

MANITOBA'S NEW FRANCHISES ACT – SOMETHING OLD, SOMETHING NEW – WHAT TO EXPECT^{†**††}

F R A N K Z A I D * *

INTRODUCTION

On September 6, 2012, I received a voicemail message, followed by an e-mail, from Tracy Lloyd, Program Counsel, Continuing Professional Development of the Law Society of Manitoba, extending an invitation to me to speak at the 2012 Pitblado Lectures in Winnipeg, on November 30, 2012. She described the program as “our most prestigious event.” However, she also said that “the circumstances of my invitation are quite sad.” She then informed me that Andrew Ogaranko, “our local *Franchises Act* authority suddenly passed away last week. Andrew was going to do an update on our new *Franchises Act* legislation at the Lectures.”

Although Tracy mentioned that I likely had heard about Andrew’s death, in fact I hadn’t. I had been on vacation the week earlier, and had not yet caught up on any news or developments from when I was away. Needless to say I was shocked at his untimely passing.

[†] Editor’s note: This paper was previously published as part of the Manitoba Law Society’s 2012 Isaac Pitblado Lectures

^{*} This paper is dedicated to the memory of a good friend and colleague, trusted advisor and true gentleman, Andrew Ogaranko, a local expert on franchising in Manitoba, on his untimely passing on August 30, 2012.

^{††} The author acknowledges with gratitude the contributions of Gillian Scott, Senior Associate (Litigation), and Michael Milne and Neda Navabi, Students-at-Law, Osler, Hoskin & Harcourt LLP, to the research for and writing of this paper.

^{†††} LL.B. (Hons.) (Osgoode Hall), Partner at Osler, Hoskin & Harcourt LLP

I had been involved with Andrew for many months on submissions that were being made to the Manitoba government: first on the new franchise legislation, and subsequently on the draft disclosure regulation. Andrew had been taking the leadership on this project as the local expert for a special committee of the Canadian Franchise Association, and had been doing a terrific job of presenting the Canadian Franchise Association's position on a number of difficult and somewhat troublesome issues. Andrew had a superb ability of always keeping the door open for a meaningful and respectful discussion with a view to arriving at a consensus that would not compromise either the industry or the regulatory viewpoint, but bring closure to the subject to the mutual satisfaction of both sides. That was always one of Andrew's many great qualities that distinguished his career as a lawyer and trusted advisor.

I had known Andrew for probably over 30 years of my 40 year career as a lawyer. Early on, Andrew assisted me with some local Manitoba matters on behalf of a client, and thereafter we collaborated from time to time as I entrusted Andrew with other matters for different clients needing local legal services in Manitoba. I always knew that Andrew would deliver timely, practical and efficient advice that would make me look good to my clients.

When Tracy told me that the organizers of the Pitblado Lectures had met and decided to ask me to consider delivering the presentation in Andrew's place, I had no hesitation in accepting. Although I have been winding down my active legal practice in the past few years, looking forward to impending retirement, and building my franchise mediation and arbitration practice, there was no way that I would pass on the invitation if for no other reason than as a tribute to the memory of Andrew and his contribution to the legal profession. Andrew was a good friend and colleague, trusted advisor, and a true gentleman. His many contributions will not be forgotten.

It is with this background that I am truly honoured to have been asked to make this presentation and to dedicate my paper on the subject of Manitoba's new *Franchises Act* to the memory of Andrew Ogaranko.

INTRODUCTION TO THE REGULATION OF FRANCHISING

1) Franchise Legislation in Canada

The first province in Canada to introduce franchise-specific legislation was Alberta, which enacted its *Franchises Act* in 1972. That legislation followed the framework of franchise legislation in the United States, requiring the filing of a prospectus with the Alberta Securities Commission and the issuance of a certificate of approval in order to offer franchises in Alberta. The legislation was revamped in 1995¹ when the Alberta government abolished the procedure of filing and approval of registration, due in large part to the administrative costs, and instituted self-regulating legislation requiring the delivery of a disclosure document to prospective franchisees with punitive consequences for failure to comply, along with a statutory duty of fair dealing between the parties. It took a great amount of time for other provinces to follow Alberta, despite high profile lawsuits in Ontario regarding franchising practices during the 1980s. It was not until 2000 that Canada saw any progress in franchise legislation and finally, over 25 years after Alberta's initiative, Ontario introduced the *Arthur Wishart Act*.²

Soon thereafter, with public and government interest in franchise legislation growing, the Uniform Law Conference of Canada (ULCC) initiated a project for the drafting of template legislation and associated regulation as a proposed model for franchise legislation in the remaining provinces and territories in Canada.³ Prince Edward Island's Bill 43 was largely reflective of an interim draft of legislation approved by the ULCC. The legislation received its first reading in the province's legislative assembly on May 12, 2005 and Prince Edward Island became the third province in Canada to enact franchise-specific legislation when the bill, known as the *Franchises Act*,⁴ received Royal Assent on June 7, 2005.

¹ *Franchises Act*, RSA 2000, c F-23.

² *Arthur Wishart Act* (Franchise Disclosure), 2000, SO 2000, c 3.

³ "Uniform Franchises Act, Report on Working Committee", Uniform Law Conference of Canada, Commercial Law Strategy (11 August 2003), online: Uniform Law Conference of Canada <<http://ulcc.ca/en/2003-frederiction-nb/288-civil-section-documents/534-franchise-law-reportb>>.

⁴ *Franchises Act*, RSPEI 1988, c F-14.1.

The ULCC adopted its final version of the model *Franchises Act* and associated regulations⁵ in August of 2005, after which New Brunswick's Bill 6 received first reading. Following a provincial election, the bill was later reintroduced as Bill 32, receiving Royal Assent as the *Franchises Act*⁶ on June 26, 2007. However, it was not proclaimed into force until February 1, 2011, after finalization of the associated disclosure regulation,⁷ making New Brunswick the fourth province in Canada to adopt franchising legislation.

2) Franchise Legislation in the United States

Because Canadian franchise legislation borrows heavily from parallel legislation in the United States, a brief description of such legislation is useful. The main difference is that Canadian franchise legislation falls within the exclusive jurisdiction of the provinces, while franchising in the United States is regulated by two tiers of government: federal and state. The Federal Trade Commission (FTC) Franchise Disclosure Rule, made under the *Federal Trade Commission Act*, regulates the sale of franchises federally.⁸ Detailed disclosure to prospective franchisees is required by the FTC Rule and, as the FTC Rule deals strictly with franchisor disclosure, there is no express duty of good faith or fair dealing and franchise relationship issues are governed by state contract law. Similarly, there are no filing or registration requirements and the disclosures are not reviewed by the FTC. While the FTC has a broad range of remedies and penalties when there are violations, there is no private right of action to enforce the FTC Rule as only the FTC can enforce it.

There are a number of states that have franchisor registration requirements which entail that franchisors must register with a state regulatory agency and obtain approval before they can offer their franchises to prospective franchisees in or from those states. Many states, unlike the FTC Rule, offer a private right of action to franchisees. Several states have also enacted franchise relationship legislation to govern the relationship between the parties after the franchise agreement is signed.

The FTC Rule and state laws require the franchisor to provide the disclosure document at least fourteen business days before the franchisee

⁵ "Regulation", Uniform Franchises Act, Disclosure Documents, online: Uniform Law Conference of Canada <http://66.51.165.111/en/us/UFA_Disclosure_Documents_Reg_En.pdf>.

⁶ *Franchises Act*, SNB 2007, c F-23.5.

⁷ Disclosure Document Regulation, NB Reg 2010-92.

⁸ Frank Zaid, *Canadian Franchise Guide*, looseleaf (Toronto: Carswell, 2007) at 2-144.31 [Guide].

pays any consideration or signs a contract. There is a uniform disclosure format called the Uniform Franchise Offering Circular (UFOC) which both the federal and state governments use. The UFOC Guidelines contain additional disclosure provisions: under both these Guidelines and the FTC Rule a franchisor must comply with certain requirements if it makes an earnings claim.

As of July 1, 2008, franchisors in the United States became required to use the new FTC Franchise Disclosure Document, which adopted the UFOC format but supplemented it with additional disclosure requirements, thus modernizing the FTC Rule. The FTC Rule allows franchisors to disclose via electronic form, and for franchisee receipts to be executed and returned electronically. Information such as stand-alone franchise costs or operating expenses are now available to franchisees, "even if no financial performance representations are included in the disclosure document, with a warning that this information does not constitute a financial performance representation."⁹ Similarly, "start-up franchisors may phase in audited financial statements over a three year period,"¹⁰ while new 'sophisticated investors' can be exempt from disclosure "where prospective franchisees meet certain net worth, investment or experience criteria."¹¹

3) Franchise Legislation in Other Countries

As of the date of writing of this paper, there are approximately 30 countries in the world that have enacted franchise legislation, apart from Canada and the United States. These countries, by way of example only, include Australia, Brazil, China, France, Indonesia, Italy, Malaysia, Mexico, South Africa and Spain.

While the framework of franchise legislation varies from country to country, the fact is that such legislation continues to receive broad interest, largely because franchising as a business concept still emanates for the most part from the United States, involving local investors as franchisees in one form or another in their domestic markets. While there are a number of examples of successful local franchisors that have expanded into other countries, including the United States and Canada, the flow is still predominantly outbound from the United States to other countries.

⁹ *Ibid* at 2-144.35.

¹⁰ *Ibid*.

¹¹ *Ibid*.

4) Franchising in the Canadian Economy

According to the Canadian Franchise Association website,¹² franchise businesses account for 40% of all retail sales in Canada and there are over 78,000 franchise units across Canada. Franchising directly employs over 1,000,000 people, amounts to 10% of Canada's gross domestic product, and accounts for 1 out of every 5 consumer dollars spent in Canada on goods and services. These figures are estimates only, as there have never been any reliable statistical surveys conducted in Canada. However, taking into account that the broader definition of a "franchise" in Canadian franchise legislation includes product distributorships and business opportunities, and with the inclusion of such large franchises as motor vehicle dealerships, hotels, soft drink bottlers, car rental agencies and major restaurants, the figures are not very difficult to accept.

BRINGING FRANCHISE LEGISLATION TO MANITOBA

1) Manitoba Law Reform Commission Consultation Paper – May 2007

In May 2007, the Manitoba Law Reform Commission published a consultation paper¹³ regarding possible franchise legislation. Having noted that franchising was a growing and relatively unregulated field of business activity in the province, as well as the recent enactment of franchise legislation in several other provinces in Canada and abroad, the Commission began to explore reforms to franchise legislation in January 2006. The

¹² Canadian Franchise Association "Fast Franchise Facts", online: Canadian Franchise Association <http://www.cfa.ca/Publications_Research/Fastfacts.aspx>.

¹³ Manitoba Law Reform Commission "Consultation Paper" (May 2007), online: <http://www.cfa.ca/files/PDF/Franchise_Legislation/ConsultationPaperOnFranchiseLaw.pdf>. Ideas for Manitoba's first franchise statute were canvassed at a symposium in Winnipeg, Manitoba, in 2008, the papers from which include: Manitoba Law Reform Commission, "Consultation Paper on Franchise Legislation" (2008) 8 *Asper Rev Int'l Bus & Trade L* 181; Bryan Schwartz, John Pozios & Leandro Zylberman, "Response to Consultation Paper on Franchise Law" (2008) 8 *Asper Rev Int'l Bus & Trade L* 253; Bryan Schwartz & Leandro Zylberman, "International Franchise Regulation" (2008) 8 *Asper Rev Int'l Bus & Trade L* 318; Dominic Mochrie & Frank Zaid, "Something Old, Something New: A Comparison of Canada's Newest Franchise Legislation Against Existing Franchise Laws" (2008) 8 *Asper Rev Int'l Bus & Trade L* 367; John Sotos & Arthur J Trebilcock, "Canadian Franchise Disclosure Statutes: Exemptions and Exclusions Analysis and Recommendations" (2008) 8 *Asper Rev Int'l Bus & Trade L* 395; John Sotos & Arthur J Trebilcock, "Canadian Franchise Disclosure Statutes: Disclosure of Rebates Recommendations" (2008) 8 *Asper Rev Int'l Bus & Trade L* 419.

consultation paper considered “whether the regulation of franchises is desirable in Manitoba.”¹⁴ The paper’s contents included an introduction to the history and various models of franchising, an overview of existing franchise regulation in Canada and other countries, and a comparison of the elements of Canadian legislative regimes. It also asked whether franchise legislation was needed in Manitoba, and if so, what elements should be included in the legislation. Finally, it invited the public to comment on the matters discussed in the paper, with the hope of receiving the opinions and suggestions of all those with an interest in the matters discussed in the paper. Following the comment period, the Commission then submitted the report to the Minister of Justice and Attorney General for consideration.

2) Manitoba Law Reform Commission – Franchise Law Report 2008

Following the May 2007 Commission Consultation Paper, the Manitoba Law Reform Commission submitted its Report on Franchise Law¹⁵ dated December 4, 2008 to the Minister of Justice and Attorney General. In this report, the Commission recommended the enactment of legislation to regulate franchising in Manitoba and also recommended what elements should be specifically included in the legislation. The Commission acknowledged from the beginning that some of its recommendations would cause concern among those members of the franchise community who support franchise legislation harmonization across Canada.¹⁶

The Commission first provided recommendations that would enhance a franchisor’s disclosure obligations. These obligations included disclosure of territory boundaries and detailed disclosure of how the franchisee may face competition from other franchisees, licensees, affiliates and competitive brands. In addition, the Commission suggested that franchisors expressly disclose that a franchise agreement contains no rights or option to renew, if applicable.¹⁷ As the Commission recommended that the remedy of damages for misrepresentation include misrepresentations related to future projects and forecasts, it advised that disclosure documents identify factors that could cause materially different actual results and contain

¹⁴ *Ibid* at 1.

¹⁵ Manitoba Law Reform Commission “Report #116” (May 2008, released December 2008), online: <http://www.manitobalawreform.ca/pubs/pdf/116-full_report.pdf> [Report #116].

¹⁶ Report #116, *supra* note 15 at 45-46.

¹⁷ *Ibid* at 77.

reasonable cautionary language with respect to the representation and/or any reasonable basis for the future project or forecast.¹⁸

The Report set out many recommendations that were criticized during the consultation process due to the confidential nature of certain information. For example, it had recommended disclosure of franchisor-franchisee disputes utilizing mediation or arbitration that are normally confidential in nature and would not be disclosed unless the information is publicly available. This also applied to bankruptcy and insolvency proceedings. Similarly, another contentious item was the proposal of disclosure of confidentiality agreements with current and former franchisees executed for purposes of other than pre-sale disclosure.¹⁹

The Report supported the use of wrap-around disclosure documents, the electronic delivery of disclosure documents, and franchisor protection from liability for minor omissions or errors not affecting the substance of a disclosure document.²⁰ In addition, the Commission proposed that confidentiality agreements be exempt from triggering a disclosure requirement. Similarly, the Commission recommended that site selection agreements and fully refundable deposits also be exempt from the advance disclosure requirement.

With regards to the regulation of the franchise relationship, the Commission expressed “concern over the power imbalance between franchisors and franchisees” and recommended that Manitoba franchise legislation impose more control over the franchise relationship.²¹ It suggested that numerous provisions be included in the legislation in order to regulate the franchise relationship including, for example, prohibiting the franchisor from interfering with communications between prospective, current and past franchisees, prohibiting the franchisor from terminating or refusing to renew a franchise agreement without just cause, and allowing the franchisee to purchase goods or services from any sources unless the goods or services are central to the franchised business.

Following these recommendations, it was expected that many members of the franchise community would take issue with the suggestion of the Manitoba legislation deviating from the limited general relationship standards contained in Canadian franchise legislation and the Model Law. It

¹⁸ *Ibid* at 70-71.

¹⁹ *Ibid* at 83-84.

²⁰ *Ibid* at 88-92.

²¹ *Ibid* at 19.

was also noted that because the franchise relationship is a business to business relationship and not a business to consumer relationship, there is a strong argument to be made in favour of resisting over-regulation of the franchise relationship and supporting the current Canadian model whereby prospective franchisees have the opportunity to obtain independent advice, have the benefits of franchise disclosure, and are entitled to certain rights and remedies for improper or non-disclosure under the legislation.²²

3) Bill 15 – *Franchises Act* – April 6, 2010

On April 6, 2010 Bill 15, otherwise known as the *Franchises Act*,²³ was introduced by the Entrepreneurship, Training and Trade Minister in Manitoba. The Act's goal is "to ensure the relationship between the franchisor and the franchisee is fair and equitable and does not place the franchisee at a disadvantage."²⁴ The new legislation was a chance for Manitoba to catch up to Alberta, Ontario, New Brunswick and Prince Edward Island's already well-established franchise legislation. Having recognized the need for full knowledge and disclosure, the presence of the risks involved in buying a franchise, and the importance of the financial strength and history of a franchisor, the province identified the important role that Bill 15 would play in the franchising industry in Manitoba.

Among the legislation's most important protections, Bill 15 included the following: "giving franchisees a right of action to recover losses caused by misrepresentation; requiring franchisors to disclose certain information such as financial statements and all material facts about a franchise to a franchisee before the franchisee enters into a franchise agreement; giving franchisees a right to associate with other franchisees and a right of action to recover damages if a franchisor imposes any penalties for associating; and, requiring both franchisors and franchisees to deal fairly in performing and enforcing the franchise agreement, including a duty to act in good faith and in accordance with reasonable commercial standards."²⁵

Bill 15 passed third reading in the Manitoba Legislature on June 17, 2010 and was enacted as the *Franchises Act*.²⁶ It was modeled on the *Uniform*

²² *Ibid* at 140.

²³ *Franchises Act*, CCSM, c F156 [*Franchises Act*].

²⁴ Province of Manitoba, News Release, "Franchises Act Would Strengthen Protection for Local Business Operators" (6 April 2010), online: <<http://news.gov.mb.ca/news/print,index.html?item=8102>>.

²⁵ *Ibid*.

²⁶ *Guide*, *supra* note 8 at 2-144.55.

Franchises Act, much like the legislation in place in Alberta, Ontario, New Brunswick and Prince Edward Island.

4) Areas of Concern in Bill 15

Industry concerns regarding Bill 15 can best be tracked by reference to the comments submitted by the Canadian Franchise Association (CFA). In June 2010, the CFA submitted a letter²⁷ to the Government of Manitoba following the second reading of Bill 15. While the CFA supported Bill 15 in principle, approach, and substance, it did take issue with a few provisions of the Act.

The first concern brought forward by the CFA was related to section 2(2) of the Bill, which would have had Bill 15 applying to “franchise agreements entered into *before* this legislation comes into effect.”²⁸ The CFA feared that the retroactive application of elements of the Act would cause the possibility of franchisors being disentitled, and franchisees being prevented from “relying on provisions that were acceptable at the time the agreement was entered into.”²⁹

The CFA’s second concern pertained to section 5(2) regarding timing. The section dealt with the timing for the receipt of disclosure documents. The CFA took issue with the fact that the definition of what constitutes a payment was much narrower than that of the Model Act. The CFA suggested that Bill 15 adopt the wording from the Model Act to increase certainty for the benefit of both franchisors and prospective franchisees. That wording included deleting the words “on behalf of the prospective franchisee”³⁰ in the provision that states “the payment of any consideration by or *on behalf of the prospective franchisee* to the franchisor or the franchisor’s associate relating to the franchise”³¹ [emphasis added].

The third concern was that Bill 15 offered no requirement for documents to be delivered as one document at one time (in section 5(3)), which meant that “franchisors would be permitted to make piecemeal deliveries of disclosure to prospective franchisees.”³² None of the provisions

²⁷ Letter from Lorraine R McLachlan to Tony Romeo, (15 June 2010), online: <http://www.cfa.ca/files/PDF/Advocacy/LettertoManitobaGovernment_June152010.pdf>

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Franchises Act*, *supra* note 23.

³² McLachlan, *supra* note 27.

in the Model Act or any other provincial legislation permit this practice, nor do they provide an extension of the timing to fulfill this requirement. Bill 15 extended the 14-day waiting period until the date of the delivery of the last document, and the CFA suggested that this be changed in order to promote uniformity with other provincial legislation and to bring it in line with the Model Act.

The method of delivery of disclosure documents was a fourth concern brought forth by the CFA. Section 5(4) of Bill 15 dealing with the delivery of disclosure documents failed to include delivery methods such as electronic disclosure and commercial courier. The CFA recommended that these two delivery methods be permitted and included in the regulation. Similarly, a fifth concern was that section 6(3), dealing with the delivery of a notice of rescission, also lacked the inclusion of electronic delivery and commercial courier as delivery methods.

The CFA's sixth concern pertained to section 5(6) regarding disclosure for mediation and arbitration purposes. This section stated that if the franchise agreement provided for mediation or arbitration, certain details such as how the mediator or arbitrator is selected, the rules and procedures governing the mediation or arbitration, confidentiality obligations, and calculations of costs would have to be included. With more detail being required in this item than in the comparable legislation in Ontario, Alberta and Prince Edward Island, the CFA felt that this "may lead to inadvertent omissions or errors in a disclosure document prepared for national distribution which could, in turn, lead to the disclosure document being declared incomplete or deficient."³³ Furthermore, the CFA proposed that alternate dispute resolution not be made mandatory so as to ensure consistency with franchise legislation present in the other provinces.

The seventh and final concern of the CFA regarding Bill 15 was in reference to section 5(14) regarding fully refundable deposits. This section excepted from disclosure fully refundable deposits without any prescribed limit on those deposits. The effect would be, according to the CFA, to require franchisees to pay large fully refundable deposits before giving prospective franchisees a disclosure document or statement of material change. The CFA once again suggested that Bill 15 be made consistent with franchise legislation of other provinces. It recommended "that the amount of the fully refundable deposit be limited in amount to 20% of the initial franchisee

³³ *Ibid.*

fee, consistent with the applicable provision found in the Alberta Regulation.”³⁴

5) Final *Franchises Act* – June 17, 2010

Despite the CFA’s number of concerns pertaining to Bill 15, the only amendments made to the bill that appear in the final *Franchises Act*³⁵ following the public’s comments pertain to subsections 5(2)(b), 5(8)(b) and 5(14).

Subsection 5(2)(b) was revised by striking out “the prospective franchisee” and substituting “or on behalf of the prospective franchisee to the franchisor or franchisor’s associate,” per the CFA’s recommendations. This same clause was amended for section 5(8)(b).³⁶ Subsection 5(14) (which relates to the aforementioned subsections) now states that “the payment of any consideration relating to a franchise does not include the payment of a fully refundable deposit that (a) does not exceed the prescribed amount; (b) is refundable without any deductions; and (c) is given under an agreement that in no way binds the prospective franchisee to enter into any franchise agreement.” None of the other recommendations of the CFA were adopted in the amendments.

6) Consultation Paper on Draft Manitoba Franchise Regulation – November 2011

On November 3, 2011 the Manitoba government released the draft Manitoba Franchises Regulation (the Regulation) for public consultation.³⁷ The key features of the proposed Regulation involved the contents of disclosure document closely following that of Ontario, Prince Edward Island and New Brunswick’s legislation; a “wraparound provision” that allows the use of a disclosure document prepared for in another jurisdiction; the advising of risk warnings to franchisees; the requirement of financial statements to be consistent with the other provinces’ legislation; two forms of a Certificate of Franchisor; additional delivery methods for disclosure such as electronic and by way of courier; the delivery of disclosure documents in

³⁴ *Ibid.*

³⁵ *Franchises Act*, *supra* note 23.

³⁶ *Ibid.*

³⁷ Draft *Manitoba Franchises Regulation*, 2011, online:
<<http://www.gov.mb.ca/business/franchises/index.html>>.

parts; the restriction on refundable deposits; and a small investment exemption. With a December 15, 2011 deadline for feedback, the CFA wasted no time providing its comments. The input was provided to the Manitoba government by the CFA's Legal and Legislative Advisory Committee (LLAC).³⁸

7) Areas of Concern in Draft Regulation

While the CFA generally supported the approach taken by the Manitoba government in drafting the Regulation, it did take issue with several of the proposed aspects of the Regulation, particularly with the sections on dispute resolution, use of financial statements from a foreign based franchisor's jurisdiction, disclosure in parts and earnings projections.

With regard to section 24(1) of Schedule A to the proposed Regulation on dispute resolution, the CFA commented that Manitoba is the only province to require that if a franchise agreement provides that disputes may be referred to, or resolved by, mediation or arbitration, that the disclosure document must include information about mediation procedures and arbitration proceedings.³⁹

The CFA expressed concern over the interpretation of the subsection leading to franchisors being discouraged from including any form of mediation or arbitration provision in their franchise agreements. The CFA claimed that to the extent there is additional work involved to satisfy the unique Manitoba obligation, franchisors will not be motivated to include such a provision, thus leading to mediation/arbitration not being included in the agreement at all.⁴⁰

In order to counter this inadvertent consequence, the CFA suggested a revision of the subsection. The proposed addition to the subsection by the CFA was as follows:

If any of the information required by section 5(6) of the Act is not in the franchise agreement, a specific statement regarding which of the information required by section 5(6) of the Act is not in the franchise agreement.⁴¹

³⁸ Letter from Lorraine R McLachlan to Manitoba Entrepreneurship, Training and Trade (15 December 2011), *CFA Response to Draft Manitoba Franchises Act Regulations* [CFA Regulations].

³⁹ *CFA Regulations*, *supra* note 38 at 2.

⁴⁰ *Ibid* at 2.

⁴¹ *Ibid* at 2-3.

The CFA also took issue with sections 7(2)(b) and 7(5) of the Regulation that pertain to the use of financial statements from a foreign based franchisor's jurisdiction. The CFA expressed its concern that the requirements "create a new disclosure requirement which goes beyond the requirements under the Alberta, Ontario, Prince Edward Island and New Brunswick franchise legislation."⁴² The CFA believed that the "requirement goes further than needed to protect the interests of franchisees without discouraging franchisors from entering the Manitoba market."⁴³ As such, it suggested a revision of the subsections.

For section 4 of the Regulation regarding disclosure in parts, the CFA recognized that providing disclosure documents in parts "both facilitates the use of electronic means for the delivery of disclosure documents and may allow documentation to be provided earlier to the prospective franchisee."⁴⁴ While the CFA appreciated that the Manitoba government included electronic means as a manner of delivery of disclosure documents in the Regulation, it found that there may be a high level of confusion and misinterpretation due to section 4. The CFA suggested that the Regulation be amended so as to eliminate confusion regarding the underlying intention behind section 5(3) of the Act: "if it is intended that there can be only one 'last document,' it would be important for the Regulation to make that clear, so there is no doubt."⁴⁵

The final concern of the CFA with regard to the Regulation was section 11(1) of Schedule A pertaining to earnings projections. This subsection specifies that:

if actual results of existing franchises or of existing businesses of the franchisor or the franchisor's associate are the basis of the projection, the franchisor must provide the 'location, areas, territories or markets of such franchises and businesses.'⁴⁶

This language is not found in Ontario or Alberta franchise legislation, despite being found in the New Brunswick and Prince Edward Island statutes. The CFA expressed its concern that this section would be misinterpreted as requiring franchisors to disclose the specific location where

⁴² *Ibid* at 3.

⁴³ *Ibid*.

⁴⁴ *Ibid* at 4.

⁴⁵ *Ibid*.

⁴⁶ *Ibid*.

the projection information has come from, “therefore exposing individual franchisee's results and what would otherwise be private and confidential information that is the property of the franchisee (and not the franchisor).”⁴⁷ The CFA thus recommended that this section be clarified (perhaps by deleting the word “locations”) and that consistency be made with Ontario and Alberta.

8) Final *Franchises Act* Regulation

None of the changes suggested by the CFA were implemented in the final Manitoba Regulation⁴⁸ and thus remain potential areas of concern.

OVERVIEW OF THE *FRANCHISES ACT*

Manitoba's *Franchises Act* received Royal Assent in June 2010.⁴⁹ The Act is unique in that it does not require the disclosure document to be delivered as one document at one time. Instead, the Act permits a disclosure document to be delivered in parts, and the 14-day disclosure period begins to run after the franchisee receives the last part of the document. As in franchise legislation in New Brunswick and Prince Edward Island, the Act allows for delivery by facsimile, prepaid courier or electronic means, “provided that the prescribed method for delivery requirements are followed.”⁵⁰ The Act also contains the unique provision that “a substantially compliant disclosure document satisfies the requirement to deliver a disclosure document “even if the disclosure document contains a ‘technical irregularity or mistake not affecting the substance of the document.’”⁵¹ Additionally, under the Act, refundable deposits of up to 20% of the initial franchise fee can be accepted by franchisors, up to a maximum of \$100,000, without disclosure, and franchisors are able to enter into site selection and confidentiality agreements within the 14-day disclosure period.⁵² Similar to all other provinces except Ontario, Manitoba franchisors “can prepare a

⁴⁷ *Ibid.*

⁴⁸ Osler, Hoskin & Harcourt LLP, News Release, “Manitoba Publishes Proposed Franchise Regulation” (4 November 2011), online: <<http://www.osler.com/newsresources/details.aspx?id=3923&langtype=4105>>.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, referring to the Franchises Regulation, Man Reg 29/2012 at s 5(1) [*Franchises Regulation*].

⁵¹ *Ibid.*, referring to the *Franchises Act*, *supra* note 23 at s 5(10).

⁵² *Ibid.*, s 5(2).

wrap-around, standalone document, or incorporate Manitoba's requirements in their national disclosure documents,"⁵³ to be used in other jurisdictions.

OVERVIEW OF FRANCHISES REGULATION

The structure and substance of the Regulation are most similar to those of New Brunswick. Prior to the drafting of the Manitoba Regulation, it was recommended that the Regulation take the form based on the Uniform Law Conference of Canada *Franchises Act* and *Disclosure Document Regulation* (the ULCC Model Bill and the Model Regulation). Both the ULCC Model Bill and the Model Regulation have been adopted by Prince Edward Island and New Brunswick as models for franchise legislation. When the Manitoba legislature released its draft Regulation in April 2012, the most notable difference between the Regulation and the Model Regulation was the great number of prescribed items that the Commission recommended to be included in a franchisor's disclosure document.

Other prominent areas where the Commission stated that additional disclosure is appropriate are in the areas of business background, financial performance representation, exclusive territory, store openings, renewal provisions and dispute resolution.

With regard to business background, the Commission recommended that the business background of any individual who will have management responsibilities be disclosed, in addition to the same requirements as the Model Regulation's disclosure of business background of the franchisor and its directors, general partners and officers. Furthermore, the business background of any associate, affiliate, or related leasing company and the directors, general partners, and officers of each must be disclosed. Likewise, the Commission recommended the disclosure of the business background of a franchisor's predecessors and its directors, general partners, and officers.

More cautionary language was recommended by the Commission with regard to financial performance representation made as between a franchisor and a franchisee. In addition, the Commission advised that details regarding projections and material facts would need to be provided. In a situation where no financial representation is made, the franchisor would have to state that it does not authorize anyone to make

⁵³ *Franchises Regulation, Ibid.*, s 2(2).

projections of financial performance and that the results of the franchise will vary depending on numerous factors such as location.

Detailed disclosure was also recommended by the Commission with regard to exclusive territory, store openings and renewal provisions. For exclusive territory, it was suggested that disclosure regarding the franchisor's policies on the use of alternative channels of distribution (such as marketing techniques or the internet) be detailed. For store openings, an additional requirement to disclose the contact information of other operating franchisees was recommended. For renewal provisions, if the franchise agreement contains no right or option to renew, the disclosure document would have to include an express statement in this regard.

Finally, with regard to dispute resolution, the Commission deviated from what is found in the Model Regulation. While the latter requires disclosure of pending civil actions and disclosure of judicial determinations, the Commission proposed that disclosure be made of any adverse settlement entered into by the franchisor and any persons whose business background is required to be disclosed, of lawsuits initiated in the last 10 years, of franchisor-franchisee disputes that were resolved through mediation or arbitration, and of other mediation or arbitration pending franchise disputes.

Other noteworthy specifics of the "piece-meal" disclosure requirements in the Regulation include the process in delivering a disclosure document in parts. Risk warnings must be provided to the franchisee, certain types of information must be provided in groups, and the signed certificate of the franchisor has to be included with the last part of the disclosure. The 14-day cooling off period begins once the last document has been delivered to the franchisee. While franchisors may use disclosure documents that were prepared for use in other jurisdictions, these documents must be supplemented in order to bring them into accordance with the Manitoba Act and Regulation. This is the same case for financial statements prepared for other jurisdictions; however, a statement in the disclosure document regarding the preparation of the financial statements must be included.

HOW THE ACT AND THE REGULATION DIFFER FROM OTHER PROVINCES

There are some significant differences in the Manitoba legislation from its counterparts in Alberta, Ontario, Prince Edward Island and New Brunswick. The following is a list of the most prominent differences:

- for purposes of the duty of fair dealing, the performance and enforcement of a franchise agreement includes the exercise of a right under the agreement;
- the Act does not require disclosure to be delivered as one document, and provides that the time period for determining when delivery has been completed commences on the date of delivery of the last document;
- a disclosure document may be delivered personally, by registered mail, fax or any other prescribed method;
- if the franchise agreement provides that disputes may be referred to or resolved by mediation or arbitration, the disclosure document must include information about mediation and arbitration proceedings;
- substantial compliance with the disclosure document requirements is permitted. If the disclosure document substantially complies with the Act, and if the disclosure document contains a technical irregularity or mistake not affecting the substance of the document, the Act deems that the disclosure document requirements, if otherwise satisfied, will have been complied with;
- an agreement that only contains terms regarding confidentiality, or designation of a location, site or territory, is not considered to constitute an agreement for the purposes of disclosure (i.e., is exempt from disclosure);
- the Act binds the Crown, meaning that Crown franchises are subject to disclosure under the legislation (but are exempt from financial statement disclosure); and
- the public is required to be consulted regarding any proposed regulation or amendment to regulation under the Act except where matters of an urgent nature are concerned.

A number of interested parties have looked into the differences between the regulations found in Ontario's *Arthur Wishart Act* and those found in Manitoba's *Franchises Act*. The most significant differences that franchise lawyers should be aware of are the following:

- the form and wording of the certificate, risk warnings, and statement of material change differ, though they are essentially the same;

- the disclosure document may be delivered by electronic means;
- the exemption from providing financial statements is not as strict in the Manitoba Regulation; a franchisor who has operated 25 franchises or more in the last 5 years in a jurisdiction other than Canada may be eligible for the exemption, but a statement must be included in the disclosure document to this effect;
- disclosure regarding administrative orders and proceedings and civil proceedings against a franchisor is only required for the preceding 10 years;
- information about operations manuals and any guarantees or security interests must be included in the disclosure document;
- earnings projections disclosure requirements are more specific and onerous in the Manitoba Regulation in comparison to other provinces;
- franchisors' territory policy with regards to internet sales, telephone sales, catalogue sales or sales by other means must be disclosed;
- a warning must be provided to franchisees with respect to the possibility of having to obtain additional licenses in their jurisdiction; and
- if earnings statements, training, manuals, or exclusive territory are not provided to franchisees, the franchisor must include a statement indicating that it does not provide them.

It is also important to note that the franchisor's financial statements must be prepared in accordance with (a) Canadian GAAP as set out in the CICA Handbook; or (b) in accordance with GAAP of the jurisdiction in which the franchisor is based, if the statements are supplemented by information that sets out any changes necessary to make the presentation and content of such statements equivalent to Canadian GAAP as set out in the CICA Handbook.⁵⁴ This underlined portion is a disclosure requirement imposed by the Manitoba Regulation that is not currently imposed in Ontario, Alberta, New Brunswick or PEI. If financial statements are not prepared in accordance with Canadian GAAP, the franchisor must consult with its local accountants or auditors to determine whether any supplemental information must be disclosed to make the presentation and content of the financial statements equivalent to Canadian GAAP.

⁵⁴ Osler, Hoskin & Harcourt LLP, News Release, "Manitoba's The Franchises Act comes into Force on October 1, 2012" (May 2012), online: <<http://www.osler.com/NewsResources/Default.aspx?id=4427>>.

Other differences include:

- Person Authorized for Service - The person authorized for service must have his or her name and address disclosed;
- Manual - If no operating manuals are provided to the franchisee, a statement to that effect must be made in the disclosure document;
- Internet, Telephone and Catalogue Sales - A description of any reservation of rights by the franchisor for Internet sales, telephone sales, catalogue sales or sales by other means. This is similar to New Brunswick's distance sales disclosure requirement but the exact language used differs slightly;
- Licences, Permits, Registrations and Authorizations - A description of every licence, registration, authorization or other permission that the franchisee will be required to obtain under federal or Manitoba provincial laws to operate the franchise. This is also required in Ontario and New Brunswick;
- Arbitration and Mediation - If a franchise agreement provides that disputes may be referred to, or resolved by, mediation or arbitration, the disclosure document must include information about mediation procedures and arbitration proceedings including:
 - a) A description of any restrictions or requirements imposed by the franchise agreement with respect to arbitration, mediation or any other alternative dispute resolution process;
 - b) The criteria and methods for selecting a mediator or arbitrator;
 - c) The rules and procedures governing mediation and arbitration;
 - d) Any confidentiality obligations imposed on parties to the mediation or arbitration;
 - e) The costs of mediation or arbitration proceedings or the method of calculating those costs; and
 - f) Any other prescribed information and statements (currently none in the finalized Manitoba Regulation).
- List of Franchisees - The disclosure document must disclose the following:
 - a) List of Current Franchisees - A list of all franchisees of the franchisor or the franchisor's associates that currently operate franchises in Manitoba of the same type as the franchise being offered, including the name, business address and

telephone number of each franchisee. If there are fewer than 20 franchisees in Manitoba, the list must also include information on the franchisees that currently operate franchises of the same type in Saskatchewan or Alberta until information is provided on 20 or all the franchisees, whichever is the lesser number. If there are fewer than 20 franchisees in Manitoba, Saskatchewan and Alberta, the list must also include information on franchisees that operate franchises that are geographically closest to Manitoba, until information on 20 or all franchisees is provided.

- b) List of Former Franchisees - A list of all franchisees of the franchisor or the franchisor's associates that previously operated in Manitoba or in any other jurisdiction from which the franchisor draws the list of current franchisees required under section 25, a franchise of the same type as the franchise being offered that has been terminated, cancelled, reacquired or not renewed by the franchisor or has otherwise left the franchise system within the fiscal year immediately preceding the date of the disclosure document, including the name, last known address and telephone number of each franchisee.
- c) List of Current Businesses - A list of all businesses of the same type as the franchise being offered that the franchisor or the franchisor's associates currently operate in Manitoba, including the name and business address of each business.

FRANCHISE DISPUTES

As discussed above, although there are differences between Manitoba's *Franchises Act* and the franchise legislation in other provinces, for the most part Manitoba's legislation largely conforms, in both form and content, to what may be found in the franchise legislation of other provinces. Given these similarities, this section highlights case law from the other jurisdictions in order to provide Manitoba lawyers with some insight as to what they can expect in the future as Manitoba courts deal with some of the interpretive issues that other jurisdictions have already faced.

PURPOSE OF THE LEGISLATION

Franchise legislation is remedial in nature. Provincial franchise legislation recognizes that the franchisor-franchisee relationship suffers from “an inherent inequality of bargaining power.”⁵⁵ This power imbalance exists and subsists for several reasons, most notably due to differences in relative commercial experience, disposable resources and—perhaps most importantly—readily available information about the franchise.

These disadvantages are amplified by the nature of a franchise agreement. Franchise agreements are contracts of adhesion, where the “main provisions are presented on a ‘take it or leave it basis.’”⁵⁶

Recognizing these inherent disadvantages, judges have made it clear that the purpose of franchise legislation is to assist in correcting the imbalance. Provincial franchise legislation is meant to protect franchisees and ensure that franchisor-franchisee relationships are conducted fairly. The Ontario Superior Court summarized the purpose of Ontario’s *Arthur Wishart Act* in this way:

The [Arthur Wishart Act] is remedial legislation that was designed to address the inequality in bargaining power between franchisees, who were frequently small business people, often lacking in commercial experience, and franchisors, who were typically more sophisticated and substantial corporate organizations. It was a legislative response to the commercial disasters that had befallen some franchisees, who found that the reality of franchise life was far from the rosy picture painted by the franchisor’s marketing force.⁵⁷

...
the [Arthur Wishart Act] is remedial legislation that was designed to level the playing field occupied by franchisors and franchisees. One of the purposes of the statute in general, and of s. 5 in particular, is to adjust the informational imbalance between the parties and to ensure that franchisees are able to make informed decisions about their investments. Sections 6 and 7 give teeth to the franchisee’s rights and impose dramatic financial consequences on franchisors, and their associates, who fail to

⁵⁵ *Shelanu Inc v Print Three Franchising Corp*, [2003] 64 OR (3d) 533 (CA), 226 DLR (4th) 577 at para 58 [Shelanu].

⁵⁶ *Ibid.*

⁵⁷ *779975 Ontario Ltd v Mmmuffins Canada Corp*, [2009] 62 BLR (4th) 137 (available on WL Can) at para 10.

comply with their statutory duties of disclosure. These sanctions are a strong incentive to franchisors to ensure that they comply with the letter, as well as the spirit of the law.⁵⁸

The consequences of such a view are readily apparent. To ensure that the *Arthur Wishart Act* lives up to its remedial purpose, courts routinely remind themselves that it must be given a broad interpretation.⁵⁹ A court's interpretation must conform and align with this recognition that the Act is intended to protect franchisees.⁶⁰ The expressed purpose of franchise legislation has influenced and shaped the judiciary's response to many interpretive questions, and judges often resolve such questions in the franchisee's favour.

A recent and succinct expression of this view may be found in *Spina v Shoppers Drug Mart Inc*:

The *Arthur Wishart Act* is remedial legislation, designed to address the power imbalance between franchisor and franchisee, and it is entitled to a generous interpretation to give effect to its purpose.⁶¹

WHAT IS A FRANCHISE/FRANCHISEE?

Some of the earliest questions facing Ontario courts concerned the most important definitions in the *Arthur Wishart Act*. Courts have generally considered two definitional questions. First, when does a potential franchisee become a full franchisee? That is, at what point during the transaction does the full application of the *Arthur Wishart Act* come into effect? In other words, who is a franchisee? Second, courts have considered what is a franchise agreement? Which necessitates asking: what is a franchise?

WHEN THE ACT APPLIES

When the *Arthur Wishart Act* first came into force, a common franchisor strategy to avoid its application was to insist that, at any time

⁵⁸ *Ibid* at para 30.

⁵⁹ See e.g. *MDG Kingston Inc v MDG Computers Canada Inc*, [2007] OJ No 5561 (available on WL Can), rev'g on other grounds, 2008 ONCA 656, 299 DLR (4th) 497 at para 8: "the [*Arthur Wishart Act*] must be given a broad and purposeful reading, as it is a form of consumer protection legislation."

⁶⁰ See e.g. *6862829 Canada Ltd v Dollar It Ltd*, [2008] OJ No 4687 (available on WL Can), rev'g on other grounds, 2010 ONCA 34 (available on WL Can) at para 26 [*Dollar It*].

⁶¹ 2012 ONSC 5563, Perell J (available on WL Can) at para 145 [*Spina*].

before the transaction closed, the ‘franchisee’ was only a ‘prospective’ franchisee and therefore not entitled to the Act’s full protection. Thankfully for franchisees, courts were quick to dismiss this line of reasoning. In doing so, courts relied on the overarching legislative purpose of the *Arthur Wishart Act*, as discussed above.

A good example of such an analysis is found in *Bekah v Three for One Pizza*,⁶² where under the understanding that a fully executed agreement was forthcoming and despite having exchanged funds, the franchisor still argued that the prospective franchisee was not in fact deserving of the *Arthur Wishart Act*’s protection. The court responded in kind:

The fact that a franchisee means a person to whom a franchise is granted does not require the closing of the transaction. To insist that a franchisee must have concluded the franchise transaction is not required by the language and would illogically leave a gap in the protection of the statute. In this case there was a binding agreement for the purchase and sale of a franchise business. Monies were paid under the agreement. Under the agreement, the purchasers were obligated to enter into a full franchise relationship. They were parties, as franchisees, to a franchise agreement as defined under the Act. They are therefore entitled to the full protection of a franchisee under the Act. To hold that they are not franchisees because the transaction had not fully closed would run counter to the scheme of the Act, the definitions of franchise agreement and prospective franchisee and would deprive the plaintiff of a remedy for the breach of a franchisor’s obligation to give full disclosure.⁶³

It is noteworthy that Ontario’s franchise legislation does distinguish between potential franchisees and ‘true’ franchisees. However, the courts have dismissed that this distinction influences when and to whom the *Arthur Wishart Act* applies.⁶⁴

WHAT IS A FRANCHISE AGREEMENT?

Both the Manitoba and Ontario legislation define “franchise agreement” broadly: the Acts state that a franchise agreement may be any

⁶² (2003) [2004] 67 OR (3d) 305 (SC) (available on WL Can) [*Bekah*].

⁶³ *Ibid* at 309.

⁶⁴ See generally, *ibid*.

agreement that relates to a franchise so long as it is between a franchisor (or a franchisor's associate) and a franchisee.⁶⁵ Unfortunately, this broad definition has recently generated a bizarre result.

In *1159607 Ontario Inc v Country Style Food Services Inc*,⁶⁶ the franchisor and franchisee were parties to an agreement that had expired. Despite its expiry, the parties continued to act according to the agreement's terms. The franchisor sent a letter outlining terms and conditions of a new sublease agreement which the franchisee accepted. The court held that this accepted letter constituted a franchise renewal and was a "franchise agreement" under the *Arthur Wishart Act* as it was an agreement relating to the franchise. This finding triggered the franchisor's disclosure requirements, which were not satisfied, and permitted the franchisee to rescind its agreement. The court came to this conclusion on its own; neither party advanced the argument.

This decision seems to suggest that the parties' intentions are not relevant to the question of whether a franchise agreement has been renewed. This conclusion runs counter to basic principles of contract law, but according to the court in that case it is in line with the purpose and intent of Ontario's franchise legislation.

In deciding whether a commercial relationship is a franchise relationship, courts will look to the substance of the transaction rather than rely on nomenclature or technicalities. In *1706228 Ontario Ltd v Grill It Up Holdings Inc*,⁶⁷ the franchisor argued that the *Arthur Wishart Act* did not apply to its transaction because the franchisee refused to sign the franchise agreement and signed an asset purchase agreement instead.

The court rejected this argument, holding that the transaction was in essence a franchise transaction. The court found that the parties entered into a franchise relationship: the transaction was structured like a typical franchise in that the franchisor entered into the head lease and subleased the premises to the franchisee; the license agreement required the franchisee to pay a royalty; the franchisor provided trade-marked ingredients and menus for the franchisee's restaurant; and the franchisor offered "significant assistance" regarding store design, equipment, location, training and branding.

⁶⁵ *Arthur Wishart Act*, *supra* note 2 at s 1(1) "franchise agreement"; *Franchises Act*, *supra* note 23 at s 1(1) "franchise agreement."

⁶⁶ *1159607 Ontario Inc v Country Style Food Services Inc*, 2012 ONSC 881, 2 BLR (5th) 315 [*Country Style*].

⁶⁷ 2011 ONSC 2735, 88 BLR (4th) 191.

Ontario courts continue to struggle with whether certain business arrangements are franchises or not. In most cases, small business owners attempt to convince the court that they are franchisees in order to claim rights arising under their provincial franchise legislation.⁶⁸ There is no one uniform checklist to determine whether a relationship is or is not a franchise; the courts will look to the entirety of the circumstances to make that decision.

DUTY OF GOOD FAITH AND FAIR DEALING

1) The View of the Courts

The duty of good faith and fair dealing is one of two major cornerstones⁶⁹ found in provincial franchise legislation.

In the first year of Ontario's franchise legislation, the statutory duty of good faith and fair dealing was recognized as being no more than a mere codification of identical common law principles. The Ontario Court of Appeal first recognized a common law duty of good faith when it compared the franchisor-franchisee relationship to an employment contract. In coming to this conclusion, the court relied on the Supreme Court's analysis in *Wallace v United Grain Growers*:⁷⁰

The relative position of the parties as outlined in *Wallace* also exists in the typical franchisor-franchisee relationship. First, it is unusual for a franchisee to be in the position of being equal in bargaining power to the franchisor ... The second characteristic, inability to negotiate more favourable terms, is met by the fact that a franchise agreement is a contract of adhesion. As I have indicated, a contract of adhesion is a contract in which the essential clauses were not freely negotiated but were drawn up by one of the parties on its behalf and imposed on the other. Further, insofar as access to information is concerned, the franchisee is dependent on the franchisor for information about the franchise, its location and projected cash flow, and is typically

⁶⁸ See eg *Butera v Mitsubishi Motors Corp*, 2012 ONSC 4980 (available on WL Can) where Hamblly J said in brief *obiter* discussion that a car dealership would not attract franchise status, but see also, *Trillium Motor World Ltd v General Motors of Canada Ltd*, 2011 ONSC 1300 (available on WL Can) [Trillium SC] aff'g 2012 ONSC 463 (Div Ct) (available on WL Can), where Strathy J accepted, for the purposes of class certification, that General Motors of Canada Limited (GMCL) may owe its dealers a statutory duty of good faith and fair dealing.

⁶⁹ The other cornerstone of provincial franchise legislation are the disclosure requirements which will be discussed later in this paper.

⁷⁰ [1997] 3 SCR 701, 152 DLR (4th) 1.

required to take a training program devised by the franchisor. The third characteristic, namely that the relationship continues to be affected by the power imbalance, is also met by the fact the franchisee is required to submit to inspections of its premises and audits of its books on demand, to comply with operation bulletins, and, often is dependent on, or required to buy, equipment or product from the franchisor. It is hardly surprising, therefore, that a number of courts, including the Manitoba Court of Appeal in *Imasco Retail Inc. (c.o.b. Shoppers Drug Mart) v. Blanu*, [1995] 9 W.W.R. 44, 104 Man. R. (2d) 286 (Q.B.), *affd* (1996), [1997] 2 W.W.R. 295, 113 Man. R. (2d) 269 (C.A.) have recognized that a duty of good faith exists at common law in the context of a franchisor-franchisee relationship.⁷¹

Courts continue to affirm this view today.⁷² In conjunction with this consistent reaffirmation, courts have also offered insight into the duty's scope and content.

2) Scope of the Duty

The duty of good faith and fair dealing is not akin to a contractual duty. A party might not necessarily breach its duty of good faith by breaching its contract. Similarly, a party does not necessarily satisfy its duty of good faith merely by acting in accordance with the contract.⁷³

Nor is the duty of good faith and fair dealing equal to a fiduciary duty. Under a duty of good faith, one party need not put the other party's interests above its own (as it would otherwise be required to do pursuant to a fiduciary duty). Instead, it must only give consideration to the second party's interests before acting.⁷⁴

The duty of good faith is "a minimal standard, in the sense that the duty to act in good faith is only breached when a party acts in bad faith."⁷⁵ Bad faith is an action or treatment that is "contrary to community standards of honesty, reasonableness or fairness."⁷⁶

⁷¹ *Shelanu*, *supra* note 55 at para 66.

⁷² One recent example may be seen in *Spina*, *supra* note 61 at para 146: "A duty of good faith exists at common law in the context of a franchisor-franchisee relationship [citing *Shelanu*]."

⁷³ *Shelanu*, *supra* note 55 at para 71.

⁷⁴ *Ibid* at para 69.

⁷⁵ 1117304 *Ontario Inc c/o Harvey's Restaurant v Cara Operations Limited*, [2008] 54 BLR (4th) 244 (ON SC) (available on WL Can) at para 68 [*Harvey's*].

⁷⁶ *Ibid*.

The duty is imposed as soon as the franchisor-franchisee relationship comes into existence.⁷⁷ It then applies to the performance and enforcement of existing agreements. However, it does “not compel one party to renew an expiring relationship when it considers it to be commercially unreasonable.”⁷⁸

Importantly, the duty of fair dealing has been recognized as a “two-way street. Whether a party under a duty of good faith has breached that duty will depend, in part, on whether the other party conducted itself fairly.”⁷⁹ It is imposed on franchisor and franchisee alike.

3) Content of the Duty

Although “the determination of whether a party has breached the duty of good faith will require an examination of all the circumstances of the case,”⁸⁰ past cases serve to provide examples of what, specifically, may or may not satisfy the duty. Examples include:

- The duty contains a time component. Both parties must respond promptly to requests from the other and make decisions within a reasonable time frame.⁸¹
- Unilateral and fundamental changes to the franchise system may breach a franchisor’s statutory duty of good faith.⁸²
- Where the franchisor is given discretion under the franchise agreement, that discretion must be exercised reasonably and with proper motive. Not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.⁸³
- Franchisors will be penalized for deliberately withholding material facts from a franchisee.⁸⁴

⁷⁷ In one case, the duty was imposed as early as the signing of a letter of intent. See *Burnett v Cuts*, 2012 ONSC 3358, 4 BLR (5th) 234 [*Burnett*].

⁷⁸ *530888 Ontario Ltd v Sobys Inc*, [2001] 12 BLR (3d) 267 (ON SC) (available on WL Can) at para 22.

⁷⁹ *Harvey’s*, *supra* note 75 at para 68.

⁸⁰ *Spina*, *supra* note 61 at para 147.

⁸¹ *Shelanu*, *supra* note 55 at para 78.

⁸² *Landsbridge Auto Corp v Midas Canada Inc* (2009), 73 CPC (6th) 10 (ON SC) (available on WL Can) [*Landsbridge*].

⁸³ *Spina*, *supra* note 61 at para 149.

⁸⁴ *Country Style*, *supra* note 66 at para 123.

4) Damages for Breach of the Duty

Damages for a breach of the duty of fair dealing may be awarded in addition to compensatory damages. As the Ontario Court of Appeal made clear, “an interpretation of the statute which restricts damages to compensatory damages related solely to proven pecuniary losses would fly in the face of this policy initiative.”⁸⁵ Although this policy is clear, courts were, however, slow at first to award separate damages for the breach of the duty of fair dealing.

Recently, however, it has become increasingly common for courts to award damages for a breach of the duty of fair dealing over and above rescission or compensatory damages. There are now exactly four examples of such awards in Ontario.⁸⁶

In two of those cases, *Country Style* and *Burnett*, the courts awarded these damages because the conduct of franchisors warranted punishment. In those cases, the franchisor deliberately withheld material facts relating to the franchise that resulted in a loss to the franchisee. The plaintiff franchisees were able to recover both the money they had put into their businesses (i.e., compensatory damages) as well as an additional award of \$25,000 for the franchisor's breach of the duty of fair dealing.

For an unusual case on the issue of damages for breach of the duty of fair dealing, consider *Salah v Timothy's Coffees of the World Inc.*,⁸⁷ where the court awarded damages for mental distress. This award shows an expansive application of the *Arthur Wishart Act*, as damages for mental distress are typically not awarded in the contractual context.⁸⁸ Although the court in *Salah SC* awarded damages for mental distress having also found a breach of the duty of fair dealing, the court was clear that it would have awarded contractual mental distress damages regardless of whether there had been an independent actionable wrong.⁸⁹

⁸⁵ *Salah v Timothy's Coffees of the World Inc.*, 2010 ONCA 673, 74 BLR (4th) 161 at para 26 [Salah CA].

⁸⁶ *Burnett*, *supra* note 77; *Salah CA*, *Ibid*; *Country Style*, *supra* note 66; *Healy v Canadian Tire Corp.*, 2012 ONSC 77 (available on WL Can).

⁸⁷ *Salah CA*, *ibid*.

⁸⁸ *Salah v Timothy's Coffees of the World Inc.*, [2009] 65 BLR (4th) 235 (ON SC) (available on WL Can) at para 154 [Salah SC].

⁸⁹ *Ibid*.

REQUIREMENT FOR—AND SUFFICIENCY OF— DISCLOSURE/RESCISSION RIGHTS

As mentioned earlier, the franchisor's requirement to disclose is the second cornerstone of every province's franchise legislation. A disclosure document is meant to remedy the imbalance of information between franchisee and franchisor, ensuring that a franchisee may make a fully informed decision about whether or not to enter into the proposed franchise agreement.

1) Method and Timing of Delivery

A disclosure document must be delivered at least 14 days before the franchisee signs the franchise agreement or pays any money in relation to the franchise. Importantly, a new disclosure document must be provided before signing any franchise agreement, unless it falls under one of the statutory exceptions (discussed below).

Unlike in Ontario, a franchisor in Manitoba may deliver disclosure documents electronically.⁹⁰ They may also deliver disclosure documents in pieces; however, the 14-day period will not begin to run until the document is complete. Note, also, that a franchisor in Manitoba may accept a deposit of up to 20% of the initial franchise fee to a maximum of \$100,000 during the 14-day period.

2) Contents of a Disclosure Document

A disclosure document must include all of the prescribed information and material facts relating to the franchise. The particulars of its required contents are set out by the relevant provincial legislation.

The main question with regards to the contents of a disclosure document is what, when missing, is sufficiently material to the document such that its absence equates to the franchisor never having provided the document in the first place. Such a finding is significant because it will give rise to the two-year rescission period for no disclosure rather than the 60-day period available for deficient disclosure. In Ontario, courts have found, with

⁹⁰ See *Vijh v Mediterranean Franchise Inc*, 2012 ONSC 3845 (available on WL Can) [Vijh], where the Ontario Superior Court of Justice found that electronic delivery of a disclosure document was a technical, though not a material, breach of the *Arthur Wishart Act's* disclosure requirements. Further discussion of this point may be found below.

increasing frequency, that certain deficiencies will amount to the franchisor having provided no disclosure at all.

In *Dollar It*,⁹¹ the Ontario Court of Appeal summarized the rationale this way:

A document does not become a disclosure document for the purposes of the Act just because it is called a disclosure document. Put another way, calling something a disclosure document doesn't make it one.⁹²

The court held that the two year rescission period must be available to a franchisee faced with a severely deficient disclosure. The legislature could not have intended to restrict a franchisee to the 60-day rescission period no matter how deficient the disclosure was.⁹³

Many cases have considered what deficiencies are or are not "sufficiently material" to amount to no disclosure at all. In *Sovereignty Investment Holdings v 9127-6907 Quebec Inc et al*,⁹⁴ the court listed four deficiencies that would, each on its own, be tantamount to the franchisor having provided no disclosure at all:

- failing to include financial statements of the franchisor;
- failing to include a statement specifying the basis for earnings projections;
- failing to deliver documentation in a single document at one time;⁹⁵ and
- failing to include the signed certificate of the franchisor.⁹⁶

However, the court also held that "a number of minor deficiencies cannot, on a cumulative basis, disqualify documentation as a 'disclosure document.'" ⁹⁷

In *Invescor*, the Ontario Court of Appeal picked up where the lower court left off and helped delineate the boundary between material and non-

⁹¹ 6792341 *Canada Inc v Dollar It Limited*, 2009 ONCA 385, 95 OR (3d) 291.

⁹² *Ibid* at para 74.

⁹³ *Ibid* at para 75.

⁹⁴ [2008] 303 DLR (4th) 515, 54 BLR (4th) 277 [*Sovereignty Investment Holdings*].

⁹⁵ Note that this will not be applicable in Manitoba, given s 5(3) of the *Franchises Act*.

⁹⁶ *Sovereignty Investment Holdings*, *supra* note 94 at paras 16-19.

⁹⁷ *Ibid* at para 21.

material deficiencies.⁹⁸ The Court of Appeal held that the two-year rescission period is reserved for “material” deficiencies. It concluded that the argument that the two-year rescission period was available for any breach of the *Arthur Wishart Act*’s disclosure requirements would make the 60-day rescission period redundant, which was clearly not the legislature’s intention. On the facts of that case, the court ruled that breaches of the *Arthur Wishart Act*’s timing requirements gave rise to the 60-day rescission period only.

Although Manitoba’s *Franchises Act* expressly provides for electronic delivery of a disclosure document, in Ontario the Superior Court of Justice recently held that electronic delivery of a disclosure document, though a technical breach of Ontario’s *Arthur Wishart Act*, was not significant enough to trigger the two-year rescission period.⁹⁹ In coming to this conclusion, the court relied on the Court of Appeal’s decision in *Imvescor*:

The Court of Appeal concluded in *Imvescor* that the two-year right of rescission is only available where there is “a complete failure to provide a disclosure document” or where the disclosure document provided was “materially deficient” but not where it was “merely late.”¹⁰⁰

...
the two-year right of rescission is not available where a complete disclosure document was provided, as here, but it was provided by email rather than registered mail. If a breach of the timing or content requirements under ss. 5(1) and 5(4) allows only a 60-day right of rescission under s. 6(1), then a breach of the method of delivery requirement under s. 5(2), which by any measure is much less significant, cannot sensibly justify a two-year right of rescission under s. 6(2). The franchisee is therefore limited to the damages remedy in s. 7(1).¹⁰¹

It is safe to conclude that any non-substantive breach of the disclosure requirements will restrict the franchisee to a 60-day rescission period, whereas a material deficiency will lead a court to conclude that effectively no disclosure was provided, thereby triggering the two-year period. Note that despite the central importance afforded to disclosure obligations, and the potent remedies that arise upon breach of those

⁹⁸ 4287975 *Canada Inc v Imvescor Restaurants Inc*, 2009 ONCA 308, 56 BLR (4th) 161 [*Imvescor*].

⁹⁹ *Vijh*, *supra* note 90.

¹⁰⁰ *Ibid* at para 7.

¹⁰¹ *Ibid* at paras 8-9.

obligations, no one may compel a franchisor to deliver a disclosure document.¹⁰² Where no disclosure document is provided, a franchisee's only remedies are for rescission or damages; specific performance is not available in this context.

3) Rescission Damages

Where a franchisee successfully and properly delivers its Notice of Rescission under the legislation, courts will apply the very severe remedy of rescission. The intent of the rescission remedy is to "put the franchisee in the position that it was in prior to entering into the franchise agreement."¹⁰³

There are four heads of recovery under which a franchisee may claim rescission or compensatory damages. The Manitoba *Franchises Act* mirrors the *Arthur Wishart Act* on this issue.

This first judgment to articulate detailed reasoning with regard to each head of recovery was handed down in *2189205 Ontario Inc v The Springdale Pizza Depot Ltd.*¹⁰⁴ The master awarded damages under every head of recovery except for the last, which obligates the franchisor to indemnify the franchisee for any loss incurred while operating the franchise. In this case, the franchisee recovered the funds it had initially paid to set up the franchise, including the franchise fee as well as inventory bought and maintained throughout its operation. The franchisee also recovered its investment in the equipment it purchased. Notably, the master denied the franchisor's request to inspect the equipment prior to paying for it. He held that there was no requirement in the Act that the franchisee make any representations concerning the quality of the equipment.

The master denied compensation under the last head of recovery. This head requires the franchisor to "compensate the franchisee for any losses that the franchisee incurred in acquiring, setting up and operating the franchise,"¹⁰⁵ less amounts paid under the other heads of damages. The master denied the franchisee's claim under this head because the franchisee had made a profit while operating the business.

¹⁰² *Pointts Advisory Ltd v 754974 Ontario Inc*, [2006] OJ No 3504 (SC) (available on WL Can) at para 59.

¹⁰³ *Payne Environmental Inc v Lord and Partners Ltd*, [2006] 14 BLR (4th) 117 (SC) (available on WL Can) at para 13.

¹⁰⁴ 2012 ONSC 3344 (available on WL Can) [*Springdale Damages Assessment*].

¹⁰⁵ *Franchises Act*, *supra* note 23 at s 6(5)(d); *Arthur Wishart Act*, *supra* note 2 at s 6(6)(d).

This decision stands in stark contrast to the recent decision of *Country Style*,¹⁰⁶ where the judge permitted an award of damages under this last head despite the franchisee's profit. This is an odd result given that the section is meant to compensate franchisees for any "losses" in operating the business. It is not clear how a franchisee can have profited from a business but simultaneously be found to have suffered a "loss," as required by the Act.

EXEMPTIONS FROM DISCLOSURE

Both the Manitoba and Ontario Acts set out various exemptions from disclosure. These exemptions relate to certain specific situations including the resale of a franchise from one franchisee to another; the renewal of an existing franchise agreement; the grant of a franchise to a person who already has intimate knowledge of the business; and the grant of a franchise if the franchisee's investment is low enough to pose little risk or high enough such that a franchisee will ensure its own due diligence.

Courts have had the opportunity to consider some of the statutory exceptions to a franchisor's disclosure obligations. While we have not seen pronouncements on many of the statutory exceptions, there are certain decisions that have been made regarding the following specific exemptions:

1) Resale of the Franchise from Franchisee to another Franchisee

The four criteria that must be met before the franchisor is relieved of its disclosure obligations are set out in the provincial Acts. They are:

- The franchisee must not be the franchisor or the franchisor's associate, or a director, officer or employee of either of them;
- The transfer of the franchise must be for the franchisee's own account;
- If the transfer involved a master franchise, then the entire franchise must be transferred; and,
- The transfer must not be effected by or through the franchisor.

The fourth criterion is the one that has attracted the most judicial consideration. In *2189205 Ontario Inc v Springdale Pizza Depot*

¹⁰⁶ *Country Style*, *supra* note 66.

Ltd.,¹⁰⁷ the Court of Appeal canvassed the law and concluded that in order for a franchisor to satisfy the fourth criterion, the franchisor must limit its involvement in the resale. It stated that a franchisor will only be able to rely on this exemption if it does no more than consent to the transfer.

In *Springdale*, the franchisor was found to have participated in the resale directly and was prevented from relying on the exception. The franchisor directed the prospective vendor to this particular business. The franchisor had detailed financial information about all franchises and the right of first refusal. Further, the franchisor had some involvement in the negotiations for the agreement of purchase and sale of the assets of the business. As noted above, all of the parties of this action negotiated together to bring about the sale of the vendor's business to the respondents and for the respondents to become a franchisee of *Springdale* as a result. Furthermore, the agreement of purchase and sale required the respondents to obtain the consent of the franchisor, and thus deal directly with the franchisor. The franchisor was not merely a passive participant in this resale.¹⁰⁸

The Court held that “[i]t may be that any of these individual circumstances would not have been enough”¹⁰⁹ to support the Court’s conclusion that the grant was effected through the franchisor. However, as one or more of these facts will be present in the majority of franchise transfers, this decision takes a very narrow view of the resale exemption. Franchisors must very carefully consider whether to take the risk of not providing a disclosure document.

2) Franchise Agreement is for Less than a Year and No Fee is Paid

Provincial franchise legislation allows for an exception to the disclosure requirements where the agreement is for no more than one year and where it does not require the payment of a franchise fee.¹¹⁰ This exemption is available because it is believed that the franchisee’s risk in these circumstances is low.

¹⁰⁷ 2011 ONCA 467, aff’g 2010 ONSC 3695, 88 BLR (4th) 177 [*Springdale*].

¹⁰⁸ *Ibid* at para 42.

¹⁰⁹ *Ibid* at para 47.

¹¹⁰ In Ontario, the exception exists where there is no required payment of a “franchise fee”; however, in Manitoba, the language stipulates that the exemption is available only where no “fee” is required. This difference is discussed in greater detail below.

In *Country Style*,¹¹¹ the relevant franchise agreement came to an end but the parties continued to treat each other as franchisor and franchisee. The court found that this was effectively a renewal of the franchise agreement on a month-to-month basis. It held that for the period during which the agreement was month-to-month, the franchisor was not under any obligation to provide further disclosure pursuant to the one-year exemption. The court went on to hold that the franchisor breached its disclosure obligations when it renewed the franchise agreement on a term for five years.¹¹²

In *TA&K Enterprises Inc v Suncor Energy Products Inc*,¹¹³ the franchisee signed an agreement that terminated one year from the date on which it was signed. Under the agreement, the franchisee was required to pay royalty and marketing fees but it did not have to pay an initial franchise fee. The court held that, under the *Arthur Wishart Act*, “franchise fee” did not encompass royalties or marketing fees. The court reasoned that if “franchise fee” did include royalties or marketing fees, there would be virtually no circumstances in which the exemption could operate. It concluded that a “franchise fee” is “essentially a fee paid for the right to be a member of the franchise chain.”¹¹⁴

While this holding has been accepted in Ontario, the language of Manitoba’s *Franchises Act* will likely ensure a different analysis. Under the Manitoba legislation, in order to meet the equivalent exemption, a franchisor must ensure that the agreement expires within a year of its signing and must not collect any non-refundable “fees.” The word “franchise” does not appear in the wording of the section. It therefore seems much more likely that royalty and marketing fees would be considered “fees” within the meaning of Manitoba’s equivalent exemption.

VENUE, JURISDICTION AND APPLICATION

All provinces indirectly require the application of their respective provincial laws, jurisdiction or venue to disputes. This creates complications

¹¹¹ *Country Style*, *supra* note 66.

¹¹² This ‘renewal’ took place in circumstances where neither party was aware that the agreement had been renewed. The court held that a letter, drafted by the franchisor, setting out terms of a lease constituted a new franchise agreement. The letter informed the franchisee of a change in the terms of the lease that the court found to be materially different and therefore a bar to franchisor’s reliance on the exemption for renewals with no material change.

¹¹³ 2011 ONCA 613, 89 BLR (4th) 68, *aff’d* 2010 ONSC 7022, 78 BLR (4th) 70.

¹¹⁴ *Ibid* at para 61.

where franchisors intend to operate franchises outside of the province in which the franchise agreement was drafted. Several cases have considered this issue, though no clear consensus as to when province-specific franchise legislation will or will not apply is yet available.

1) Exclusive Jurisdiction Clauses

In *Bad Ass Coffee Co of Hawaii Inc v Bad Ass Enterprises Inc*,¹¹⁵ the Alberta Court of Queen's Bench considered whether a Canadian court should refuse to register a foreign judgment obtained by a US franchisor against a Canadian franchisee if the franchise agreement does not comply with Canadian franchise disclosure legislation. This case clarified the application of the governing law, jurisdiction and venue sections of Canadian franchise legislation. These sections declare provisions in franchise agreements that restrict the application of provincial law, venue or jurisdiction in respect of claims "otherwise enforceable" under the legislation to be void. Since contractual claims about franchise agreement disputes alone are not claims enforceable under franchise legislation, they can be governed by foreign law and/or heard in a foreign court. A foreign judgment will likely be enforceable in a Canadian court unless precluded by public policy.¹¹⁶ However, many franchise disputes also involve claims of unfair dealing. If a case is governed by foreign law and heard by a foreign court, a claim for breach of the statutory duty of fair dealing may be excluded, in which case the matter may not be heard by a local court.

Implicitly, the court also indicated that no matter what a franchise agreement provides concerning the governing law or the forum in which disputes will be litigated, a right and claim arising out of a province's franchise legislation will always be capable of being litigated in that province.

2) Governing Law Clauses

In *405341 Ontario Ltd v Midas Canada Inc*,¹¹⁷ the court held that the parties' intentions are paramount. When a contract purports to select its governing law, that law will ordinarily govern the contract as long as the choice was "bona fide and legal." In *Midas*, the court came to this conclusion despite recognizing that many of the franchisee class members operated their

¹¹⁵ 2007 ABQB 581 (Master), [2008] 1 WWR 738, aff'd 2008 ABQB 404, [2009] 1 WWR 289.

¹¹⁶ *Beals v Saldanha*, [2003] 3 SCR 416, 39 BLR (3d) 1.

¹¹⁷ [2009] 64 BLR (4th) 251 (available on WL Can), aff'd 2010 ONCA 478, 322 DLR (4th) 177 [*Midas*].

franchises in other provinces with different applicable franchise legislation. It appears, then, that governing law clauses may not offend the exclusive jurisdiction provisions contained in provincial franchise legislation.

3) Application of Franchise Legislation in other Jurisdictions

In *Lansbridge*,¹¹⁸ the court found that the statutory duty of good faith and fair dealing was necessarily restricted to franchises operating within the province, but that this did not derogate or limit the application of the common law duty of good faith to those franchises operating outside the province.

RIGHT TO ASSOCIATE

All provinces include a statutory right of franchisees to associate and to form an organization of franchisees. A franchisor cannot interfere with, prohibit, restrict or penalize a franchisee in the exercise of these rights. Importantly, this right has been interpreted to extend to the right to participate in a class action.¹¹⁹ In the class actions context, the right to associate is fundamental to a franchisee's right to access to justice. Given that the right to associate encompasses the right to participate in a class action, it is foreseeable that a franchisee may argue that a clause in a franchise agreement requiring the franchisee to arbitrate any disputes violates its right to associate. This argument has not yet been advanced.

CLASS ACTIONS

To date, courts have certified significantly more franchise class actions than not. However, as of the fall of 2012, no franchise class proceeding in Canada has yet been tried on its merits.¹²⁰

The fact that "a typical franchise relationship involves a common contract, a common 'system' and common treatment of franchisees by the franchisor"¹²¹ makes franchise disputes "particularly suitable as a class

¹¹⁸ *Lansbridge*, *supra* note 82.

¹¹⁹ *Midas*, *supra* note 117.

¹²⁰ Jennifer Dolman, Geoffrey Grove, David Sterns and Stuart Freen, "Unique Circumstances in Litigating Franchise Class Actions" (The Canadian Institute: 12th Annual National Forum on Class Actions Litigation, September, 2011). This paper was revised by Jennifer Dolman, David Sterns and Lia Bruschetta for the 13th Annual National Forum on Class Actions Litigation.

¹²¹ *Trillium SC*, *supra* note 68 at para 57.

action.”¹²² Moreover, it is often unrealistic “to think that an individual franchisee, who has experienced the loss of their business, is financially or psychologically equipped to engage in protracted, complicated and very expensive litigation”¹²³ with a larger, more powerful franchisor. This is especially so where some or all of the individual franchisees intend to continue within the franchisor’s system following the conclusion of the action. The Court wrote:

In view of the power imbalance between the franchisor and the franchisees, the very concern that the [Arthur Wishart Act] was designed to address, there is a significant impediment to access to justice by way of individual action, particularly where some of the franchisees remain a part of the [franchisor’s] system.¹²⁴

Note, however, that although there are many qualities to a franchise dispute that lend themselves to certification, this does not mean that every franchise dispute should or will be certified. Ultimately the question of whether the action should be certified as a class action must be answered by looking to the certification criteria, taking into account all of the circumstances.¹²⁵

In deciding which common issues should be certified, the courts have recognized that, like in other class actions, although there may be individual issues to deal with at the damages stage of an action, this should not defeat the motion for certification. Although it may be “necessary to determine individual entitlement” after franchisees have been successful in proving their allegations, often, this “is but a matter of accounting.”¹²⁶

To avoid having to conduct individual inquiries, courts may frame the common issues as questions concerning the franchisor’s conduct. Provincial franchise legislation provides franchisees with the tools necessary to avoid individual inquiries. The Acts deem reliance on any misrepresentation found in a disclosure document,¹²⁷ and the duty of fair

¹²² *Ibid.*

¹²³ *Ibid* at para 161.

¹²⁴ 578115 Ontario Inc (cob McKee’s Carpet Zone) v Sears Canada Inc, 2010 ONSC 4571, 325 DLR (4th) 343 at para 68.

¹²⁵ Fairview Donut Inc v The TDL Group Corp, 2012 ONSC 1252 (available on WL Can). (This decision is under appeal and will be heard by the Ontario Court of Appeal on December 5 and 6.)

¹²⁶ 1176560 Ontario Ltd v Great Atlantic & Pacific Company of Canada Ltd, [2002] 62 OR (3d) 535 (SC) (available on WL Can), aff g [2004] 70 OR (3d) 182 (Div Ct) (available on WL Can) at para 53.

¹²⁷ See eg Arthur Wishart Act, *supra* note 2, s 7.

dealing may be assessed without reference to a franchisee's actions or knowledge.¹²⁸

Each of the following common issues involves questions of fact and law that would have to be proven by any individual member of the class asserting a claim. Each has been held to be suitable for certification in previous franchise certification motions:¹²⁹

- Breach of a common franchise agreement in relation to the supply of products to franchisees;
- Failure of a franchisor to pass on supplier rebates and allowances;
- Breach of the common law contractual duty of good faith in relation to the supply of products by a franchisor;
- Breach of the statutory duty of fair dealing under the Act in relation to the prices charged on supplies;
- Breach of the statutory duty of fair dealing under the Act in relation to the failure of the franchisor to disclose or pass on rebates to suppliers;
- Breach of the statutory duty of fair dealing under the Act in relation to the amount of time provided to the plaintiffs to accept or reject a wind-down offer from the defendant;
- Whether a franchise agreement imposes a common law duty on a franchisor to charge commercially reasonable prices and whether such duty has been breached;
- Whether conduct by a franchisor in relation to the distribution of products to franchisees can give rise to unjust enrichment;
- Whether damages relating to overcharging on supplies and improper withholding of supplier monies can be determined in the aggregate;
- Whether a duty was owed to a network of dealers to adjust the compensation paid to the dealers; and
- Whether a corporation breached the plaintiffs' right of association.

SUMMARY AND LOOKING AHEAD

As can be seen from the extensive discussion above, the enactment of franchise legislation in Manitoba effectively means that more than half the provinces in Canada now have such legislation in force (assuming that

¹²⁸ See eg *Trillium SC*, *supra* note 68.

¹²⁹ Dolman, *supra* note 120.

Quebec's Civil Code operates to some degree to regulate franchising in that province and imposes a duty of fair dealing in contracts generally). Also, franchising has been a fertile field for litigation, particularly in view of the unique statutory right of rescission arising from no or incomplete disclosure, especially when such litigation is incorporated into a class action.

As there are now some well established principles of law on issues arising in cases under franchise legislation in other provinces, principally in Ontario, which will have application in Manitoba, we can also predict some significant interpretation issues arising under Manitoba's *Franchises Act* due to the number of unique provisions in the legislation. No doubt many lawyers will become involved in advising either franchisors or franchisees in Manitoba. However, it is probably safe to predict that they will find a significant challenge in providing certainty to their clients as have their fellow legal colleagues in the other provinces where franchise legislation has been enacted. Uniformity in provincial legislation, while a logical goal, has been attained to some degree, but Manitoba has departed from model franchise legislation more than any other province, for reasons not altogether certain. While franchisees in Manitoba will undoubtedly welcome the fact that they now have legislative rights to balance their interests and rights to some degree with those of franchisors, franchisors, particularly national franchisors, will not welcome the extra costs and inconsistencies of having to include Manitoba's legal requirements within their national disclosure documents and franchise documents.

As the title of this paper suggests, Manitoba's franchise legislation offers something old, and something new. All of which will result in one certainty: expect the unexpected.

APPENDIX A

The following is a summary of the unique additions/additional information that must be disclosed pursuant to Manitoba's franchise legislation that are not already required disclosure items pursuant to the franchise laws of Ontario, Alberta, New Brunswick or Prince Edward Island:

1) Risk Warnings - The following statements must be included at the beginning of the disclosure document for Manitoba:

a) A prospective franchisee should seek information on the franchisor and on the franchisor's business background, banking affairs, credit history and trade references.

b) A prospective franchisee should seek expert independent legal and financial advice in relation to franchising and the franchise agreement before entering into the franchise agreement.

c) A prospective franchisee should contact current and previous franchisees before entering into the franchise agreement.

d) Lists of current and previous franchisees and their contact information can be found in this disclosure document.

2) Person Authorized for Service - Disclose the name and address of a person authorized to accept service in Manitoba on the franchisor's behalf.

3) Financial Statements - Financial statements of the franchisor must be prepared in accordance with:

a) Canadian GAAP as set out in the CICA Handbook; or

b) In accordance with GAAP of the jurisdiction in which the franchisor is based, if the statements are supplemented by information that sets out any changes necessary to make the presentation and content of such statements equivalent to Canadian GAAP as set out in the CICA Handbook - Accounting. [Note: The underlined portion of this is a disclosure requirement imposed by the Manitoba Regulation that is not currently imposed in Ontario, Alberta, New Brunswick or Prince Edward Island.]

4) Manual - If no operating manuals are provided to the franchisee, a statement to that effect must be made in the disclosure document.

5) Internet, Telephone and Catalogue Sales - A description of any reservation of rights by the franchisor for internet sales, telephone sales, catalogue sales or sales by other means. [Note: This is similar to New Brunswick's distance sales disclosure requirement but the exact language used differs slightly].

6) Licences, Permits, Registrations and Authorizations - A description of every licence, registration, authorization or other permission that the franchisee will be required to obtain under federal or Manitoba provincial laws to operate the franchise [Note: This is also required in Ontario and New Brunswick.]

7) Arbitration and Mediation - If a franchise agreement provides that disputes may be referred to, or resolved by, mediation or arbitration, the disclosure document must include information about mediation procedures and arbitration proceedings including:

- a) A description of any restrictions or requirements imposed by the franchise agreement with respect to arbitration, mediation or any other alternative dispute resolution process;
- b) The criteria and methods for selecting a mediator or arbitrator;
- c) The rules and procedures governing mediation and arbitration;
- d) Any confidentiality obligations imposed on parties to the mediation or arbitration;
- e) The costs of mediation or arbitration proceedings or the method of calculating those costs; and
- f) Any other prescribed information and statements (currently none in the finalized Manitoba Regulation).

8) List of Franchisees - The disclosure document must disclose the following:

- a) List of Current Franchisees - A list of all franchisees of the franchisor or the franchisor's associates that currently operate franchises in Manitoba of the same type as the franchise being offered, including the name, business address and telephone number of each franchisee. If there are fewer than 20

franchisees in Manitoba, the list must also include information on the franchisees that currently operate franchises of the same type in Saskatchewan or Alberta until information is provided on 20 or all the franchisees, whichever is the lesser number. If there are fewer than 20 franchisees in Manitoba, Saskatchewan and Alberta, the list must also include information on franchisees that operate franchises that are geographically closest to Manitoba until information on 20 or all franchisees is provided.

b) List of Former Franchisees - A list of all franchisees of the franchisor or the franchisor's associates that previously operated, in Manitoba or in any other jurisdiction from which the franchisor draws the list of current franchisees required under section 25, a franchise of the same type as the franchise being offered that has been terminated, cancelled, reacquired or not renewed by the franchisor or has otherwise left the franchise system within the fiscal year immediately preceding the date of the disclosure document, including the name, last known address and telephone number of each franchisee.

c) List of Current Businesses - A list of all businesses of the same type as the franchise being offered that the franchisor or the franchisor's associates currently operate in Manitoba, including the name and business address of each business.

9) Certificate of Franchisor - Insert the required Certificate of Franchisor including the prescribed language:

This disclosure document:

(a) contains no untrue information, representation or statement, whether of a material fact or otherwise; and

(b) contains every material fact, document and other information that is required under the *Franchises Act* and Regulation.

If the franchisor is not providing financial statements with the disclosure statement due to subsection 8(1) of the Franchises Regulation, the following statement is to be added: The franchisor meets the requirements of subsection 8(1) of the Franchises Regulation and is not including financial statements with this disclosure document as a result.

If the disclosure document is not provided as one document, the certificate must identify each part of the disclosure document that was provided to the franchisee and the date each part was provided.

Date of Certificate

It is also noteworthy that the disclosure document is not required under Manitoba franchise laws to be delivered as one document at one time. However, it is generally a recommended best practice to deliver the disclosure as one document. If, however, a franchisor chooses to deliver a disclosure document in parts in Manitoba, there are additional rules relating to when the franchisor must provide the risk warning statements, the certificate of the franchisor, and other statements that are prescribed to be printed at the top of any document that forms part of the disclosure document.

The CFA has adopted a chart (prepared for the CFA by Daniel F. So, McKenzie Lake Lawyers LLP) comparing franchise legislation in the five provinces which have enacted such legislation. The chart is available on the CFA's website www.cfa.ca for its members. As the chart has restricted use, and is 64 pages in length, it is not reproduced in this paper.

