies that were tantamount to the franchisor having made no disclosure.

The case law developed to date supports that certain deficiencies in a disclosure document will satisfy the section 6(2) test to allow for rescission of a franchise agreement.[2] However, the case law also recognized that even these presumptive "material" deficiencies can be rebutted where the factual circumstances of a case requires it. As such, an analysis of the deficiencies is required in the individual circumstances of each case.

The Certificate

It is a mandatory statutory requirement, under section 5(4)(a) of the *Act*, that when a franchisor has two or more officers and/or directors, a minimum of two officers or directors need to sign the Certificate. In *Freshly Squeezed* the franchisee alleged that based on the Corporation Profile Report the franchisor had two officers, only one of whom had signed the Certificate. However, based on the evidence provided at trial, it was determined that the second director had resigned quite some time before the Disclosure Document was issued. The Court therefore concluded that the Certificate was properly signed and thus rejected the franchisee's assertion in this regard.

[2] An exhaustive list is beyond the scope of this article; however, the courts have held that rescission can be claimed if: (a) the franchisor failed to include a signed and dated certificate in the appropriate form signed by the required number of officers or directors of the franchisor; (b) the franchisor failed to provide financial statements as required or provided stale dated (not current) financial statements; (c) the franchisor failed to provide a statement of material change in circumstances where it was required; (d) the disclosure document was provided in successive stages and not as one document at one time; and (e) the disclosure document did not contain copies of all agreements that the franchisee was required to sign.

Incomplete Financial Statements

The franchisee also claimed that the financial statements contained in the Disclosure Document were materially deficient because they did not include as attachments the referenced notes to certain lines on the financial statement. For example, the financial statements reference "Note 3" for the line item that relates to the accounts receivables owed to the franchisor from third parties, which represented about 73% of the franchisor's assets. However, nothing was included in Note 3.

The failure to comply with the requirement to include financial statements has been characterized by the courts as a "foundational part of disclosure", which "by itself constitutes a material deficiency" and rises to the level of non-delivery of a meaningful disclosure statement normally allowing for a rescission. The Court thus concluded that the missing notes resulted in incomplete information that prevented the franchisee from knowing the complete financial picture, which prevented it from making an informed investment decision. This failure constituted a material deficiency.

Failure to Disclose the Absence of a Head Lease

In respect of the lease issues, the franchisee submitted the following were deficiencies:

1. the failure to disclose that a head lease had not been secured;

2. that there was no protection for the franchisee to back out of the Franchise Agreement should the terms of the head lease ultimately be unacceptable to them;

3. that the Disclosure Document was missing the Agreement to Lease, which had been negotiated by the franchisor and the landlord. The franchisee was particularly concerned by two clauses in the Agreement to Lease, one being that the Landlord would not guarantee that the subject unit would be built and that the Landlord reserved the right to terminate the 10-year lease early without compensation, if the hospital decided to demolish, redevelop or renovate the food hall space.

The evidence did demonstrate that the franchisee was made aware of the approximate monthly cost for rent; that a designated unit for their franchisee did currently exist; that a head lease had not been entered into before signing the Franchise Agreement; and that a draft lease was provided to the franchisee.

Ultimately, the Court decided that in the circumstances of the case, the failure to disclose the negotiated (partly executed) Agreement to Lease in the Disclosure Document or at least the material terms of the lease was a material fact that ought to have been disclosed. The Court relied on *Raibex Canada Ltd. V. ASWR Franchising Corp.*, 2018 ONCA 62, 419 D.L.R. (4th) 53, to emphasize that since the franchisee was also not provided any safeguards or options to cancel

the Franchise Agreement and sublease upon receipt of the Head Lease these elements added to the non-disclosures being material deficiencies.

The First "Non-Mall" Location

Finally, the franchise submitted that, although it was aware their franchise would be located in a hospital, the franchisor should have disclosed that this was the first and only franchise location to be opened in a non-mall setting. Of relevance is the fact that the Disclosure Document did list all addresses of all current and terminated franchises, so arguably the information was there from which the Franchisee could have extrapolated that this was a first "non-mall" location.

However, the Court stipulated that the reason for the strict disclosure requirements of the *Act* was to ensure uniform documentary disclosure, so that all of the material facts are contained in a single disclosure document. Based on this, it was determined that the fact that this location was the first non-mall setting was a material fact that should have been specifically referenced in the Disclosure Document.

The Final Decision

After going through the analysis of each claimed deficiency the final determination made was that the Disclosure Document failed to provide the franchisee with the information needed to make an informed investment decision and this was tantamount to "non-delivery" within the meaning of section 6(2). As a result the franchisee's rescission was valid.

The key factor in this case was that the franchisor withheld information that was within their power to disclose, in particular, the Agreement to Lease (or contractual safeguards for termination), the notes to the financial statements, and information that this franchise location would be the first one to be operated in a non-mall retail environment. The disclosure requirements are meant to protect parties and it was determined that the franchisor failed to act in a transparent manner.

Practice Takeaways

In *Freshly Squeezed* the Court stipulated that the *Act* was enacted to "ensure fair, frank and uniform disclosure" by franchisors, yet the takeaway from the case is that there is no exact template as what disclosure will ensure that a franchisor has complied with the "fair" and "frank" requirement. Even those requirements directly stipulated within the *Act* or presumptively determined in case law are not as clear as they may appear. The reality is that the disclosure requirements are enacted to protect franchisees and allow them to make informed decisions; however, the franchisor's disclosure requirements have to be determined based on the circumstances and facts of each individual case.

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Apotex v. Eli Lilly – A Decade-Long Battle Over an Ancient English Statute Comes to an End

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The English *Statute of Monopolies*,[1] introduced in 1624, was enacted to limit monarch abuses in awarding monopolies over a variety of economic activities. Almost 400 years later, Apotex began relying on the statute to claim damages against innovator pharmaceutical companies in circumstances where Apotex was delayed in receiving marketing authorization due to the innovator bringing an application under the *Patented Medicines (Notice of Compliance) Regulations* ("***PM(NOC) Regulations***"), and where the patent in issue was found invalid. Somewhat remarkably, over the past decade since Apotex started making these claims, no action has gone to trial. Apotex had successfully resisted several motions to strike these allegations on the basis that the claims were novel. Nevertheless, in *Apotex v. Eli Lilly*, 2021 ONSC 1588, the Ontario Superior Court decided on a summary judgment motion that the pre-confederation English statute, along with the similar Ontario *Statute of Monopolies*[2] and the common law, are all not applicable in the determination of damages under Canada's patented drug regime.

The PM(NOC) Regime

Introduced in 1993, the *PM(NOC) Regulations* permit innovator drug companies to list patents on a Patent Register that meet certain criteria. Companies wanting to launch a generic product before the expiry of listed patents must serve a Notice of Allegation ("**NOA**") on the innovator that details why the listed patent would not be infringed by the generic, is invalid, or is improperly listed on the Patent Register. Service of an NOA gives to the innovator the right to bring an action for patent infringement against the generic, triggering a freezing event whereby the Minister of Health is prohibited from issuing regulatory authorization to a generic company for a 24-month period (unless the prohibition proceeding was disposed of earlier). If a generic company is ultimately successful in the action, it may seek damages for delayed market entry pursuant to section 8 of the *PM(NOC) Regulations*.

For the past decade, Apotex had alleged in several actions against innovator companies that if a patent kept Apotex out of the market by operation of the *PM(NOC) Regulations*, and that patent was subsequently found invalid and void *ab initio*, then Apotex should be entitled to damages under the English *Statute of Monopolies*, its Ontario equivalent, and the common law. Until now, that issue had not been decided.

[1] *An Act concerning Monopolies and Dispensation with Penal Laws, and the Forfeitures thereof*, 1624, 21 Jac. I, c.3 (the English *Statute of Monopolies*).
[2] *An Act concerning Monopolies, and Dispensation with penal laws, etc.*, R.S.O. 1897, c. 323 (the Ontario *Statute of Monopolies*).

The *Olanzapine* Decision

In *Apotex Inc. v. Eli Lilly Canada Inc.*, 2021 ONSC 1588 ("***Olanzapine***"), Apotex claimed damages against Eli Lilly for being delayed market entry with respect to olanzapine, an anti-schizophrenic drug. While Lilly's patent was upheld in a prohibition proceeding against Apotex, the patent was later declared invalid in another proceeding against a different generic company. Despite the subsequent invalidation, Apotex was precluded from seeking damages pursuant to section 8 of the *PM(NOC) Regulations* since it was unsuccessful in Lilly's prohibition application. As an alternative, Apotex commenced the Ontario action claiming damages against Lilly, including treble damages under both *Statutes of Monopolies,* for the delayed market entry by reason of an invalid patent.

Lilly brought a summary judgment motion shortly before trial. In granting Lilly's summary judgment motion and dismissing the action, the Court found that Apotex was kept out of the market due to the lawful operation of the *PM(NOC) Regulations*. By invoking the *PM(NOC) Regulations,* Lilly relied on an existing patent that was presumed to be valid. Lilly was simply using the established regulatory scheme established to address patent disputes involving pharmaceutical drugs. Relying on a number of judicial precedents, the Court concluded that patent law in Canada is "wholly statutory", with the *Patent Act* and the *PM(NOC) Regulations* providing "a complete code" to govern the issuance and use of patents, and the remedies available when patents have been infringed or found invalid. The Court also specifically observed that the *Patent Act* does not provide a right of damages against a patentee that unsuccessfully asserts a patent against a person. The Court thus held that absent a "stand alone cause of action" or a claim "totally independent of the regulatory regime," the *Patent Act* and the *PM(NOC) Regulations* constitute a complete code which precludes causes of action arising from the operation of that code. Accordingly, the Court found that Apotex's action should be dismissed as the actions alleged to have caused harm to Apotex were authorized by law and flowed from the operation of law.

Apotex argued that it had been "hindered, grieved, disturbed and disquieted by occasion of [Lilly's Patent]" that was void *ab initio*, and sought "treble damages". The Court found that when the English *Statute of Monopolies* was enacted almost 400 years ago, it specified that the prohibition on monopolies did not apply to patents for new inventions (nor did the Ontario *Statute of Monopolies*). Instead, it restricted other monopolies for trade in certain goods, trade routes, and to operate in particular industries, in return for payment to the Crown. The Court noted that Apotex's argument that it was harmed by Lilly's Patent was inconsistent with its position that Lilly's Patent never existed. If Lilly's Patent is void *ab initio*, then it is deemed to have never been granted a prohibited licence, patent, or monopoly under the *Statutes of Monopolies* under which Apotex could be granted damages. Lastly, to hold a patent owner retroactively liable for damages beyond those provided for in the *Patent Act* and *PM(NOC) Regulations* if a patent is found invalid would upset the patent bargain and undermine the objectives of the *Patent Act*. Thus, the Court found that Apotex's monopolies claim had no merit and did not raise a genuine issue for trial. The Court also summarily dismissed Apotex's claims for damages under section 7 of the *Trademarks Act* and for conspiracy.

The *Sildenafil* Decision

Four days after the *Olanzapine* decision, the Superior Court released an endorsement in a parallel action: *Apotex Inc. v. Pfizer Ireland Pharmaceuticals*, 2021 ONSC 1860 (“***Sildenafil***”). In that action, Apotex sought damages under the *Statutes of Monopolies* similar to those in the *Olanzapine* action, but this time against Pfizer and its patent relating to sildenafil. Pfizer had sought to adjourn an upcoming trial date to instead schedule a summary judgment motion against Apotex to dismiss its action. The decision was under reserve when the *Olanzapine* decision was released.

Relying on the *Olanzapine* decision, the Court in the *Sildenafil* action vacated the upcoming trial dates, allowing Pfizer to proceed with its summary judgment motion instead. As noted by the Court: “[i]nviting a 20-day trial to re-visit questions of law already decided against the plaintiff by this court does not strike me as apt based on the foregoing doctrinal, resource allocation, efficiency, and affordability concerns”.

While a procedural one, the *Sildenafil* decision foreshadows that the *Olanzapine* decision—if upheld—will have broad application with respect to numerous pending cases that Apotex has brought making similar claims. Indeed, the Court in *Sildenafil* noted that if the *Olanzapine* decision is upheld “as one of pure legal analysis”, then a trial in the underlying *Sildenafil* action “is probably unnecessary”.

These cases, and in particular, the *Olanzapine* decision, suggest that the only remedy available to a generic company that is delayed market entry due to operation of the *PM(NOC) Regulations* is damages through section 8 of those regulations. While Apotex has appealed,[3] the decision starts to bring welcomed clarity to an issue left unresolved in many actions for a decade.

[3] Ontario Court of Appeal Docket C69320.

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Registration refused: How adjudication in Ontario's cannabis licencing regime is leaving store operator and manager hopefuls high and dry

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Introduction

The sale and use of cannabis in Ontario has been a hot topic in recent years, all the more so after the *Cannabis Act* legalized the recreational use of cannabis on October 27, 2018, and the *Cannabis Licence Act* correspondingly legalized the retail sale of cannabis. Cannabis use in Ontario is only increasing, especially during the pandemic. Applications for cannabis stores also show no sign of slowing down. As of February 2021, Ontario had 430 licensed cannabis stores open for business and more than 940 applications were still awaiting processing. The demand for retail stores has been so great since the inception of the licencing regime that Ontario has been operating on a lottery basis.

While most cannabis headlines relate to this increase of pot shops in Toronto or the market moves of cannabis giants, the Alcohol and Gaming Commission of Ontario (AGCO) quietly acts as a gatekeeper for managers and operators of retail cannabis shops. The Registrar of the AGCO is responsible for administering the *Cannabis Licence Act*, and reviews and approves or rejects applications for cannabis licences. This article discusses the licencing process for managers and operators and how the AGCO and the Licence Appeal Tribunal (the "Tribunal") has approached issues around individuals seeking a cannabis licence.

The cannabis licencing and hearing process

Cannabis may only be sold at an authorized retail store run by a licenced retail operator. There are three kinds of cannabis licences: Cannabis Retail Manager (CRM) licences, Cannabis Retail Operator (CRO), both of which are individual licences, and retail store authorization for the store a retail operator intends to open.

CRO and retail store authorizations are generally granted together, as a CRO can only operate in a store that it opens. The main difference between a CRO and a CRM is that a CRO opens and operates a retail store whereas a CRM only manages a retail store that has already been opened by a CRO. While a licence is not required to work at a cannabis retailer, only a CRM or CRO can supervise or manage employees of a cannabis retail store, oversee or coordinate the sale of cannabis, manage compliance issues in relation to the sale of cannabis, or have signing authority to purchase cannabis, enter into contracts, or make offers of employment.

There must be at least one CRM for each authorized store location unless a CRO is a sole proprietor or is in a partnership between two or more individuals and will be the licenced operator and performing the duties of a CRM for a particular store. None of the three kinds of licences are transferrable between licence holders, but recent amendments to the Registrar's

Standards for Cannabis Retail Stores now allow CRO's and CRM's to oversee up to five cannabis retail store locations.

The AGCO's work is important: it ensures that only qualified persons are permitted to manage cannabis retailers and sell cannabis to the public. The AGCO's mandate should, in theory, boost public confidence in the newly regulated retail cannabis market. As with other legislation for regulated industries, the primary goal of the AGCO in governing the retail cannabis regime is consumer protection.

If the AGCO decides to refuse an application, the Registrar issues a Notice of Proposal to Refuse. The applicant may then file an appeal with the Tribunal for a hearing on the merits of the Registrar's proposal.

Similarly, the Registrar may issue a Notice of Proposal to Revoke a licence if a person is already licenced under the cannabis licencing regime but the Registrar has concerns about the person's ability to carry on business within the law, or with integrity, honesty or in the public interest.

After holding a hearing, pursuant to section 15(2) of the *Cannabis Licence Act*, the Tribunal may confirm or set aside the proposal of the Registrar and direct the Registrar to take any action specified by the Tribunal that it considers appropriate to give effect to the purposes of the Act, including attaching conditions to the licence. The Tribunal may also substitute its opinion for that of the Registrar when deciding to set aside the Registrar's proposal or decision. This provision appears to give the Tribunal broad power and significant latitude in making a decision.

If the Tribunal affirms the Registrar's proposal to refuse an application, the applicant may reapply after two years have passed since the refusal, and will be eligible for a licence if the applicant can show a material change in circumstances along with being otherwise eligible. If the Tribunal decides that the applicant should be registered, the applicant shall receive their licence.

Both the AGCO and the applicant have a statutory right of appeal to the Divisional Court from an order of the Tribunal.

Registration Pre-Conditions

As with all licencing processes, there are prescribed requirements set out by the governing legislation that an applicant must meet in order to obtain a licence. Sections 3(4) and 5(4) of the *Cannabis Licence Act* pertain to eligibility for CRO and CRM licences, respectively. The language reads as follows:

> *An applicant is not eligible to be issued a cannabis retail manager licence in any of the following circumstances:*
>
> 1. *There are reasonable grounds to believe that the applicant will not, in acting as a cannabis retail manager, act in accordance with the law, or*

> *with integrity, honesty or in the public interest, having regard to the past or present conduct of the applicant.*

2. *The applicant has been convicted of or charged with an offence under this Act, the Cannabis Control Act, 2017, the Cannabis Act (Canada) or the regulations made under any of them that is prescribed for the purposes of this paragraph.*

3. *There are reasonable grounds to believe that the applicant is carrying on activities that are, or would be if the applicant were the holder of a cannabis retail manager licence, in contravention of or not in compliance with a provision of this Act, the Cannabis Control Act, 2017, the Cannabis Act (Canada) or the regulations made under any of them that is prescribed for the purposes of this paragraph.*

4. *The applicant makes a false statement or provides false information in the application.*

5. *Any other circumstance that may be prescribed.*

The *Cannabis Licence Act*'s eligibility provisions are stricter than other statutes considered by the Licence Appeal Tribunal, making it unique in this respect. For instance, the *Motor Vehicle Dealers Act* at paragraph 6(1) and the *Real Estate and Business Brokers Act* at paragraph 10(1) state that "an applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless […]". Similarly, the *Liquor Licence Act* at paragraph 6(1) states that "an applicant is entitled to be issued a licence to sell liquor except if […]".

The *Cannabis Licence Act* does not use the language of entitlement *except* in certain circumstances; it uses the language of eligibility, stating that a person is *not eligible* in certain circumstances. This distinction affords the Tribunal significantly less discretion in making an order. According to the *Goldlist* decision, discussed below, the exercise is over when an applicant is found to be ineligible.

As with other hearings in regulated industries, the onus is on the Registrar to prove that the applicant does not meet the requirements of the *Cannabis Licence Act*. The standard of proof is "reasonable grounds for belief", which is less than "a balance of probabilities" but more than "mere suspicion". In other words, this is not a high bar for the Registrar to meet, and is lower than both the criminal and civil burden of proof.

Licence Appeal Tribunal decisions

There is not yet a reported case involving a Notice of Proposal to Revoke a cannabis licence, and there are only two reported decisions in which a Licence Appeal Tribunal Hearing proceeded on the basis of a Notice of Proposal to Refuse a CRM or CRO. These decisions, discussed below, highlight the AGCO's strict scrutiny of applicants applying for CRM and CRO

licences and demonstrate how the Licence Appeal Tribunal interprets the *Cannabis Licence Act* when an applicant requests a hearing of the Registrar's proposal.

***Kyle Drake Hildebrand v. Registrar, Alcohol, Cannabis and Gaming Regulation and Public Protection Act, 1996*, 2020 CanLII 27346 (ON LAT)**

(i) Overview

Mr. Hildebrand applied for a cannabis retail operator licence in February 2019. The Registrar issued a Notice of Proposal to Refuse the application pursuant to section 3(4)1 and 3(4)4 on the basis that there were reasonable grounds to believe that Mr. Hildebrand would not carry on business in accordance with the law, or with integrity, honesty or in the public interest, having regard to his past or present conduct; and on the basis that Mr. Hildebrand made a false statement or provided false information in his application.

(ii) Decision

After a hearing on the issues, the Tribunal confirmed the Proposal to refuse Mr. Hildebrand's licence and directed the Registrar to carry out the Proposal on January 21, 2020. The Tribunal relied on both grounds listed above, noting that each ground was independent of the other and that failure to satisfy either ground is enough to refuse licensure. Chief among the Tribunal's findings were the following:

- Mr. Hildebrand continued to drink and drive after multiple DUI convictions and violated his probation;

- Mr. Hildebrand was vague in his answers [about his prior offences] in interviews with investigators and minimized the seriousness of his prior offences, indicating an unwillingness or inability to comply with the law; and

- Mr. Hildebrand was not at the stage of his life where he had accepted his past and was able to self-regulate his actions in a way that ensured compliance with rules and regulations.

The Tribunal found that conditions would not be appropriate in this case. Mr. Hildebrand had made strides toward sobriety and had not committed an offence in over 2.5 years from the hearing, but he had failed in being candid, open and honest with the AGCO about his past in the application process. This insufficient disclosure, in addition to the conduct itself, was fatal to his application.

[***Goldlist v. Registrar, Alcohol, Cannabis and Gaming Regulation and Public Protection Act, 1996*, 2021 CanLII 30519 (ON LAT)**]

(i) Background

Mr. Goldlist applied for a cannabis retail manager licence in January 2020. The Registrar issued a Notice of Proposal to Refuse his application pursuant to section 5(4)1 only: that there were reasonable grounds to believe that Mr. Goldlist would not carry on business in accordance with the law, or with integrity, honesty or in the public interest, having regard to his past or present conduct.

(ii) Decision

After a hearing on the issues, the Tribunal confirmed the Proposal to refuse Mr. Goldlist's licence and directed the Registrar to carry out the Proposal on April 7, 2021.

The Tribunal did not take issue with Mr. Goldlist's disclosure in his application, although this was a point of contention during the hearing. The Tribunal based its decision to refuse Mr. Goldlist's application on only two factors: (1) its concern with the fact that Mr. Goldlist "broke in" to the illegal dispensary above his headshop run by his former business partner to evict the dispensary, seize video recordings, and empty the dispensary of its illegal product; and (2) that Mr. Goldlist is involved in outstanding civil litigation that may include allegations based in whole or in part on "fraud, misrepresentation, deceit, or other similar conduct". The Tribunal concluded at paragraph 106:

> *When combined with the other factors that cause concern in this case … my view is that while the appellant's civil dispute against AG remains outstanding, and until such time as the matter either settles or a judge makes findings of fact one way or another, there are reasonable grounds to believe that the appellant will not, in acting as a CRM, act in accordance with the law or with integrity, honesty or in the public interest.*

(iii) Critique

There are two glaring problems with this decision. First, the Tribunal considered and speculated upon matters which were not raised by the Registrar in either its Notice of Proposal, Amended Notice of Proposal, or Notice of Further and Other Particulars. The issue around the eviction or "break in" on the illegal dispensary was not raised in the Registrar's proposal. This presented a procedural fairness issue for Mr. Goldlist, who could not have known that these were issues he would have had to address during the hearing. The Tribunal, in relying upon the "break in" to refuse the application, did not give Mr. Goldlist the opportunity to respond and address those concerns during the hearing.

Second, and as alluded to above, both of the Tribunal's conclusions were based on speculation, not supported by evidence, and were therefore not the proper basis to ground the decision to refuse.

The circumstances of the alleged "break in" were not borne out with sufficient certainty on the record. The AGCO attempted to establish that Mr. Goldlist took the video recordings from the illegal dispensary to cover up his alleged involvement in the dispensary but presented no evidence to prove this allegation. Furthermore, Mr. Goldlist owned the building with his business partner and had been trying for months to get the dispensary evicted from the premises. Finally, Mr. Goldlist provided illegal cannabis to the police that evening and was successful in shutting down the operations of the illegal dispensary for a time. This incident was less a "break in" and more an eviction.

Regarding the civil dispute, it was clear on the record at the hearing that the Registrar did not properly admit evidence of these allegations, and as much was acknowledged by the Tribunal. While the Tribunal is permitted to admit hearsay evidence, a decision should not turn on the existence of allegations of "fraud, misrepresentation, deceit or other conduct" where these allegations have not been borne out in court in the ongoing civil litigation, and where their existence is not a *prima facie* bar to registration under the *Cannabis Licence Act*. The Tribunal stated at paragraph 106 that "presumably the question about outstanding litigation is asked for a reason; that reason being that outstanding litigation involving fraud, deceit, misrepresentation or similar conduct may be relevant to whether a person qualifies for a licence". The Tribunal misunderstood the question on the application about allegations of "fraud, misrepresentation, deceit or other similar conduct" as being a bar to registration, when it is merely relevant.

At the very least, the *Goldlist* decision is perplexing. There was no nexus between the impugned past or present conduct and the ability of Mr. Goldlist to carry out his duties under the *Cannabis Licence Act* because the evidence was simply too speculative to be able to draw a nexus. The Tribunal went beyond the Proposal and the evidence to refuse Mr. Goldlist's licence.

The *Goldlist* decision is currently being appealed to the Divisional Court.

Comparing *Hildebrand* and *Goldlist*

(i) Scrutinizing past conduct

In both *Hildebrand* and *Goldlist*, the past and present conduct of the appellant informed the Tribunal's decision to refuse the licence. In the *Hildebrand* case, the Tribunal's main concern lay with Mr. Hildebrand's active avoidance of disclosing of his previous convictions. The great strides he had made in the couple years leading up to the hearing did not overcome the concerns about disclosure and integrity.

The ACGO brought more of Mr. Goldlist's past conduct into issue than Mr. Hildebrand's, but the Tribunal ultimately based its decision on the two discrete grounds of the dispensary eviction

and the ongoing civil litigation. Both of these decisions demonstrate that an applicant's total history comes under scrutiny during the application process, not just industry-related conduct. Any past offences, litigation, and failures to conduct oneself with integrity generally could be grounds to refuse an application.

Not all past conduct will be subject to such scrutiny. The *Cannabis Licence Act* at section 5(5) specifically states that a cannabis-related drug conviction prior to October 27, 2018 — the date the *Cannabis Act* legalized the recreational sale and use of cannabis — does not disqualify a person from being licenced under the *Cannabis Licence Act*. This provision affords persons who were formerly distributing cannabis in the illegal market to enter the legal market without a stigma attached to their prior conduct.

There is a disconnect between the Tribunal's basis to refuse Mr. Goldlist's and Mr. Hildebrand's applications and the fact that other persons with arguably more concerning past conduct have been granted CRM and CRO licences. Consider the application of Chris Goodwin, who was arrested 14 times and convicted 4 times for cannabis-related offences. Chris and his wife Erin were also the subject of high-profile dispensary raids in 2016. Mr. Goodwin got his retail manager licence in May 2020, and Ms. Goodwin got hers November 2020.

While it is encouraging that the *Cannabis Licence Act* does not bar the registration of persons with cannabis-related convictions pre-October 27, 2018, it is concerning that speculative conduct of an applicant without any recent convictions is not eligible for registration while a publicly defiant illegal dispensary owner is eligible for registration. Which applicant inspires more confidence in the public's eyes?

(ii) The importance of disclosure

Both the *Hildebrand* and *Goldlist* decisions affirm the importance of disclosure in an application for a CRM or CRO licence. The application is the first test of honesty and integrity for applicants seeking registration in regulated industries generally. A false statement on an application is a nonstarter for eligibility. Even if an applicant's history involves some concerning conduct, it is better to disclose this information and explain it than shelter it and hope it goes unnoticed. Mr. Hildebrand was less than forthright in his application and paid the price. Mr. Goldlist was as forthright as possible, and it helped his case in that the Tribunal took no issue with his disclosure.

(iii) Tribunal's discretion to grant a licence

There remains a lack of clarity on the extent of the Tribunal's discretion in considering whether to grant registration when the Tribunal finds that there are reasonable grounds for belief that the applicant will not act in accordance with the law, or with integrity, honesty or in the public interest.

In *Hildebrand*, the Tribunal considered whether granting registrations with terms and conditions was appropriate but found that it was "not confident that the appellant can be monitored

closely enough to ensure he is being truthful, nor do I have the confidence that he will take these [the proposed] requirements seriously. I find that conditions are not appropriate in the circumstances." This analysis suggests that the Tribunal had the ability to grant registration despite finding the applicant ineligible for registration if it had found that conditions existed to allay the concerns of the Registrar.

In *Goldlist*, the Tribunal found that the wording of the eligibility requirements of the *Cannabis Licence Act* means that the Tribunal has "no discretion to still grant a licence with conditions" if it found that there were reasonable grounds to believe that the appellant will not act in accordance with the law, or with integrity, honesty or in the public interest. This raises the question as to why the Tribunals powers are set out in section 15(2) if they are inapplicable once the Registrar has met its onus. The Tribunal's interpretation of its powers in *Goldlist* may be unduly narrow in light of its section 15(2) powers.

One must wonder if the *Goldlist* decision would have been different if the Tribunal had viewed its discretion more like the Tribunal did in *Hildebrand*. This may not have impacted the Tribunal's findings on whether reasonable grounds to refuse registration existed, but it may have allowed the Tribunal to grant the licence with conditions where it otherwise did not believe it could do so.

A lingering stigma

The stigma of cannabis use has substantially abated in recent years, but it has not been eradicated. Some Ontarians still associate the use of cannabis with criminality and do not wish cannabis retailers to set up shop in their neighbourhoods, citing "safety concerns" for local residents. These views are misguided. The cannabis licence regime is highly regulated and is just as safe an industry as the alcohol sales industry, for instance. While the black market remains strong in Ontario, much of this persistence can be attributed to the fact that consumers can purchase a more potent, less expensive product on the black market and that legal cannabis companies have marketing restrictions. Legal cannabis retailers should not be punished for the provincial government's failure to manage the black market or deliver a better product. In any event, illegal cannabis sale in a neighbourhood does not necessarily make that neighbourhood less safe.

When viewed on a statistical basis, alcohol is used far more heavily than cannabis, when used alone alcohol is more likely to hospitalize or kill a person than cannabis use on its own, and the risk of alcohol addiction is higher than that of cannabis. Yet the liquor licencing regime does not have such strict eligibility requirements. Are the current eligibility requirements too strict in light of the actual dangers of cannabis use?

It is possible that this lingering stigma plays into the AGCO's consideration of applications for retail licences. A flourishing legal cannabis market in Ontario is less likely when the AGCO needlessly proposes to refuse applications licences based on speculation about an applicant's past and current conduct.

While appropriate safeguards must be in place to protect the cannabis-consuming public, the standard that an applicant must meet to be licenced should not be substantially higher than that of liquor licencing or used car sales, for example. The *Cannabis Licence Act*'s eligibility requirements should be reconsidered to put cannabis licence applications on the same footing as other regulated industries.

Conclusion

Chris Goodwin, after his application was approved, said in a Facebook comment that "I hope me getting approved gives other people confidence to apply. A lot of people are… saying they didn't even bother cause [*sic*] they thought they'd get denied". The *Goldlist* decision does not give credence to Mr. Goodwin's comment; the past and present conduct of Mr. Goldlist did not rise to the level of ineligibility and he was denied.

As the retail cannabis regime ages and scores of new applications for CRM and CRO licences are submitted, the Registrar will continue to issue proposals to refuse registration. Legal representatives must be ready to assist the Tribunal in navigating the *Cannabis Licence Act* to give their clients a chance to pursue their passion. It is no surprise that the Licence Appeal Tribunal is grappling with this new legislative framework, but the Tribunal's strict application of the legislation to applications must be commensurate with the actual risks of cannabis sale. Most importantly, a clarified interpretation of the eligibility requirements in light of the Tribunal's powers to grant registration in the event of ineligibility is needed.

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Competitor Collaboration Guidelines: Competition Bureau Updates Key Guidance

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On May 6, 2021, the Competition Bureau (the "Bureau") released updates to its *Competitor Collaboration Guidelines* (the "CCGs"). The revised CCGs can be found here.

Background

The CCGs are a "big deal". The Competition Bureau puts out a significant volume of guidance, addressing various matters respecting its enforcement approach under the *Competition Act* (the "Act"). Virtually all guidance from the Bureau is welcome, but not all is of equal importance. The CCGs are right at the top of the importance hierarchy. One reason is that competitor collaboration — in some cases price fixing or cartel conduct — can involve the most serious competition offences. Consequently, the CCGs are of great interest for businesses seeking to collaborate, legitimately, with competitors while avoiding serious competition law offences.

The other reason is that there is limited judicial guidance on this very important topic. The Canadian law was changed very significantly in 2010, to create *per se* offences with respect to certain types of agreements between competitors (essentially price fixing, market allocation and output restriction agreements), and to remove other types of agreements (such as vertical arrangements) from the ambit of the criminal law. The amendments also created a specific, but not entirely clear, statutory defence to the criminal provisions for some types of joint venture arrangements between competitors. Finally, the 2010 amendments added a new provision (section 90.1) which allows civil challenge to other types of agreements between competitors.

Even the brief overview above demonstrates the complexity of the 2010 *Competition Act* amendments. There has been very limited jurisprudence since their introduction to provide interpretation.[2] Therefore, guidance respecting the Bureau's views in this area is particularly valuable. This Bulletin does not summarize the full content of the CCGs. It focuses on the significant changes from the original version published in 2009.

Implications for Mergers

(i) Agreements going beyond a pure merger

The updated CCGs stipulate that where parties to a merger enter into an agreement that

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[2] The most significant decision interpreting of the revised provisions is the judgement of the British Columbia Court of Appeal in *Watson v. Bank of America*, 2015 BCCA 362, which confirmed that the new section 45 offence does not apply to agreements between firms which are related only vertically in the distribution chain, and further requires that to be an offence, an agreement between competitors needs to be an agreement dealing with the product with respect to which they compete.

goes beyond the pure merger arrangement, the Bureau may consider whether it should commence a potential criminal investigation with respect to those aspects of the transaction which go beyond the merger proper. In this regard, the updated CCGs added the following new language:

> Where parties enter into any agreement(s) that goes beyond the acquisition, amalgamation or combination agreement, whether within or outside said agreement, the Bureau will consider under which provision(s) of the Act any investigation or inquiry should be pursued. The Bureau may utilize its formal powers under sections 11 and/or 15 of the Act to obtain information and/or records relevant to this determination.

(ii) Non-compete agreements

The updated CCGs continue to recognize, as did their predecessors, that non-competition agreements associated with merger transactions can serve legitimate purposes, such as ensuring that a purchaser in a merger transaction realizes the full value of a purchased business by not being required to compete against the vendor for customer loyalty, and they provide that non-competition agreements entered into in connection of a merger will generally be examined under the merger provisions of the Act. However, in a change from the original CCGs, the updated CCGs warn of rare instances when a non-competition agreement entered into in connection with a merger may be examined under the criminal cartel provisions as amounting to a market allocation agreement, or under the civil agreement provision if the effect of the non-competition agreement is uncertain in the merger review. The updated CCGs added the language below:

> However, in rare instances [non-compete clauses entered into in connection with a merger] may be considered under section 45 of the Act, for example where the non-compete may amount to a market allocation agreement, or under section 90.1 of the Act, for example where the effect of a non-compete agreement is uncertain at the time when the merger is reviewable under section 92 of the Act.

The new language may prove to have a significant chilling effect on what the CCGs themselves acknowledge to be normal, and economically beneficial, non-compete agreements which make possible the transfer of the full value of a business in a merger transaction.

Sham Agreements

The revised CCGs add a section providing that where the form of any agreement is a sham designed to avoid application of the criminal provisions of the Act, the Bureau will focus on the substance of the agreement or collaboration when determining whether specific conduct should be assessed under the criminal provision. In this regard, the updated CCGs added the following language:

> The Bureau is cognizant that parties may attempt to structure or design agreements or collaborations to avoid scrutiny under section 45. Regardless of formality or enforceability, where the Bureau has evidence that a collaboration or agreement is a sham it will consider the arrangement under the most

appropriate section of the Act.

Commentators had urged the Bureau, if its concern was to capture transactions which were designed to look like mergers but were in substance conspiracies, to articulate a "sham" exception to its guidance that mergers would not attract criminal prosecution, as an alternative to watering down the clear guidance with respect to mergers provided in the original CCGs. In the event, the Bureau elected to do both.

Vertical Agreements and Dual Distribution

The revised CCGs state that vertical agreements between customers and suppliers will generally be assessed under the reviewable matters provisions and not the criminal provisions of the Act. However, the revised CCGs weaken the guidance, particularly with respect to dual distribution arrangements — which was one of the strongest portions of the original CCGs. They do this by, first, providing that the guidance applies only to "purely" vertical agreements. Second, they provide that vertical arrangements that include an agreement between competitors to fix price, allocate markets or limit the supply of a product will generally be assessed under the criminal provision.

Since section 45 can only apply to horizontal agreements, this addition is likely to cause significant concern and confusion for those engaged in dual distribution arrangements.

Broader Concept of "Competitor" Under the Civil Provision

The prior CCGs stated that the Bureau would not consider parties to an agreement to be competitors for the purpose of the civil agreement provision (section 90.1) only where they compete in respect of products that are subject to the challenged agreement.

In the revised CCG, the Bureau has broadened its approach to competitors. The Bureau now takes the position that the civil agreement provision can apply to any agreement as long as two or more of the parties to that agreement are competitors or potential competitors with respect to any product, although its primary focus is likely to be with regard to the products subject to the agreement. In addition, the revised CCGs note that a party to an agreement who does not compete with any of the other parties to the agreement could still be subject to the sanction of the civil agreement provision if at least two of the other parties to the agreement are actual or potential competitors.

In this regard, the updated CCGs cite the consent agreements it obtained in the E-books inquiry under section 90.1, in which Apple was considered a party to agreements with publishers for purpose of section 90.1 even though Apple did not compete with the publishers.

Broader Potential Challenges to Competitor Agreements and Joint Ventures

In the revised CCGs, the Bureau appears open to broadening its enforcement approach to the civil agreement provisions of the Act, in addition to the above-noted broadened definition of competitor. Firstly, they note that the Bureau will consider whether the agreement is likely to prevent or lessen competition substantially in any market, not just the product market subject to the agreement. Secondly, the prior CCGs indicated that the

Bureau would consider a challenge to the collaboration only if parties were unable independently to carry out the activities which they instead agree to provide via collaboration. They further noted that even if the parties were likely, independently, to carry out the activity, further investigation may be warranted but that the conduct would not necessarily be subject to challenge. That language has been removed from the updated CCGs.

Agreements on "Buy Side" and Employment Issues

In the draft revisions to the CCGs released last summer, there was a suggestion that agreements between firms to buy things or acquire inputs — in particular agreements related to hiring or paying employees — might be subject to the criminal provisions, despite the fact that the wording of the Act does not support that view and that buying groups are often seen as benefitting competition, especially for smaller competitors.

This suggestion provoked some controversy, and in late November 2020, the Bureau released a statement clarifying its view that the criminal cartel provisions of the Act do not apply to no-poach agreements (*i.e.*, agreements between competitors not to hire one another's employees), wage-fixing agreements, and other forms of "buy-side" agreements. Please see our earlier bulletin for a discussion of the implication of that statement.

Updated CCGs reiterate the Bureau's clarifying statement from November 2020 that joint purchasing agreements, employee no-poaching and wage-fixing agreements are not prohibited by section 45 but may be subject to review under the reviewable practices provisions of the Act.

This issue remains a controversial one, and may result in legislative change at some point.

Guidance Is Good, But Not Determinative

As we have noted, guidance by the Commissioner of Competition, both with respect to competitor collaborations and more generally, is welcome and important. However, it is not determinative. It may influence but does not bind either the Competition Tribunal or the courts. They have ruled contrary to Competition Bureau guidance on a number of occasions. Nor do Competition Bureau guidelines bind the Competition Bureau itself, which has occasionally acted contrary to such guidance. Finally, and perhaps most significantly, the Competition Bureau's guidelines do not bind private plaintiffs, including class action plaintiffs, who may choose to bring actions, alleging breach of the criminal provision of the Act for conduct which the Bureau's guidance advises does not implicate a criminal violation. So, guidance is welcomed, and clear unambiguous guidance, minimizing use of words such as "generally" and "usually" is particularly welcomed, but it does not and cannot address all concerns. Care is important, particularly when venturing, or joint venturing, close to the line.

Conclusion

As noted at the outset, the Bureau offers no more important guidance to the legal and business community than that in the CCGs. The issuance of the original CCGs was timely and extremely influential. An update a decade later is appropriate. Similarly, the care which

the Bureau has taken in making the changes contained in the revised CCGs is also appropriate, particularly given the limited jurisprudence to date. That said, there are some meaningful changes contained in the updated CCGs and it is important that businesses understand these subtle but important adjustments. They indicate, to some degree, a mildly increased suspicion of business collaborations, and the potential for a somewhat more aggressive enforcement stance in the area.

Consequently, particularly when considering joint venture arrangements it will be important to pay close attention to these changes.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.