## Index

## A

Acquiring a franchise, 79

- buying an existing franchise, 106
- franchise agreements, 87
  - alternative dispute resolution,
    105
  - approved suppliers and volume rebates, 98
    - uniformity, 98
  - o fees, 94
  - o financial reporting, 95■ right to audit, 96
  - o insurance, 101
  - licence and reservation of rights, grant of, 89
    - non-exclusive licence, 90
  - operations manual and system modification, 99
  - o non-competition, 104
  - o parties to the franchise agreement, 89
  - o security, 98
  - site selection and development, 92
    - branding and image, 92
  - o term and renewal, 90
    - common renewal condition, 91
  - o termination, 101
  - o territory, 91
    - right of first refusal, 92
  - o trademark protection, 96
  - training and operating assistance, 100
  - o transfer and assignment, 103

- legislative overview, 83
  - o consequences of noncompliance, 86
  - o duty of disclosure, 84
  - o duty of fair dealing, 85
  - o right to associate, 85
- preliminary questions, 80

Agreements, *see* Shareholder agreements, *and* Subscription agreements

### В

Business succession and estate freezes, 111

- arm's length treatment, 129
- assembling the team, 113
- creating a business succession plan, 114
- different vs. equal treatment of children, 127
- ensuring liquidity, 122
- estate freeze, 120
- family law considerations, 130
- · family trusts, 124
- gift of shares, 118
- implementing the business succession plan, 117
- preliminary questions, 112
- retaining control, 122
- sale of shares, 119

#### $\mathbf{C}$

Closing the deal, 237

 assigning contracts and obtaining consents, 245

- closing agenda, 243
- discharging mortgages and liens, 243
- putting the company in closing condition, 238
  - o amending shareholder agreements, 242
  - correcting or updating records and filings, 239
  - limiting or removing liabilities, 238
  - protecting intellectual property, 242
  - reviewing employee relationships, 240
  - reviewing customer relationships, 241
  - reviewing landlord relationships, 241
  - reviewing supplier relationships, 241
  - upgrading or replacing assets, 239
- obtaining government approvals, 246
- organizing the closing, 246

Commercial lease, *see* Leasing commercial property

Confidential information, 32

Contractors, outside, 21

· independent contractors, 21

Copyright, 37

Corporation, holding of, 12

Credit and loan agreements, 167

- availment restrictions, 169
- borrower actions to avoid exercise of lender remedies on default, 182
- calculation of interest, 168
- permitted encumbrances, 175
- qualifications to cost recovery and indemnification, 177
- qualifications to events of default, 176
- qualifications to financial covenants, 173

- qualifications to representations and warranties, 171
- remedies on default, 179
- · restrictions on assignment, 179

## Creditor proofing, 43

- · commonly used structures, 48
  - transfer of assets to a holding company, 49
  - transfer of assets to a sibling company, 50
  - transfer of assets to a subsidiary, 49
- components of a creditor proofing plan, 44
  - dividing ownership amongst family members, 48
    - creditor protection, 48
  - holding valuable lease separate from operating business, 47
  - investing in the operating business by secured loan, 46
    - secured load, 46
  - keeping deposits and loans separate, 47
  - providing services to the operating business through another company, 46
  - separating ownership of valuable assets from the operating business, 45
    - real estate, 46
  - o stripping equity, 47
  - use of multiple corporations, 44
    - transferring assets, 45
- example of creditor proofing structure, 56
- legislative restrictions, 51
  - o oppression remedy, 53
- proceed with caution, 58
- things to avoid, 54
  - o commingling of assets, 55
    - piercing the corporate veil, 55
  - failing to identify the business as a separate corporation, 55

- failing to maintain separate records and record intercorporate transfers, 56
- o fraud, badges of, 54
- interlocking boards and management, 55
- transferring assets for only nominal consideration, 56

#### D

## Dealing with employees, 17

- changing the employee relationship, 24
- employment contract, 17
- equity compensation, 22
- intellectual property, 20
- outside contractors, 21
- terminating the employee relationship, 25
- · work environment, 27

# Debt financing and commitment letters, 147

- acquisition financing, 161
- · availment, 152
- commitment letters generally, 148
- conditions precedent, 160
- · covenants, 154
- credit facilities, 151
- events of default, 157
- permitted encumbrances, 156
- postponement, 159
- representations and warranties, 153
- · security, 158

## Director duties and liabilities, 305

- director meetings, 315
  - o attendance at meetings, 316
  - o conduct of meetings, 317
  - $\circ$  minutes of meetings, 318
  - o notice of meetings, 315
- duty of care, 310
  - o business judgment rule, 310
- fiduciary duty, 307
  - avoiding misuse of corporate opportunity, 309
  - disclosing conflicts of interest, 308

- Canada Business Corporations Act (CBCA), 308
- in writing, 308
- o good faith, 307
- · other director duties, 311
  - acquisition and redemption of shares, 311
    - solvency tests, 311
  - o appointment of officers, 312
    - unanimous shareholder agreement, 312
  - approval of financial statements, 312
  - authorizing payment of commissions, 312
  - o borrowing, 312
  - compliance with CBCA and company charter, 312
  - o declaration of dividends, 313
    - solvency test, 313-314
  - filling director and auditor vacancies, 314
  - o fixing remuneration, 314
  - $\circ$  issuance of shares, 315
  - o passing by-laws, 315
- protection of directors, 319
  - claiming due diligence defense, 323
  - implementing a unanimous shareholder agreement, 324
  - obtaining an indemnification agreement, 321
  - o obtaining insurance, 321
  - o recording dissents, 323
  - o relying on experts, 324
  - o resigning, 325
  - reviewing the company's bylaws, 320

## Dispute resolution and shareholder remedies, 335

- derivative action, 338
- · mediation and arbitration, 337
- oppression remedy, 339
  - o family businesses, 341
- other court applications, 342
  - o appointment of auditor, 342
  - o calling of meeting, 342

- o compliance with CBCA, 342
- o fix fair value of shares, 343
- investigation of company, 343
- liquidation and dissolution of company, 343
- o rectification of records, 344
- o removal of auditor, 344
- restrain holding of meeting, 344
- o set aside contract, 344
- o settle controversy over election, 344

Duties, see Director duties and liabilities

#### E

Employees, see Dealing with employees

Employment contract, 17

Equity compensation, 22

Equity financing and term sheets, 195

- · anti-dilution protection, 205
- · board of directors, 206
- conversion rights, 204
- · dividend rights, 201
- drag-along rights, 212
- due diligence period, 215
- employees, 208
- expenses, 218
- information rights, 209
- liquidation preference, 203
- · lock-up, 216
- · loss of rights, 213
- management and control, 207
- owners and managers vs. investor, 197
- personal liability, 214 preemptive rights, 209
- piggyback rights, 211
- redemption rights, 202
- registration rights, 212
- representations and warranties,
  214
- rights of first refusal, 210
- time of closing, 217
- · use of proceeds and funding, 200

- valuation, 199
- · voting rights, 204

Estate freezes, *see* Business succession and estate freezes

#### F

Family trust, 12

Franchise, see Acquiring a franchise

### G

Governance, 327

- · benefits of good governance, 328
- implementing good governance, 333
- pressure to implement good governance, 329
- recommended governance structures and practices, 330
  - o audit committee, 331
  - code of business conduct and ethics, 332
    - monitoring compliance,333
  - compensation committee, 332
  - director orientation and continuing education, 333
  - o nominating committee, 332
  - regular board assessments,333
  - the board and independent directors, 331
- resistance to good governance, 329

Guarantees, *see* Security agreements and guarantees

## I

Income splitting, 11

Intellectual property, see Protecting intellectual property

## L

Leasing commercial property, 61

- assignment and subletting, 64
- co-tenancy, 71

- demolition or sale, 73
- due diligence, 76
  - $\circ$  condition of the premises, 78
    - independent building search, 78
  - o title search, 76
  - o zoning compliance, 77
  - changing by-laws, 77
- environmental indemnity, 70
- exclusivity and other restrictions,
  68
- gross lease v. net lease, 62
- indemnity, 70
- insurance, 70
- leasehold improvements, 69
- net lease v. gross lease, 62
- offer to lease, 62
- option to purchase and right of refusal, 67
- option to renew and right to extend, 65
- percentage rent, 63
- relocation, 71
- removal and restoration, 75
- subordination and attornment,
  68

Liabilities, see Director duties and liabilities

## M

Meetings, see Shareholder meetings

## N

Negative covenants, 269

- enforcement of negative covenants, 271
- non-competition covenant, 271
- non-disclosure covenant, 270
- non-solicitation covenant, 270

### o

Owners vs. managers, 3

Ownership, determining, 30

#### p

Patents, 34

Preferred shares, 9

### Private company, 2

Protecting intellectual property, 29

- copyright, 37
- determining ownership, 30
- industrial design, 40
- maintaining ownership, 31
- patents, 34
- trade secrets and confidential information, 32
- · trademarks, 38

### R

Remedies, *see* Dispute resolution and shareholder remedies

Representations, see Warranties and representations

### S

Security agreements and guarantees, 185

- conflicts with loan agreement, 185
- describing the obligations secured, 186
- general security, 188
- guarantees, 187
- postponement and assignment, 187
- priority of other security, 192
- special treatment of certain assets, 190
- · specific security, 189

## Shares, 9

- buy-back rights, 13
- · class of, 8
- gift, 118
- issuing, 9
- payment for, 13
- preferred shares, 9
- sale, 119
- · valuation of, 13

## Shareholder, 4

Shareholder agreements, 249

- auction rights, 269
- bank financing and guarantees,
  258

- board and management representation, 253
- · drag-along rights, 264
- family law covenants, 272
- first refusal rights, 261
- information rights, 256
- major decisions, 256
- mandatory shareholder funding, 260
- miscellaneous matters, 274
- negative covenants, 269
  - enforcement of negative covenants, 271
  - non-competition covenant,271
  - o non-disclosure covenant, 270
  - o non-solicitation covenant, 270
- piggyback rights, 263
- pre-emptive rights, 259
- shotgun rights, 267
- transfer rights upon certain events, 264
- unanimous shareholder agreements, 251
- use of profits, 257
- valuation of transferred shares, 266

## Shareholder meetings, 299

- · adjournment of meeting, 301
- annual meetings, 300
- conduct of the meeting, 302
- notice of meeting, 300
- place of meetings, 300
- preparation for a meeting, 302
- special meetings, 300

Shareholder remedies, see Dispute resolution and shareholder remedies

# Shareholder statutory rights, collective, 287

- · amalgamation, 288
- amending articles, 290
- auditors m 291
  - o right to appoint auditor, 291
  - o right to remove auditor, 291
- by-laws, 291
- continuance, 293

- · directors, 294
  - o right to elect directors, 294
  - o right to remove directors, 294
  - right to restrict directors' powers, 294
- liquidation and dissolution, 295
- shareholder squeeze-out, 295
- · stated capital, 296
  - right to increase stated capital, 297
  - right to reduce stated capital, 297
- transfer of all of the assets, 297

# Shareholder statutory rights, individual, 275

- · corporate records, 278
  - right to copies of certain corporate records, 279
  - right to examine corporate records, 278
  - right to examine shareholder list, 279
  - right to receive shareholder list, 279
- · dissent and appraisal, 279
- financial statements, 280
  - right to examine financial statements, 280
  - right to receive financial statements, 280
- receipt of company dividends, 281
- receipt of company property on dissolution, 282
- share certificates, 282
  - right to receive replacement share certificate, 283
  - right to receive share certificate, 282
- shareholder meetings, 283
  - right to require auditor attendance, 283
  - right to requisition meeting, 284
  - o right to solicit proxies, 284
  - right to submit proposals, 284
  - o right to vote, 285

Starting up the company, 7

- · choosing the capital structure, 8
- income splitting, 10
- issuing the shares, 9
- share buy-back rights, 13
- shareholder loans, 14
- use of a family trust, 12
- use of a holding corporation, 12
- valuation and payment for shares,
  13

Statutory rights, *see* Shareholder statutory rights, collective, *and* Shareholder statutory rights, individual

Subscription agreements, 219

- · conditions of closing, 231
  - o certain agreements, 232
  - conditions for the benefit of the company, 233
  - no adverse law or actions to restrain, 232
  - no material adverse change,231
  - satisfactory due diligence results, 233
  - o third party consents, 232
- covenants, 228
  - o access to information, 230
  - o prohibited actions, 229
  - regulatory and contractual consents, 229
- · indemnification, 234
  - indemnification by the company, 235
  - indemnification by the investor, 235
  - o maximum and minimum amounts, 236
- limitation on remedies, 236
- representations and warranties,
  223
  - o accounts receivable, 226
  - o compliance with laws, 226
  - o customers and suppliers, 226
  - dividends and distributions,225

- o environmental matters, 227
- o financial statements, 225
  - generally accepted accounting principles (GAAP), 225
  - international financial reporting standards (IFRS), 225
- o leased premises, 226
- representations of the investor, 227
- subscription price, 221
- survival of covenants and representations, 230

### T

Trademarks, 38

#### 17

Valuation, 133

- goodwill, 138
- influence of buyer synergies on price, 141
- influence of payment terms on price, 142
- limitations of valuation methods,
  140
- normalizing adjustments, 135
- other influences on price, 143
- · valuation methods, 136
- various discounts and premiums, 138

## W

Warranties and representations, 223

- · accounts receivable, 226
- compliance with laws, 226
- · customers and suppliers, 226
- dividends and distributions, 225
- environmental matters, 227
- · financial statements, 225
- · leased premises, 226
- representations of the investor, 227

Work environment, 27