

**Welcome!**



**Breakfast Series**

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***CEO and Executive Director***



# The Lawyer's Role in Your Food Business

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Prepared for



Breakfast Series Event

FASKEN



# About Fasken

## A One Stop Shop for Legal Services

Leading **international business and litigation** law firm

Over **700 lawyers** across eight offices in **Canada, Africa and Europe**

We have top-ranked lawyers in a wide range of industries and practice areas, including:

- Antitrust/Competition & Marketing
- Banking & Finance
- Capital Markets
- Communications
- Corporate/Commercial
- Corporate Governance
- Corporate Social Responsibility
- Environmental
- Food, Beverage and Agri-business
- Government Relations & Ethics
- Information Technology
- Intellectual Property
- International Trade & Customs
- Labour, Employment & Human Rights
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Mining
- Privacy & Information Protection
- Private Equity & Venture Capital
- Product Liability
- Real Estate
- Securities
- Tax
- Technology

# About Fasken

## National Coverage and Local Strength

Our offices in Canada are located in major city centres from coast to coast, providing maximum availability to our clients.

### Vancouver Office

- Vancouver's **largest law firm** with over 140 lawyers.
- We service **all sectors of business** including **food and beverage**, securities, M&A, employment, tax, real estate and banking.
- Our history in the city dates back **over 100 years**.
- Success based on experience, expertise, client-focused approach and cost-effective services.



# ▼ About Fasken

## Excellent Track Record

We have an excellent track record. Our international excellence and broad industry expertise consistently garner accolades and top rankings worldwide from renowned guides, including:



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*"Fasken Martineau DuMoulin LLP's corporate and M&A group is 'near the top in Canada in terms of size', and clients praise its 'very good business acumen and strength-in-depth team'." - Legal 500*

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# Food and Beverage

## Depth of Expertise

Our food and beverage group provides advice on a wide array of legal matters affecting our clients in the food and beverage industry.

### **Our Expertise**

- Corporate and commercial matters
- Financing activity, including equity and debt fundraising and bank funding
- Corporate and Board governance
- Confidentiality and trade secret protection
- Mergers and acquisitions
- Privacy, CASL and data security
- Employment and labour
- Litigation
- Product liability, customer complaint process and enterprise risk management
- Regulatory matters, including food and beverage labelling and food safety
- Intellectual property portfolio development and management
- Commercial agreements, including co-packing, manufacturing, distribution, ingredient supply and brand licensing
- Real estate, including leasing
- Tax

# Leaders in Food and Beverage

Depth in Client Base



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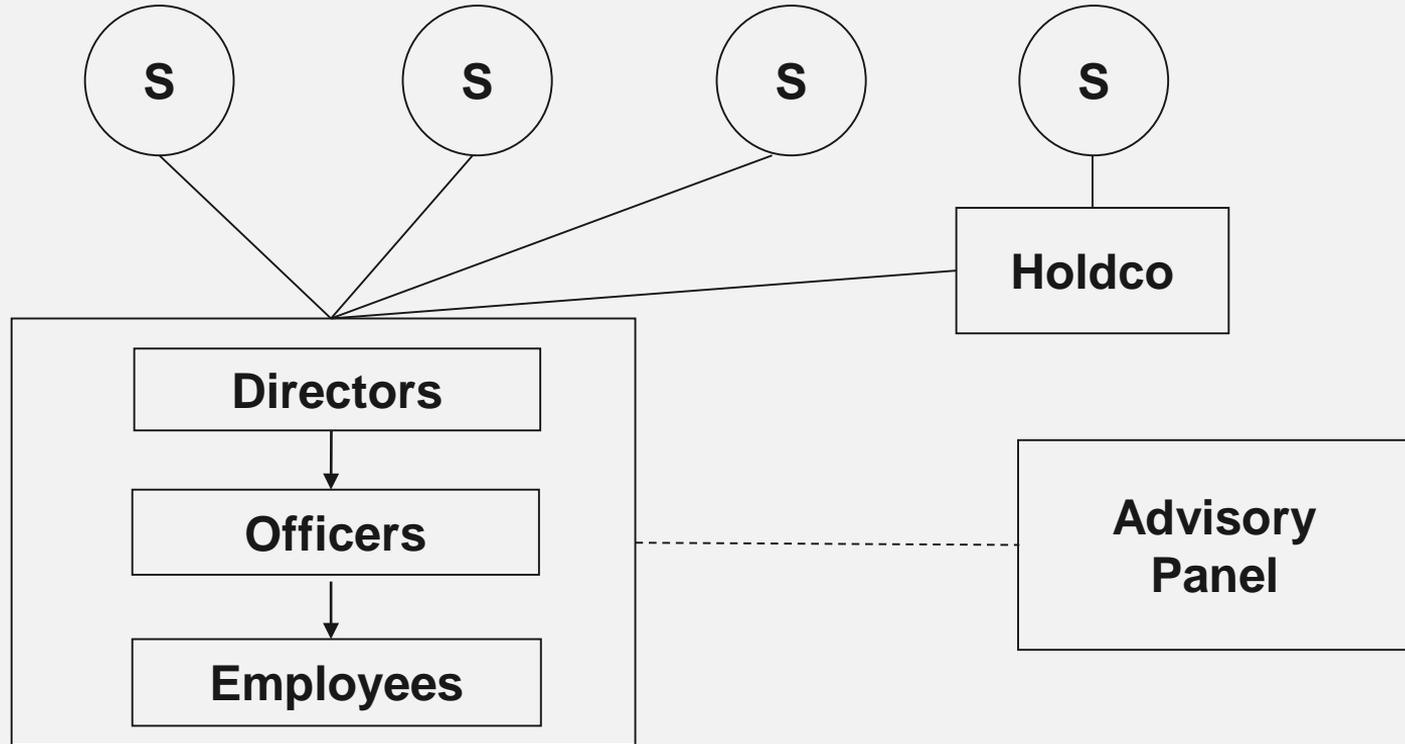
# Business Law

Top Ten Mistakes made  
by Food Companies

# ▼ 1. Failing to Incorporate Early Enough

- Corporate structure provides:
  - Limited liability
  - Familiarity to investors and business partners
  - Well suited for governance, funding and contracting
- Not incorporating exposes proprietor of business to personal liability

# ▼ Basic Corporate Structure



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# ▼ Governance and Operations

- **Shareholders** – no liability beyond investment (unless otherwise agreed), elect directors
- **Board of Directors** – elected by shareholders, duty to act fairly and diligently, owe fiduciary duty
- **Officers** – appointed by directors (CEO, VP, etc.) – manage day to day affairs of the company
- **Employees** – provide services to the company

## ▼ 2. Issuing Founder Shares without Vesting Schedule

- Once shares are issued, they are property of the shareholder
- If a shareholder does not meet their commitments or there is a dispute, there is no obligation to return those shares

# ▼ Reverse Vesting

- A Reverse Vesting Agreement sets out the expected contributions of team members in advance
- Usually time-based. I.e. if a shareholder leaves the company 2 years into a 4 year reverse vesting period, the company can repurchase half their shares
- Ensures fairness among founders (and also protects investors)

## ▼ 3. Not Considering a Shareholders' Agreement

- A Shareholders' Agreement sets out the rights and obligations of and establishes the relationship among the shareholders, and governs how the company will be run
- Often a customized document to suit the shareholders' requirements and business deal

# ▼ Typical Terms of a Shareholders' Agreement

## 1. Governance

- a) Board Composition
- b) Special Approval Requirements
- c) Board Meetings and Committees

## 2. Financing

- a) Future Capital Requirements
- b) Rights to Future Share Issuances
- c) Profit Distribution

## 3. Transfer of Shares

- a) Transfer Restrictions
- b) First Refusal Rights
- c) Piggy-back and Drag Along Rights
- d) Transfers on Occurrence of Special Events
- e) Financing Mandatory Transfer

## 4. Dispute Resolution/Exit Plans

- a) Shot-gun Clause
- b) Put/Call Options
- c) Auction and Winding-Up Clauses

## 5. Valuation of Shares

- a) Fixed Formula
- b) Periodic Agreement / Stated Price
- c) Third Party Appraisal

## 6. Non-Competition

- a) Shareholders/Employees
- b) Drafting Issues
- c) Enforcement

## 7. Confidentiality

## 8. Termination and Amendment

## ▼ 4. Disclosing Confidential Information without an NDA

- When disclosing confidential information to a third party, always enter into an NDA first
- That being said...
  - Even with an NDA, be careful about what you disclose!
  - For example, don't give your co-packer or your trade secrets if you can avoid it

## ▼ 5. Leaving Employment / Consulting Agreements until “later”

- Agreement terms:
  - confidentiality
  - assignment of intellectual property
  - waiver of moral rights
  - non-competition
- Compensation
  - cash
  - shares
  - options
- Post-termination obligations

## ▼ 6. Raising funds without complying with securities laws

- Who can you raise money from?
  - Different than a public company
  - Must always comply with securities laws!
- Two main categories of exemptions:
  - Accredited Investor (wealthy investor)
  - Eligible Related Investor (relationship of trust)

# ▼ Accredited Investor

- Examples:
  - financial assets before taxes, but net of any related liabilities, exceed \$1,000,000 (alone or with spouse)
  - net income before taxes exceeded \$200,000 in each of two most recent calendar years (or \$300,000 combined with spouse)
  - an individual who, either alone or with a spouse, has net assets of at least \$5,000,000

# ▼ Eligible Related Investor

- Examples:
  - a director, officer, employee, founder
  - a spouse, parent, grandparent, brother, sister, child or grandchild of a director, executive officer, founder
  - a close personal friend of a director, executive officer, founder
  - a close business associate of a director, executive officer, founder

# ▼ Friends and Family

- Will often fit into the Eligible Related Investor category
- Investing based on trust with the founding team
- Little or no due diligence
- Simple Subscription Agreement with minimal Representations and Warranties

# ▼ Angel Investors

- Typically are Accredited Investors
- Will conduct some due diligence
- More of a negotiation on terms
- Shareholders' Agreement may be required, if not already in place

# ▼ Venture Capital

- High standard of due diligence
- Past legal records and financials must be in order
- Strict conditions attached to investment
  - Preferred shares (greater rights than Common shares)
  - Shareholders' Agreement
  - Key Personnel Agreements

## ▼ 7. Failing to Protect Intellectual Property

- Research your new brand before launching
- Register the trademark as soon as feasible
- Consider patent protection, and don't disclose inventions without an NDA in place (if at all)

## ▼ 8. Too Many Handshake Deals

- The food industry tends to do a lot of transactions without a contract in place
- This is even more evident in family owned food businesses
- This sometimes works out fine.... but it can be a BIG issue when it doesn't

# ▼ Example: Engaging a Co-Packer

## Key Terms

1. Product Specifications
2. Minimum Volume
3. Shipping/Delivery
4. Pricing/Incentives/Rebates
5. Reporting
6. Term and Termination
7. Food Safety/Quality Assurance
8. Inspection Rights
9. Confidentiality
10. Intellectual Property Rights
11. Reps and Warranties
12. Unacceptable Products/Shelf Life>Returns
13. Indemnification/Limitation of Liability
14. Insurance Coverage
15. Governing Law/Venue

## ▼ 9. Not Utilizing Government Funding

- EBC Tax Credits (30% refund for BC investors)
  - Five categories of qualifying activities
- Scientific Research and Experimental Development Tax Credits (SR&ED)
- Other programs, such as BDC loans, Farm Credit Canada

## ▼ 10. Thinking legal, accounting and tax problems can be solved later

- When a problem arises, it is sometimes too late
- In addition to legal, for food and beverage companies, import/export, accounting and sales tax issues often arise



**Questions?**

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# Employment Law

Legal Issues in Managing  
Your Employees

## ▼ Overview

- Do's and Don'ts of Hiring and Firing
- Performance Management and Discipline
- Employment Agreements and Key Terms
- Non-Competition/Non-Solicitation Clauses
- Human Rights Accommodation Issues

# ▼ Do's and Don'ts of Hiring

- **Do:**

- Verify information (education, qualifications) provided by the applicant.
- Ensure the applicant is the right fit for the job – check references.
- Prepare a written employment agreement and ensure it is signed BEFORE commencing employment.
- For higher level employees, inquire if the candidate has (enforceable) post-employment obligations to their current employer?

**Don't:**

- Ask inappropriate interview questions (ex. about age, sexual orientation, etc.)
- Hire with verbal employment agreements
- Decline to hire based on a ground protected by human rights legislation

# ▼ Do's and Don'ts of Firing

## Do:

- Review termination provisions (if any) in employment agreement
- Prepare and provide a written termination letter
- Be respectful and calm, and hold the termination meeting in private
- Consider offering outplacement counselling and a reference letter.
- When employee refuses change in term of employment, make election as to whether continue on existing terms or terminate at end of notice period.

# ▼ Do's and Don'ts of Firing

## Don't:

- Terminate for human rights-related reason.
- Allege cause when you do not have it.
- Fail to give reasons for termination.
- Engage in bad faith conduct or be unduly insensitive in the manner of termination

# ▼ Performance Management and Discipline

- A common and difficult issue facing employers.
- Vital that employers implement and follow a consistent and effective performance management system.
- Employers have the right to:
  - Establish reasonable production standards.
  - Expect that members will perform their assigned duties in a careful manner.
    - Cannot insist on perfection in every respect of every duty assigned.
  - Impose discipline when members fail to meet these standards of performance because of *culpable* conduct.

# ▼ Performance Management and Discipline

- Distinction between:
  - Non-culpable
    - Inability to fulfill requirements because of factors *beyond control* (i.e. beyond qualifications/capabilities, physical/mental disabilities).
  - Culpable
    - Inability to fulfill requirements because of factors *within control* (i.e. inattentiveness, carelessness, poor attitude, disregard for safety procedures, etc.)
- Cannot discipline if poor performance is the result of non-culpable behaviour
- Must comply with duty to accommodate if caused by physical or mental disability.

# ▼ Performance Management and Discipline

- Need to determine if misconduct culpable or non-culpable through investigation
  - Quickly assess severity of the alleged misconduct and determine whether suspension pending investigation is appropriate and necessary.
  - Starting point: the investigation must be **fair, impartial, thorough, and well-documented**.
  - Depending on the conduct in question, an investigation may involve a straightforward interview with each of the parties involved, or may require a complex consideration of medical, surveillance, and other types of evidence.
  - Investigation should be timely.

# ▼ Performance Management and Discipline

- If the decision is to discipline, put in writing.
- Meet with the employee, present the letter, and explain their discipline verbally.
- Presumption is that discipline should escalate.
  - Verbal warning
  - Written warning
  - Suspension
  - Termination
- Discipline must be proportionate .

# ▼ Employment Agreements and Key Terms

- Always have an employment agreement.
- Canadian law assumes employees retain all rights, unless specifically contracted away.
- Contracts must always provide for entitlements at least equal to the minimum entitlements provided for under applicable employment standards legislation.

# ▼ Employment Agreements and Key Terms

- **Ensuring Enforceability**

- Need to provide clear consideration to employee in exchange for them entering into the agreement.
  - Offer of continued employment not sufficient - specific tangible consideration required.
- Best if entered into at time of hire or promotion.
- Provide reasonable opportunity for candidate to review and/or seek legal advice, if required.

# ▼ Employment Agreements and Key Terms

- **Compensation clauses**

- Ensure all forms of compensation, direct and indirect, are addressed.
- Especially important to consider how these entitlements will be dealt with upon termination.

- **Termination Clauses**

- Set expectations upfront.
- Options limited only by creativity, provided minimum statutory standards are satisfied.
  - Limit to ESA minimums?
    - Can have a chilling effect on recruitment.
    - Not appropriate for executives, senior managers but can be good for lower level employees.
  - Fixed entitlement or predetermined formula based on years of service?

# ▼ Employment Agreements and Key Terms

- **Restrictive Covenants**

- Can be broadly categorized into 3 groups:

1. Confidentiality

- Purpose of including confidentiality provision in employment agreement is to both:
  - Put employee on notice of their obligation.
  - Clearly define what the employer considers and expects to be treated as confidential.

2. Non-competition

3. Non-Solicitation of Customers/Suppliers/Employees

# ▼ Non-Competition/Non-Solicitation Clauses

- The ability of a person to carry on his or her trade is paramount in a free market society.
- These clauses are restraints on trade.
  - General rule is that they are contrary to public policy, and therefore void.

# ▼ Non-Competition/Non-Solicitation Clauses

- A non-solicitation clause is aimed at restricting post-employment solicitation.
  - Restrict one or both of:
    - Solicitation of customers.
    - Solicitation of employees.
- A non-competition clause is aimed at restricting post-employment competition.
  - Competition can include:
    - Accepting employment with one of your competitors.
    - Starting a new business that competes with your company.

# ▼ Non-Competition/Non-Solicitation Clauses

## Enforceable if:

- 1. It protects a legitimate proprietary interest of the employer.**
  - An employer does not have a proprietary interest in the employee's professional skill and experience.
  - Trade secrets, business/trade connections, client lists, and customer goodwill are legitimate proprietary interests worthy of protection.
  
- 2. The restraint is reasonable between the parties in terms of:**
  - Temporal length,
  - Spatial area covered,
  - Nature of activities prohibited, and
  - Overall fairness.

# ▼ Non-Competition/Non-Solicitation Clauses

**Enforceable if:**

- 3. The terms of the restraint are clear, certain and not vague.**
  - If clause is ambiguous, it is unenforceable.
  - Courts will not read down ambiguous portion in order to make it legal.
  - Avoid using:
    - Restriction on solicitation of “any client of the company which has been a client of the company”.
    - Restriction on solicitation of *past* clients and *potential* clients.
    - Restriction on solicitation of *former* employees of the employee.
  
- 4. The restraint is reasonable in terms of the public interest.**

# ▼ Human Rights Accommodation Issues

- In a claim of discrimination, claimant must establish that a standard is discriminatory on its face.
- Employer must prove – on a balance of probabilities – that the discriminatory standard is a bona fide occupational requirement.

# ▼ Human Rights Accommodation Issues

## The Duty to Accommodate Three Step Test: *Meiroyin*

### STEP ONE

- The employer adopted the standard for a purpose or goal rationally connected to the performance of the job

### STEP TWO

- The employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and

### STEP THREE

- The standard is reasonably necessary to the accomplishment of that legitimate work-related purpose.

# ▼ Human Rights Accommodation Issues

- To show that the standard is reasonably necessary, it must be demonstrated that it is **impossible** to accommodate individual employees sharing the characteristics of the claimant without imposing **undue hardship** upon the employer.
- Very elusive concept.
  - The SCC has said proof of undue hardship may “take as many forms as there are circumstances.”
- Each case will ultimately turn on its facts.
  - In order to assert undue hardship, an employer must have evidence, not impressionistic or anecdotal evidence, of the reasons why accommodation will not work.

# ▼ Human Rights Accommodation Issues

## Hardship Factors:

1. Financial costs
  2. Disruption of collective agreement
  3. Employee morale issues
  4. Interchangeability of employees and facilities
  5. Risk to employees and to a lesser extent, to the employee requiring accommodation
- The list is not exhaustive.

# ▼ Human Rights Accommodation Issues

**What the employer ordinarily does NOT have to do:**

- Create a make-work project or a non-productive position.
  - Displace other employees.
  - Remove essential characteristics of the job.
- 
- The employee must participate in the accommodation process by providing medical evidence where requested and accepting reasonable accommodation offers.



# Managing Risk in Your Business:

Product Liability and Enterprise  
Risk Management

# ▼ Risk Management for Food Producers

- What is risk?
- Categorizing and identifying types of risk
  - Business risk
  - Internal risk
  - External risk
- Evaluating risk probability and severity
  - Conduct a risk audit
  - Prepare a risk matrix
    - Probability: almost certain to highly unlikely
    - Severity: minimal (no impact or interruption) to catastrophic (business closes)
- Mitigating risk

# ▼ Business Risk

- Risks inherent in the food manufacturing business
- Internal risks:
  - Financial
  - Employment
  - Property (including intellectual property)
- External risks:
  - Regulators
  - Supply chain parties
  - Customers

# ▼ Regulatory Risk

- What regulators have oversight?
  - Health Canada
    - Canadian Food Inspection Agency
    - Health Product and Food Branch
  - Competition Bureau
  - Ministry of Agriculture (BC)
  - Municipalities
  - Foreign regulators
- Know what regulations apply
- Know what processes and record keeping needs to be in place
- Know your regulators

# Advertising Risk

- What can you say about your products?
- Who has a say over what you say?
- *Food and Drug Act* (Health Canada)
- *Safe Food for Canadians Act* (Health Canada)
- *Consumer Packaging and Labelling Act* (Competition Bureau)
- *Business Practices and Consumer Protection Act* (BC Gov't/ courts)
- *Sale of Goods Act* (courts)
- Common law (courts)

# ▼ Commercial Risk

- Beware your supply chain—the parties with whom you do business are your greatest source of risk
- Know your supply chain partners
- Have contracts where the relationship/ transaction warrants
- Have standard terms and conditions which apply where there is no contract
- Understand the legal obligations and exposure you are being asked to assume
- Balance the desire for a deal with the potential downside

# ▼ Consumer Risk

- Understanding your customers and their concerns
- Communicating with your customers
  - Have a social media policy and strategy
- Managing consumer complaints
  - Have a claims resolution process
- Crisis management
  - Have a crisis team and plan
- Recalls

# ▼ Litigation Risk

- Avoid litigation like the plague—it is costly, distracting and risky
- Think about who may sue you and why
  - Business litigation
  - Personal injury claims
  - Class action/ consumer claims
  - Regulatory proceedings
- What to do when you get sued?
- When to sue?

# ▼ Mitigating Risk

- Conduct a risk audit and create a risk matrix
- Have good written manufacturing and safety processes
- Keep good records
- Have contracts and terms and conditions
- Have suitable and sufficient insurance
  - Property and business interruption
  - General liability
  - Product liability and recall
  - Contractual liability
- Resolve small problems before they become big



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*Thank you  
Merry Christmas!*