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Jeffrey P. Hoffman

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FRANCHISE LEGISLATION IN CANADA

Jeffrey P. Hoffman*

ABSTRACT

This paper examines the regulation of franchising in Canada with a focus on those provinces that have enacted franchise disclosure and relationship legislation; the business arrangements to which this legislation applies; the obligation to provide pre-sale disclosure in the form of a franchise disclosure document; the remedies available to franchisees where there was no disclosure or deficient disclosure; the duty of fair dealing; the right of franchisees to associate; and the right to seek damages for a breach of the duty of fair dealing and the right to associate.

I. PROVINCIAL FRANCHISE LEGISLATION

A. INTRODUCTION

UNDER the Canadian Constitution Act of 1867,¹ there is a division of powers between the federal government and the provinces. Matters of contract, including franchise agreements, are considered to be matters of “property and civil rights” and within exclusive provincial jurisdiction.² However, not all provinces have chosen to enact franchise legislation. Franchise disclosure and relationship statutes exist in five of the ten provinces of Canada: Alberta, Ontario, New Brunswick, Prince Edward Island (PEI) and Manitoba.³ There is cur-

* Partner, Gowling Lafleur Henderson LLP, Toronto, Canada.

1. Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.).

2. Larry Weinberg & Geoffrey B. Shaw, *A Practical Road Map to Entering the Canadian Market*, 24 FRANCHISE L.J. 63, 63 (2004).

3. Franchises Act, R.S.A. 2000, c. F-23 (Alta.) [hereinafter Alberta Statute]; The Franchises Act, C.C.S.M. c. F-156 (Man.) (in force since October 1, 2012) [hereinafter Manitoba Statute]; Franchises Act, S.N.B. 2007, c. F-23.5 (N.B.) [hereinafter New Brunswick Statute]; Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3 (Ont.) [hereinafter Ontario Statute]; Franchises Act, R.S.P.E.I. 1988, c. F-14.1 (P.E.I.) [hereinafter PEI Statute]. These statutes may be viewed online at www.canlii.org. The British Columbia Law Institute published a consultation paper in March 2013 requesting input on proposed franchise legislation for the province of British Columbia (BC). See CONSULTATION PAPER ON A FRANCHISE ACT FOR BRITISH COLUMBIA, B.C. LAW INST. (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2251456. On March 31, 2014, the Institute released a report that recommended the enactment of franchise legislation in that province. See THE REPORT ON A FRANCHISE ACT FOR BRITISH COLUMBIA, B.C. LAW INST. (2014), available at http://www.bcli.org/wordpress/wp-content/uploads/2014/03/report-76_BC-Franchise-Act_with_Cover.pdf. As of the date of this pa-

rently no franchise-specific legislation, and thus no obligation to prepare and deliver a franchise disclosure document (FDD) to franchisee candidates in British Columbia, Saskatchewan, Quebec, Newfoundland and Labrador, or Nova Scotia.⁴

Franchisors can prepare FDDs for use in each province or prepare a single FDD for use across the country, provided that where a single FDD is used, it addresses the requirements of each of the provincial statutes and their respective disclosure regulations.

The disclosure regulations under the Alberta, Manitoba, PEI, and New Brunswick statutes expressly permit the use of an FDD prepared and used to comply with the disclosure requirements under the laws of another jurisdiction if the franchisor includes such additional or supplementary information with that document as is necessary to comply with the disclosure requirements of these statutes and their respective disclosure regulations.⁵

The practice of using a foreign FDD and supplementing it with the documents and information required by provincial legislation is discouraged as, unless the FDD is carefully prepared, there is the potential for errors and inconsistencies between the information provided in the foreign FDD and the information to be provided in the domestic FDD, particularly with respect to the base information used to create earnings projections, if any, and the cost of establishing and operating the franchised business which information may differ between countries. Using a foreign FDD as the base for a Canadian FDD may also result in a lengthy and cumbersome document and make it difficult to meet the requirement of the laws of Ontario, PEI, Manitoba, and New Brunswick that all of the information in the FDD be "accurately, clearly, and concisely set out."⁶

There is no obligation to register an FDD with a governmental authority and, indeed, there is no law compelling a franchisor to deliver an FDD, even where it is apparent that one ought to be provided. Though the statutes set out obligations of disclosure, the only remedies available where one is not delivered is to seek rescission and, in some provinces,

per, the author anticipates that a franchise statute will come into force in British Columbia sometime over the next two years.

4. There is also no such legislation in the Yukon, Northwest or Nunavut Territories in Northern Canada. In Québec, while there is no franchise-specific legislation, the Civil Code of Québec (CCQ) has provisions governing standard form contracts (contracts of adhesion) including provisions that impose a duty of good faith (art. 1375) both at the time an obligation is created and at the time it is performed or extinguished. Contracts of adhesion that are illegible or incomprehensible to a reasonable person (art. 1436) or that contain clauses that are determined to be "abusive" (art. 1437) are not enforceable. Civil Code of Québec, S.Q. 1991, arts. 1375, 1436, 1437 (Can.).
5. Franchises Regulation, Alta. Reg. 240/1995 s. 2(2); Franchises Regulation, Man. Reg. 29/2012 s. 2(2); Franchise Act Regulations, P.E.I. Reg. EC232/06 s. 4; Disclosure Document Regulation, N.B. Reg. 2010-92 s. 4.
6. Manitoba Statute, s. 5(9); New Brunswick Statute, s. 5(7); Ontario Statute, s. 5(6); PEI Statute, s. 5(6).

damages for the failure to disclose.⁷

B. THE PURPOSE OF THE LEGISLATION

The rights and obligations under the law are similar in each province with franchise legislation and their object is the same: “to assist prospective franchisees in making informed investment decisions by requiring the timely disclosure of necessary information”;⁸ to impose on each party to a franchise agreement a duty of fair dealing in its performance and enforcement;⁹ to protect the rights of franchisees to associate;¹⁰ and to provide statutory and civil remedies, including (in some provinces) the right to bring an action for damages for a breach of these obligations.¹¹

Franchise legislation in Canada is remedial and, as such, is given “such fair, large and liberal interpretation as best ensures the attainment of its objects.”¹²

The legislation arose from an imbalance of power between franchisors and franchisees, both in the negotiations that led to the entering into of a franchise agreement and during the course of the franchisor-franchisee relationship. As a member of the Ontario legislature put it during the debates that led to the creation of the Ontario statute:

It’s very important that we take a serious look at and take to heart that which we might do, and make every effort to go as far as we can to put in place things that will create a level playing field, that will present to people the opportunity they felt they were getting into when they signed agreements to go into business in Ontario.¹³

The Ontario Court of Appeal has made a number of statements regarding the purpose of the Ontario statute, gleaned from its reading of the Act and the debates that led to its passing. For example:

One of the prime purposes of the Act is to obligate a franchisor to make full and accurate disclosure to a potential franchisee so that the latter can make a properly informed decision about whether or not

7. *Pointts Advisory Ltd. v. 754974 Ontario, Inc.*, [2006] O.J. No. 3504, para. 59 (Can. Ont. Sup. Ct. J.).

8. Alberta Statute, s. 2(a).

9. Alberta Statute, s. 7; Manitoba Statute, s. 3(1); New Brunswick Statute, s. 3(1); Ontario Statute, s. 3(1); PEI Statute, s. 3(1).

10. Alberta Statute, s. 8; Manitoba Statute, s. 4; New Brunswick Statute, s. 4; Ontario Statute, s. 4; PEI Statute, s. 4.

11. All such legislation provides a statutory rescission remedy for the failure to properly disclose material facts and all such legislation, except Alberta’s statute, provides a right of action in damages for breach of the duty of fair dealing and interference with the right to associate.

12. Legislation Act, S.O. 2006 c. 21, sch. F, s. 64 (Ont.); Interpretation Act, R.S.A. 2000, c. I-8, s. 10 (Alta.); Interpretation Act, R.S.N.B. 1973, c. I-13, s. 17 (N.B.); The Interpretation Act, C.C.S.M., c. I-80, s. 6 (Man.); Interpretation Act, R.S.P.E.I. 1988, c. I-8, s. 9 (P.E.I.).

13. Ontario, Legislative Assembly, Official Report of Debates (Hansard), L060A (17 May 2000) at 1520 (Tony Martin, MPP Sault Ste Marie).

to invest in a franchise.¹⁴

It is clear, therefore, that the focus of the Act is on protecting the interests of franchisees. The mechanism for doing so is the imposition of rigorous disclosure requirements and strict penalties for non-compliance. For that reason, any suggestion that these disclosure requirements or the penalties imposed for non-disclosure should be narrowly construed, must be met with scepticism.¹⁵

The purpose of the statute is clear: it is intended to redress the imbalance of power as between franchisor and franchisee; it is also intended to provide a remedy for abuses stemming from this imbalance.¹⁶

These judicial pronouncements make it sound like these statutes are to be read in a way that favors the interests of franchisees over franchisors, but that is not the case. The statutes do impose "fairly onerous disclosure requirements on franchisors" but the Court of Appeal for Ontario has clarified that the statute is "not entirely one-sided" as it imposes a duty of fair dealing on "each party" to a franchise agreement with respect to performance and enforcement and thus "obliges both the franchisor and the franchisee to deal fairly with one another."¹⁷ It has also stated that "a fair interpretation of the [Ontario] Act is one that balances the rights of both franchisees and franchisors."¹⁸

C. NO DEROGATION OF RIGHTS

The rights and remedies conferred by these statutes are in addition to and do not derogate from any other right or remedy that a franchisee or franchisor may have at law.¹⁹ For example, a claim by a franchisee for a remedy available to it under a statute does not prevent a franchisor from commencing a claim (or counterclaim) for, say, breach of contract.²⁰

D. APPLICATION TO INITIAL GRANT, RENEWAL AND EXTENSION

These statutes apply to the initial grant of a franchise. These statutes also apply to existing franchise agreements with respect to imposing a duty of fair dealing on the parties to a franchise agreement and protecting

14. 1490664 Ont. Ltd. v. Dig This Garden Retailers Ltd., [2005] 256 D.L.R. 4th 451, para. 16 (Can. Ont. C.A.).

15. Personal Serv. Coffee Corp. v. Beer (c.o.b. Elite Coffee Newcastle), [2005] O.J. No. 3043, para. 28 (Can. Ont. C.A.).

16. Salah v. Timothy's Coffees of the World Inc., [2010] O.J. No. 385, para. 26 (Can. Ont. Sup. Ct. J.), *aff'd*, [2010] O.J. No. 4336 (Can. Ont. C.A.).

17. *Beer*, [2005] O.J. No. 3043, para. 29.

18. 4287975 Canada Inc. v. Imvescor Restaurants Inc., [2009] O.J. No. 1508, para. 40 (Can. Ont. C.A.), *leave to appeal dismissed* [2009] S.C.C.A. No. 244.

19. Alberta Statute, s. 15; Manitoba Statute, s. 9; New Brunswick Statute, s. 10; Ontario Statute, s. 9; PEI Statute, s. 10.

20. In the *Beer* case, the franchisee's rescission claim was granted, but the franchisor was permitted to continue its counterclaim to pursue Mr. Beer for improperly appropriating its business and carrying on the same business in competition with PSSC using the know-how, suppliers, customers, and equipment provided by PSSC during the course of their relationship. *Beer*, [2005] O.J. No. 3043, para. 24.

the right of franchisees to associate.²¹ In Ontario, Manitoba, PEI, and New Brunswick they also apply, subject to certain exemptions, to the renewal or extension of a franchise agreement.²²

Most franchise agreements list conditions that must be met before the franchisee is able to extend or renew its franchise agreement, such as the payment of a renewal fee, execution of the franchisor's current form of franchise agreement and the execution and delivery of a general release in favor of the franchisor.

If the language of either the renewal clause in the franchise agreement or the release to be signed by the franchisee is broad enough to include a release or waiver of the franchisee's rights under a franchise statute, then the renewal clause is void and unenforceable. The statutes provide that any purported waiver or release by a franchisee of a right given under the statutes or of an obligation or requirement imposed on a franchisor is void.²³

In *405341 Ontario Ltd. v. Midas Canada Inc.*, Mr. Justice Cullity considered terms of the Midas standard form franchise agreement that required a franchisee to provide Midas with a general release as a condition of renewal or assignment of the franchise agreement.²⁴ Justice Cullity declared the requirement to provide a general release void.²⁵ His decision was upheld by the Court of Appeal for Ontario where Madam Justice MacFarland wrote "[i]f you include a term in your franchise agreement that purports to be a waiver or release of any rights a franchisee has under the Act, it will be void."²⁶ "Requiring franchisees to give up any claims they might have against a franchisor for purported breaches of the Act in order to renew their franchise agreement, unequiv-

21. Alberta Statute, s. 3(2); Manitoba Statute, s. 2(2); New Brunswick Statute, s. 2(3); Ontario Statute, s. 2(2); PEI Statute, s. 2(2).

22. Manitoba Statute, s. 2(1); New Brunswick Statute, s. 2(2); Ontario Statute, s. 2(1); PEI Statute, s. 2(1). In Alberta, there is an exception from the obligation to disclose in respect of the renewal or extension of an existing franchise agreement. Alberta Statute, s. 5(1)(d). In order for a franchisor to be exempt from the obligation to disclose on a renewal or extension of an existing franchise agreement in Ontario, Prince Edward Island, Manitoba and New Brunswick, there must be (a) no interruption in the operation of the business operated by the franchisee under the franchise agreement and (b) no material change since the franchise agreement or latest renewal or extension of the franchise agreement was entered into. Manitoba Statute, s. 5(11)(f); New Brunswick Statute, s. 5(8)(f) (where "most recent renewal" is used in place of "latest renewal"); Ontario Statute, s. 5(7)(f); PEI Statute, s. 5(7)(f).

23. Alberta Statute, s. 18; Manitoba Statute, s. 11; New Brunswick Statute, s. 12; Ontario Statute, s. 11; PEI Statute, s. 12.

24. See *405341 Ontario Ltd. v. Midas Canada Inc.*, [2009] O.J. No. 4354 (Can. Ont. Sup. Ct. J.) *aff'd*, [2010] O.J. No. 2845 (Can. Ont. C.A.) (the author was one of the lawyers representing Midas on this motion and the appeal from the order made on the motion).

25. *Id.* para. 8.

26. *405341 Ontario Ltd. v. Midas Canada Inc.*, [2010] O.J. No. 2845, para. 26 (Can. Ont. C.A.).

ocally runs afoul of the Act.”²⁷ Franchisors should, therefore, take care to ensure that any requirement in a franchise agreement for a release of the franchisor on renewal, extension, transfer or assignment of the franchise agreement is limited to those things capable of being released at law.

E. CHOICE OF LAW AND CHOICE OF VENUE

Franchisors should give careful consideration to the choice of law and venue provisions of their franchise agreements. If the franchise agreement is governed by a law other than the law of the province in which the franchisee carries on business or if it requires disputes to be resolved in a province or state other than the province in which the franchisee carries on business, the choice of law and choice of venue provisions will be void to the extent that they purport to restrict the application of the law of the province that governs the relationship or to the extent they restrict venue to a forum outside of that province with respect to a claim otherwise enforceable under the applicable provincial franchise statute.²⁸

If a franchise is granted in a province without a franchise statute and the franchise agreement is governed by the laws of a province with a franchise statute, then the parties will have contracted into the laws of the province with the franchise statute and be bound by its statutory obligations.

In the *Midas* case, franchise agreements for shops located across Canada uniformly provided that they were to be construed, performed, and enforced in accordance with the laws of the Province of Ontario. The court held that “the intention of the parties was that their rights and obligations—including the reciprocal and inviolable rights and duties of fair dealing—are to be the same as if the business of the franchise was operated in Ontario.”²⁹

It does not necessarily follow that by contracting into the laws of a province with franchise legislation that a franchisor must provide a franchisee candidate with an FDD (unless there is disclosure legislation in the province where the franchise is to be operated). This is because the obligation to disclose is a pre-contractual obligation and the parties do not contract into the laws of a province with disclosure legislation until such time as they enter into a franchise agreement with such a choice of law provision.

27. *Id.* para. 30. Where the franchise agreement calls for the execution of a general release in favor of the franchisor, one that includes a release or waiver of rights under a franchise statute, the provision cannot be saved by presenting the franchisee with a form of release that preserves the franchisee’s right to advance a claim under the statute. See 2176693 Ontario Inc. v. Cora Franchise Group Inc., [2014] O.J. No. 550, para. 14 (Can. Ont. Sup. Ct. J.). This decision is under appeal.

28. Alberta Statute, s. 17; Manitoba Statute, s. 10; New Brunswick Statute, s. 11; Ontario Statute, s. 10; PEI Statute, s. 11.

29. *Midas*, [2009] O.J. No. 4354, para. 35.

II. NON-APPLICATION OF FRANCHISE STATUTES

The Ontario, Manitoba, New Brunswick, and PEI statutes expressly provide that they do not apply to a number of business relationships,³⁰ including an employer-employee relationship, a partnership, membership in a co-operative association, a relationship or arrangement arising out of an oral agreement where there is no writing which evidences any material term or aspect of the relationship or arrangement, and a service contract or franchise-like arrangement with the government or an agent of the government.³¹

The Ontario, Manitoba, New Brunswick, and PEI statutes also expressly state that they do not apply to an arrangement arising from an agreement between a licensor and a single licensee to license a specific trade-mark, where the license is the only one of its general nature or type to be granted by the licensor with respect to that trade-mark.

The Ontario statute is silent as to the geographic scope of the "single license" to be granted, but it is presumed to mean a single license within Canada as trade-marks registration and regulation is a matter of federal jurisdiction and the statutes in Manitoba, New Brunswick, and PEI expressly provide that their statutes do not apply to a single license granted "in Canada."

A distinction must be drawn between the "non-application" of the statutes and the availability of an "exemption" from the obligation to disclose.³² When acting for a trade-mark owner who is looking to license its trade-mark in Canada, it is essential for the licensor to consider, in the following order:

- (a) Whether provincial franchise disclosure legislation applies to the arrangement;
- (b) Whether the arrangement is a "franchise;" and
- (c) If the arrangement is a "franchise," whether it is exempt from disclosure

Special attention must be given to such arrangements made in the Province of Alberta, where the franchise statute does not have a "non-application" provision. In Alberta, where a licensor is seeking to license a specific trade-mark to a single licensee, the licensor must determine, in the following order:

- (a) Whether the licensee's business is to be operated either partly or wholly in Alberta, and whether the purchaser of the business is an Alberta resident or has a permanent establishment in Alberta for the purposes of the Alberta Corporate Tax Act,³³ in which case the Alberta statute applies;

30. Manitoba Statute, s. 2(3); New Brunswick Statute, s. 2(4); Ontario Statute, s. 2(3); PEI Statute, s. 2(3).

31. Except in New Brunswick and Manitoba, where the statutes bind the Crown. New Brunswick Statute, s. 2(1); Manitoba Statute, s. 13.

32. Exemptions are discussed in Part IV(D), *infra*.

33. Alberta Statute, s. 3(1).

- (b) Whether the arrangement is a “franchise;” and
- (c) If the arrangement is a “franchise,” whether it is exempt from disclosure

III. “FRANCHISE” DEFINED

A. ONTARIO, NEW BRUNSWICK, PEI, AND MANITOBA

The definition of “franchise” under the statutes of Ontario, New Brunswick, PEI, and Manitoba are virtually identical. There are two definitions of “franchise” under the statutes of these provinces, each of which require fact-based inquiries.

The first definition of “franchise” has been described as the “classic” definition or “business format” franchise.³⁴ The test is divided into three parts: (1) a payment or continuing payments, whether direct or indirect, or a commitment to make such payment or payments, to the franchisor, in the course of operating the business or as a condition of acquiring the franchise or commencing operations; (2) the grant of the right to sell, offer for sale or distribute goods or services that are substantially associated with the franchisor’s trade-mark; and (3) the franchisor exercises “significant control” over or offers “significant assistance” in the franchisee’s method of operation, including building design and furnishings, locations, business organization, marketing techniques, or training.³⁵

The second definition of “franchise” has been described as the “alternative” definition or “product distribution” franchise. It too consists of a three-part test: (1) a payment or continuing payment, whether direct or indirect, or a commitment to make such payment or payments, to the franchisor, in the course of operating the business or as a condition of acquiring the franchise or commencing operations; (2) a grant of representational or distribution rights, whether or not a trade-mark is involved, to sell, offer for sale or distribute goods or services supplied by the franchisor or a supplier designated by the franchisor; and (3) the franchisor or a third person designated by the franchisor provides “location assistance,” including securing retail outlets or accounts for the goods or services to be sold, offered for sale or distributed or securing locations or sites for vending machines, display racks or other product sales displays used by the franchisee.

In *Di Stefano v. Energy Automated Systems Inc.*, Mr. Justice Code stayed an action commenced in Ontario in favor of Tennessee because the contract between the parties provided that Tennessee was the forum in which any disputes regarding the agreement were to be determined.³⁶

34. Weinberg & Shaw, *supra* note 2, at 67.

35. See Manitoba Statute (the Manitoba statute adds the words “under a business plan” after “method of operation” but does not define “business plan” other than to include the phrase in the definition of “franchise system.” It also substitutes the word “strategies” for “techniques”).

36. See *Di Stefano v. Energy Automated Systems Inc.*, [2010] O.J. No. 385 (Can. Ont. Sup. Ct. J.).

The plaintiffs, a group of ten dealers, argued that they were “franchises” and, as a result, the dispute had to be determined in Ontario.³⁷ Justice Code held that they were not “franchises.” The plaintiffs paid the defendant manufacturer for a five-day training course and planned to sell products associated with its trademarks.³⁸ There was no evidence that the manufacturer exercised “significant control” over or offered “significant assistance” in the plaintiffs’ method of operation.³⁹ The only evidence of assistance was the five-day training program taken prior to obtaining a dealership. Justice Code held that this assistance was not “significant” and that this “slender thread” was not a “reasonable basis” to assert that the contracts were franchise agreements.⁴⁰

First, the five day training program was a condition precedent to obtaining a dealership. It was not “ongoing assistance during the pendency of the agreement.”⁴¹ The Ontario statute uses the verbs “exercises” and “offers,” in the present tense, in relation to the elements of “control” and “assistance.”⁴² It does not refer to a one time training program undertaken and completed in the past. Second, the offer of assistance did not relate to the business’s “method of operation.”⁴³ Learning about products was not the same as learning about any particular “method of operation.” Last, the legislature did not intend that by merely teaching nascent distributors about sophisticated products, a manufacturer would become, in law, a “franchisor.”⁴⁴

Contrast the result in the *Di Stefano* case with the decision in 1706228 *Ontario Ltd. v. Grill It Up Holdings Inc.*, where Mr. Justice Corbett held that the business being sold to the plaintiff was a “franchise.”⁴⁵ *Grill It Up* granted the plaintiff the right to sell and offer for sale food that was “substantially associated with the Grill It Up name and trademarks.”⁴⁶ Grill It Up “did not exercise control over the plaintiffs, but did ‘offer significant assistance’ respecting the store construction, design, equipment, location, menu, training and branding.”⁴⁷ The court held that there was more than enough “substantial assistance” to bring the relationship within the meaning of “franchise.”⁴⁸

The court, in determining whether a business is a “franchise,” will examine the entirety of the relationship, including any and all agreements that govern the relationship.

37. *Id.* paras. 7–14.

38. *Id.* paras. 6, 8.

39. *Id.* para. 26.

40. *Id.* para. 27.

41. *Id.*

42. See Ontario Statute.

43. *Di Stefano*, [2010] O.J. No. 385, para. 27.

44. *Id.* paras. 26–27.

45. See 1706228 *Ontario Ltd. v. Grill It Up Holdings Inc.*, [2011] O.J. No. 2206 (Can. Ont. Sup. Ct. J.).

46. *Id.* para. 27.

47. *Id.*

48. *Id.*

B. ALBERTA

The definition of "franchise" under the Alberta statute differs from the definition of the term under the other provincial statutes.

The right to engage in a business in Alberta is not a "franchise" unless there is a plan or system in place that specifies a material aspect of conducting business.

Section 1(1)(d) of the Alberta statute reads:

- (d) "franchise" means a right to engage in a business
 - (i) in which goods or services are sold or offered for sale or are distributed under a marketing or business plan prescribed in substantial part by the franchisor or its associate,
 - (ii) that is substantially associated with a trademark, service mark, trade name, logotype or advertising of the franchisor or its associate or designating the franchisor or its associate, and
 - (iii) that involves
 - (A) a continuing financial obligation to the franchisor or its associate by the franchisee and significant continuing operational controls by the franchisor or its associate on the operations of the franchised business, or
 - (B) the payment of a franchise fee,
 and includes a master franchise and a subfranchise.⁴⁹

Section 1(1)(l) of the Alberta Franchises Act defines "marketing or business plan" as meaning:

- (l) . . . a plan or system that specifies a material aspect of conducting business, including, without limitation, any one or more of the following:
 - (i) price specification, special pricing systems or discount plans;
 - (ii) sales or display equipment or merchandising devices;
 - (iii) equipment to be used to perform services;
 - (iv) sales techniques;
 - (v) promotional or advertising materials or cooperative advertising;
 - (vi) training relating to the promotion, operation or management of the business;
 - (vii) operational, managerial, technical or financial guidelines or assistance.⁵⁰

IV. THE OBLIGATION TO DISCLOSE

Once it is determined that what is being granted is the right to engage in a franchised business, the obligation to provide an FDD is triggered.

A. TIMING

A franchisor is required to provide a prospective franchisee with an FDD no less than fourteen days before the earlier of:

49. Alberta Statute, s. 1(1)(d).

50. Alberta Statute, s. 1(1)(l).

- (a) The signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and
- (b) The payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise.⁵¹

An FDD must be one document delivered at one time,⁵² except in Manitoba where piecemeal disclosure is permitted.⁵³

B. CONTENTS

The courts have variously described the need to provide disclosure that is "full,"⁵⁴ "accurate,"⁵⁵ "comprehensive,"⁵⁶ and "complete."⁵⁷

An FDD must contain:

- (a) all material facts, including material facts as prescribed;
- (b) financial statements as prescribed;
- (c) copies of all proposed franchise agreements and other agreements relating to the franchise to be signed by the franchisee;
- (d) other information and copies of documents as prescribed.⁵⁸

In Ontario, Manitoba, New Brunswick, and PEI, an FDD must also contain mandatory statements encouraging franchisees to conduct their own due diligence by obtaining commercial credit reports regarding the franchisor, by contacting current or previous franchisees prior to entering into the franchise agreement, and by obtaining independent legal and financial advice.⁵⁹

In Ontario, the FDD must also include language warning franchisees that the cost of goods and services acquired under the franchise agreement may not correspond to the lowest cost of the good and services

51. Alberta Statute, s. 4; Manitoba Statute, s. 5; New Brunswick Statute, s. 5; Ontario Statute, s. 5; PEI Statute, s. 5.

52. 1490664 Ont. Ltd. v. Dig This Garden Retailers Ltd., [2005] 256 D.L.R. 4th 451, para. 15 (Can. Ont. C.A.).

53. Manitoba Statute, s. 5(3) ("If the disclosure document is not delivered as one document, the requirement [of a franchisee to receive an FDD] under subsection (2) is not met until the date of the delivery of the last document").

54. *Dig This Garden*, [2005] 256 D.L.R. 4th 451, para. 16.

55. *Id.*

56. 578115 Ontario Inc. (c.o.b. McKee's Carpet Zone) v. Sears Canada Inc., [2010] O.J. No. 3921, para. 19 (Can. Ont. Sup. Ct. J.); *MAA Diners Inc. v. 3 for 1 Pizza & Wings (Canada) Inc.*, [2003] O.J. No. 430 para. 33, *aff'd*, [2004] O.J. No. 297 (Can. Ont. C.A.).

57. *Hi Hotel Ltd. P'ship v. Holiday Hospitality Franchising Inc.*, [2008] A.J. No. 892 (Can. Alta. C.A.). The regulations require certification of the FDD. In Ontario, the certificate must state that the FDD includes "every material fact, financial statement, statement and other information required by the Act and this Regulation." *Arthur Wishart Act (Franchise Disclosure)*, 2000, O. Reg. 581/00, s. 7 (Can.).

58. Manitoba Statute, s. 5(5); New Brunswick Statute, s. 5(4); Ontario Statute, s. 5(4); PEI Statute, s. 5(4); *Franchises Regulation*, Alta. Reg. 240/95, s. 2(1).

59. *Franchise Regulation*, Man. Reg. 29/2012, s. 3; *Disclosure Document Regulation*, N.B. Reg. 2010-92, s. 5; *Arthur Wishart Act (Franchise Disclosure)*, 2000, O. Reg. 581/00, s. 3; *Franchise Act Regulations*, P.E.I. Reg. EC232/06, s. 3.

available in the marketplace.⁶⁰

The Alberta, Manitoba, and PEI statutes require that an FDD be “substantially complete”⁶¹ whereas the Ontario statute has been interpreted by the courts to require “strict compliance” with the disclosure provision of its statute.⁶²

“Substantially complete” under the Alberta statute has been interpreted to mean that “each one of the requirements for the disclosure document must be met, however technical defects in any of the required elements will not invalidate the disclosure so long as each required element is substantially complied with.”⁶³ For example, an FDD is not substantially complete if the officers or directors of the franchisor failed to certify that the FDD contains no untrue information of a material fact, does not omit to state a material fact that is required to be stated, and does not omit to state a material fact that needs to be stated in order for the information not to be misleading.⁶⁴

C. THE REQUIREMENT TO DISCLOSE ALL MATERIAL FACTS

The FDD must contain all of the information and documents described in the statutes and prescribed by regulation including all “material facts.” This requirement was discussed in *1518628 Ontario Inc. v. Tutor Time Learning Centres, LLC*, where Mr. Justice Cumming, as he then was, wrote:

Under Canadian common law, a franchiser, so long as it does not make a misrepresentation, has no legal duty to disclose material facts within its knowledge but which are unknown to a prospective franchisee, even if the franchiser knows that the prospective franchisee has formed an incorrect impression that would be corrected by disclosure. The disclosure requirement of the Act has the purpose of overcoming this failure of the common law. Disclosure of all material facts is required.⁶⁵

60. Arthur Wishart Act (Franchise Disclosure), 2000, O. Reg. 581/00, s. 4.

61. Alberta Statute, s. 4(3)(a); Franchises Regulation, Alta. Reg. 240/95, s. 2(4) (“A disclosure document is properly given for the purposes of section 13 of the Act if the document is substantially complete.”). See also Manitoba Statute, s. 5(1); Franchise Act Regulations, P.E.I. Reg. EC232/06, s. 3(3).

62. 6792341 Canada Inc. v. Dollar It Ltd., [2009] O.J. No. 1881 (Can. Ont. C.A.); 2189205 Ontario Inc. v. Springdale Pizza Depot Ltd., [2010] O.J. No. 3071, para. 18 (Can. Ont. Sup. Ct. J.); 2189205 Ontario Inc. v. Springdale Pizza Depot Ltd., [2011] O.J. No. 2921, paras. 24–25 (Can. Ont. C.A.) (*affg* [2010] O.J. No. 3071).

63. Hi Hotel Ltd. P’ship v. Holiday Hospitality Franchising Inc., [2007] A.J. No. 1465, para. 138 (Can. Alta. Q.B.).

64. An FDD must be certified by two officers or directors of the franchisor where the franchisor has two or more directors and by one officer or director where the franchisor has only one officer or director. Hi Hotel Ltd. P’ship v. Holiday Hospitality Franchising Inc., [2008] A.J. No. 892, paras. 130–31 (Can. Alta. C.A.).

65. 1518628 Ontario Inc. v. Tutor Time Learning Centres, LLC, [2006] O.J. No. 3011, para. 55 (Can. Ont. Sup. Ct. J.); *leave to appeal granted* [2006] O.J. No. 4992, *appeal dismissed*, April 12, 2007, unreported, handwritten endorsement (Div. Ct.).

“Material fact” is broadly defined in each statute, except Ontario’s statute, as meaning any information about the business, operations, capital, or control of the franchisor or its associate, or about the franchise system, that would reasonably be expected to have a significant effect on the value or price of the franchise to be sold or the decision to purchase the franchise.⁶⁶ In Ontario, the definition of “material fact” is open-ended. It is defined as “including” the information about the franchisor and the system described above.⁶⁷

The broad and open-ended definition of “material fact” in Ontario has given rise to an obligation to disclose not only the information that is prescribed, but information about the specific opportunity, including site-specific information, where it exists.⁶⁸ For example, even though the Ontario statute requires the FDD to include copies of all proposed franchise agreements and other agreements relating to the franchise to be signed by the prospective franchisee, the courts have interpreted the obligation to disclose “all material facts” as including the obligation to include a copy of any head lease in the FDD, even though a head lease is not typically signed by a franchisee.⁶⁹

A practice has developed among franchisors to provide a generic disclosure document to franchisee candidates when they first express an interest in a franchise opportunity and, once a site is selected, to then provide either a second FDD or a statement of material change that includes a copy of any lease and other site-specific information.

Franchisors should not face any difficulty in disclosing information or providing documents that are expressly set out in the statutes or regulations as being “material.” The challenge for franchisors is to determine what other “material facts” exist and to ensure that *all* of them are disclosed.⁷⁰

D. DISCLOSURE EXEMPTIONS

The burden of proving an exemption from a requirement or provision

66. Alberta Statute, s. 1(1)(o); Manitoba Statute, s. 1(l); New Brunswick Statute, s. 1(1); PEI Statute, s. 1(1)(l).

67. Ontario Statute, s. 1(1).

68. Leonard H. Polsky, *Location-Specific Deficiencies in Disclosure Documents—Case Comment: Melnychuk v. Blütz Ltd.*, 16 FRANCHISE & DISTRIBUTION 3, 1352 (2010).

69. *Id.*

70. Jeffrey P. Hoffman “The Increasing Difficulty of Preparing and Using Disclosure Documents”, 2011, Ontario Bar Association, Annual Franchise Law Conference, at p. 9. Not every fact is a “material fact” that must be disclosed. In *Caffé Demetre Franchising Corp. v. 2249027 Ontario Inc., et al.* the court granted partial summary judgment dismissing the franchisee’s counterclaim for rescission. *See id.* [2014] O.J. No. 1614, paras. 24–27 (Can. Ont. Sup. Ct. J.). The court held, for example, that the fact that the franchisor commenced a lawsuit (a month after the delivery of the FDD) against a former franchisee in order to protect the franchise system from unlawful competition was not a “material fact” that needed to be disclosed. *Id.*

of one of the statutes is on the person claiming it.⁷¹ A franchisor ought to err on the side of caution and provide an FDD to the candidate, unless it is absolutely clear that the transaction is exempt from the obligation to disclose.

There is no obligation to provide an FDD to a franchisee candidate where:

- (a) the grant of a franchise is by a franchisee if:
 - (i) the franchisee is not the franchisor or an associate of the franchisor or a director, officer, or employee of the franchisor or of the franchisor's associate,
 - (ii) the grant of the franchise is for the franchisee's own account,
 - (iii) in the case of a master franchise, the entire franchise is granted, and
 - (iv) the grant of the franchise is not effected by or through the franchisor;
- (b) the grant of a franchise to a person who has been an officer or director of the franchisor or of the franchisor's associate for at least six months . . . for that person's own account;
- (c) the grant of an additional franchise to an existing franchisee if that additional franchise is substantially the same as the existing franchise that the franchisee is operating [and, in Ontario, PEI, Manitoba, and New Brunswick], if there has been no material change since the existing franchise agreement or latest renewal or extension of the existing franchise agreement was entered into;
- (d) the grant [or sale] of a franchise by an executor, administrator, sheriff, receiver, trustee, trustee in bankruptcy, or guardian on behalf of a person other than the franchisor or the estate of the franchisor;
- (e) the grant of a franchise to a person to sell goods or services within a business in which that person has an interest, if the sales arising from those goods or services, as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into will not exceed [20 percent] of the total sales of the business [expressly defined, in the Alberta statute as a "fractional franchise"];
- (f) the renewal or extension of a franchise agreement [and, in Ontario, PEI, Manitoba, and New Brunswick,] where there has been no interruption in the operation of the business operated by the franchisee under the franchise agreement and there has been no material change since the franchise agreement or latest renewal or extension of the franchise agreement was entered into;⁷²

71. Alberta Statute, s. 19; Manitoba Statute, s. 12; New Brunswick Statute, s. 13; Ontario Statute, s. 12; PEI Statute, s. 13.

72. Alberta Statute, s. 5(1); Manitoba Statute, s. 5(11); New Brunswick Statute, s. 5(8); Ontario Statute, s. 5(7); PEI Statute, s. 5(7); Arthur Wishart Act (Franchise Disclosure), 2000, O. Reg. 581/00, s. 8; Franchises Regulation, Alta. Reg. 240/1995, s. 4.

- (g) the grant of a franchise if:
 - (i) the prospective franchisee is required to make a total annual investment to acquire and operate the franchise in an amount that does not exceed [\$5,000];⁷³
The following is added to (g) in Ontario:
 - (ii) the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable franchise fee, or
 - (iii) the franchisor is governed by section 55 of the Competition Act (Canada), which section governs multi-level marketing plans which has its own disclosure requirements; and⁷⁴
- (h) In Alberta only, "the sale of a right to a person to sell goods or services within or adjacent to a retail establishment as a department or division of the establishment, if the person is not required to purchase goods or services from the operator of the retail establishment."⁷⁵

E. ADDITIONAL DISCLOSURE EXEMPTION AVAILABLE ONLY IN ONTARIO

Under the Ontario statute, the obligation to disclose does not apply to the grant of a franchise where the prospective franchisee is investing in the acquisition and operation of the franchise, over a prescribed period, and for an amount greater than the prescribed amount.⁷⁶ Under the regulation made under the Ontario statute, the prescribed amount of the investment is \$5,000,000 CDN and the prescribed period is one year.⁷⁷ While there are no cases that have interpreted this exemption, it would appear that the intention of the legislature was to exempt the franchisor from having to provide an FDD to a franchisee where the franchise was being purchased by a wealthy, sophisticated investor.

V. STATUTORY RESCISSION

A. TIME WITHIN WHICH TO GIVE NOTICE OF RESCISSION OR CANCELLATION

In Alberta:

if a franchisor fails to give a prospective franchisee [an FDD within the time required by the statute], the prospective franchisee may re-

73. Manitoba Statute, s. 5(11)(g); Arthur Wishart Act (Franchise Disclosure), 2000, O. Reg. 581/00, s. 6(1); Arthur Wishart Act (Franchise Disclosure), 2000, O. Reg. 581/00, s. 9.

74. In Manitoba, New Brunswick and Prince Edward Island, this exemption requires the agreement to not be longer than one year and the franchisor must provide locational assistance or the grant is subject to section 55 of the Competition Act (Canada). In Manitoba there is an added condition that the agreement does not involve the payment of a non-refundable fee. Manitoba Statute, s. 5(8)(h); New Brunswick Statute, s. 5(8)(h)-(i); PEI Statute, s. 5(7)(h).

75. Alberta Statute, s. 5(1)(g).

76. Ontario Statute, s. 5(7)(h).

77. Arthur Wishart Act (Franchise Disclosure), 2000, O. Reg. 581/00, s. 10.

scind the franchise agreement by giving a notice of cancellation to the franchisor or its associate, as the case may be,

(a) no later than sixty days after receiving the disclosure document, or

(b) no later than two years after the franchisee is granted the franchise, whichever occurs first.⁷⁸

In Ontario, Manitoba, PEI, and New Brunswick, a franchisee may rescind the franchise agreement, without penalty or obligation:

(a) no later than sixty days after receiving the disclosure document, if the franchisor failed to provide the disclosure document or statement of material change within the time required by the applicable statute, or if the contents of the disclosure document did not meet the requirements of the disclosure section of the applicable statute;⁷⁹ or

(b) no later than two years after entering into the franchise agreement if the franchisor never provided the disclosure document.⁸⁰

B. ERROR IN TIMING OF DELIVERY OF FDD NOT FATAL

In *4287975 Canada Inc. v. Imvescor Restaurants Inc.*, the franchisee sought to rescind a franchise agreement just shy of two years after it entered into the franchise agreement on the grounds that disclosure was late, the franchisee having paid a deposit two months prior to receiving an FDD.⁸¹ The franchisee signed the franchise agreement about six months after receiving the FDD.⁸²

The Court of Appeal for Ontario upheld the lower court's ruling denying the franchisee's rescission claim.⁸³ It held that, as there was disclosure in that case, the franchisee could not seek to rescind the franchise agreement within the two-year rescission period.⁸⁴ The Court held that if the franchisee wanted to rescind its franchise agreement it had only sixty days from the date of receipt of the FDD to do so (even though it did not sign a franchise agreement for some six months after receiving the disclosure document).⁸⁵ How could a franchisee rescind an agreement that it had not yet entered into? Was it just to require it to rescind within sixty days of receipt of the FDD in such circumstances? The Court of Appeal answered these questions by holding that rescission within the two-year period was reserved for cases where there was no disclosure or disclosure that was so deficient that it did not amount to disclosure and that the

78. Alberta Statute, s. 13.

79. Manitoba Statute s. 6(1); New Brunswick Statute s. 6(1); Ontario Statute s. 6(1); PEI Statute s. 6(1).

80. Manitoba Statute s. 6(2); New Brunswick Statute s. 6(2); Ontario Statute s. 6(2); PEI Statute s. 6(2).

81. *4287975 Canada Inc. v. Imvescor Restaurants Inc.*, [2009] O.J. No. 1508, para. 3 (Can. Ont. C.A.).

82. *Id.*

83. *Id.* para. 12.

84. *Id.*

85. *Id.* para. 26.

shorter sixty-day rescission period was reserved for situations where the FDD did not meet the timing and/or content requirements of the statute.⁸⁶

The Court of Appeal held that its ruling did not result in an injustice to the franchisee because “the franchisee has sufficient time—at least [sixty] days—to make an informed decision as to whether or not to enter into the franchise agreement.”⁸⁷

C. ERROR IN METHOD OF DELIVERY OF FDD NOT FATAL

The decision in the *Imvescor* case was followed by Mr. Justice Belobaba in *Vijh v. Mediterranean Franchise Inc.*⁸⁸ There, the only alleged deficiency with the FDD was its method of delivery. The FDD was delivered by e-mail, a method not permitted by the Ontario statute.⁸⁹ The court held that where the FDD was complete and only the method of delivery was incorrect, the franchisee did not have two years within which to rescind the franchise agreement.⁹⁰

Following the Court of Appeal’s ruling in the *Imvescor* case, Justice Belobaba wrote 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.’”⁹¹

D. FATAL DISCLOSURE ERRORS

In *Sovereignty Investment Holdings, Inc. v. 9127-6907 Quebec Inc.*, Mr. Justice Wilton-Siegel of the Ontario Superior Court of Justice held that there were at least four deficiencies in the FDD provided by the franchisor to Sovereignty, each of which, on its own, was “fatal to 9187’s assertion that the Franchisor complied with the requirement of the [Ontario] Act to deliver a ‘disclosure document’”:⁹²

- (a) The failure to provide disclosure in a single document at one time;

86. *Id.* paras. 27, 32.

87. *Id.* para. 39.

88. *Vijh et al. v. Mediterranean Franchise Inc. et al.*, [2012] O.J. No. 3119 (Can. Ont. Sup. Ct. J.).

89. *Id.* para. 3. At present, only personal delivery or registered mail are permitted methods of delivery in Ontario, PEI and NB. Ontario Statute, s. 5(2); PEI Statute, s. 5(2); New Brunswick Statute, s. 5(2). Manitoba also permits delivery by fax. Manitoba Statute, s. 5(4). The Alberta statute is silent on the method of delivery. It simply provides that “[a] franchisor must give every prospective franchisee a copy of the franchisor’s disclosure document.” Alberta Statute, s. 4(1).

90. *Vijh*, [2012] O.J. No. 3119, paras. 5–7.

91. *Id.* para. 7.

92. *Sovereignty Inv. Holdings, Inc. v. 9127-6907 Que. Inc.*, [2008] O.J. No. 4450, paras. 15–19 (Can. Ont. Sup. Ct. J.). These deficiencies were described as sufficiently material so as not to comply with the substantive provisions of the Act. This case also stands for the proposition that an assignee of a franchise agreement accepts both the benefits and obligations of the agreement and is responsible for rescission claims where it is held that the franchisor/assignor breached its disclosure obligations.

- (b) The failure to provide the franchisor's financial statements, as prescribed;
- (c) The failure to include a statement specifying the basis for the earnings projections (where such projections are provided); or
- (d) The absence of a signed and dated certificate.

The following are further examples of where the courts have granted a rescission remedy for the failure to disclose information that was material and that ought to have been disclosed:

- (a) The failure to provide an FDD from the company that entered into the franchise agreement as "franchisor";⁹³
- (b) The failure to disclose the location where information was available for inspection to substantiate financial projections;⁹⁴
- (c) The failure to have a certificate signed by the correct number of officers and directors;⁹⁵
- (d) "[T]he absence of notice of a pending law suit against the franchisor by one of its franchisees;"⁹⁶
- (e) "[T]he absence of a copy of the existing Offer to Lease . . . [when] the final Lease had not yet been executed when the disclosure document was given to the franchisee" candidate;⁹⁷
- (f) "[T]he lawyer stipulated on the disclosure document as being the person authorized to receive service of process in Canada on behalf of the franchisor was in fact not so authorized and declined service of litigation documents;"⁹⁸
- (g) The failure to include the head lease, where it exists;⁹⁹
- (h) Financial statements were not prepared to the correct standard of reporting required by regulation;¹⁰⁰
- (i) Information about the advertising fund, including "the percentage of the fund spent on national or local advertising campaigns preceding the date of the disclosure document; . . . the percentage of the fund retained by the franchisor; . . . the projected amount of the contribution, a projection of the percentage of the fund to be spent on national or local advertising campaigns for the current fiscal year . . . [or a] projection of the percentage of the fund to be retained by the franchisor . . . [and] whether reports on advertising activities financed by the fund would be made available to the

93. *Apblouin Imps. Ltd. v Global Diaper Servs. Inc.*, [2013] O.J. No. 1968, para. 27 (Can. Ont. Sup. Ct. J.).

94. *Id.* paras. 31–32.

95. *Id.* para. 44; 1448244 *Alta. Inc. v. Asian Concepts Franchising Corp.*, [2013] A.J. No. 350, para. 23 (Can. Alta. Q.B.).

96. 6862829 *Can. Ltd. v. Dollar It Ltd.*, [2008] O.J. No. 4687, para. 27(c) (Can. Ont. Sup. Ct. J.), *rev'd*, [2010] O.J. No. 214 (Can. Ont. C.A.) (reversed with respect to the finding that there was no liability on the part of franchisor's associates).

97. *Id.* para. 27(d).

98. *Id.* para. 27(e).

99. 2189205 *Ont. Inc. v. Springdale Pizza Depot Ltd.*, [2010] O.J. No. 3071, para. 16 (Can. Ont. Sup. Ct. J.), *appeal dismissed*, [2011] O.J. No. 2821 (Can. Ont. C.A.); *Melnichuk v. Blitz Ltd.*, [2010] O.J. No. 306, paras. 11, 23 (Can. Ont. Sup. Ct. J.).

100. *Melnichuk*, [2010] O.J. No. 306, para. 23.

franchisees;”¹⁰¹

- (j) A description of the exclusive territory to be granted to the franchisee;¹⁰²
- (k) A policy on the proximity between franchisees, where such a policy exists;¹⁰³
- (l) A description of the franchisor’s policy, if any, regarding volume rebates, and whether or not the franchisor or the franchisor’s associate receives a rebate, commission, payment or other benefit as result of purchases of goods and services by a franchisee and, if so, whether rebates, commissions, payments or other benefits are shared with franchisees, either directly or indirectly;¹⁰⁴
- (m) A copy of an indemnity agreement to be signed by the franchisee;¹⁰⁵
- (n) A copy of a General Security Agreement to be signed by the franchisee;¹⁰⁶ and
- (o) The failure to accurately summarize a provision of the franchise agreement, for example the length of time during which competition is to be restrained following the expiry or termination of the franchise agreement.¹⁰⁷

E. WITHOUT PENALTY OR OBLIGATION

Where a franchisee rescinds the franchise agreement, it rescinds “without penalty or obligation.”¹⁰⁸ It has no further obligation to perform the agreement or to make payments due and owing to the franchisor under the agreement. If such payments were made, they would only add to the amount that the franchisee would seek to recover from the franchisee as

101. 6792341 Canada Inc. v. Dollar It Ltd., [2009] O.J. No. 1881, para. 49 (Can. Ont. C.A.).

102. *Id.* para. 52; *Melnychuk*, [2010] O.J. No. 306, para. 23.

103. 679 *Dollar It*, [2009] O.J. No. 1881, para. 62.

104. *Id.* para. 65.

105. *Melnychuk*, [2010] O.J. No. 306, para. 23.

106. *Id.*

107. *Mapleleaf Franchise Concepts, Inc. v Nassus Frameworks Ltd.*, [2011] A.J. No. 1034, paras. 2, 20 (Can. Alta. Q.B.).

The fact is that while the Plaintiff was not required to make a summary of what the various portions of the agreement contained, if it chose to summarize those provisions, it must summarize them accurately. There is a mistake made with respect to the reference to three kilometres as opposed to ten kilometres. There is an omission with respect to the agreement containing a prohibition from carrying on business at the same location and a radius of ten kilometres from that location for a period of two years upon termination of the franchise. The summary contained in the disclosure document is not correct. It was, by definition, a misrepresentation. In my view, it constituted a material fact that would reasonably be expected to have significant effect upon the value or price of the franchise or the decision to purchase it.

Id.

108. 1490664 *Ont. Ltd. v. Dig This Garden Retailers Ltd.*, [2005] 256 D.L.R. 4th 451, para. 28 (Can. Ont. C.A.).

part of its rescission claim.¹⁰⁹

Often, it takes time for the franchisee to wind down its operations, to negotiate its way out of a lease, or to sell off remaining inventory (where the franchisor has refused to repurchase it). The court has held that it is reasonable for franchisees to take these steps and that by continuing to carry on business the franchisee has not affirmed the franchise agreement.¹¹⁰ The moment the franchisee delivers a notice of rescission there is “no longer any contract in existence capable of affirmation.”¹¹¹

F. FRANCHISOR’S OBLIGATION ON RESCISSION

Under the Ontario, PEI, New Brunswick, and Manitoba statutes, within sixty days of delivery of a valid notice of rescission, a “franchisor or franchisor’s associate, as the case may be,” is required to:

- (a) refund to the franchisee any money received from or on behalf of the franchisee, other than money for inventory, supplies or equipment;
- (b) purchase from the franchisee any inventory that the franchisee had purchased pursuant to the franchise agreement and remaining at the effective date of rescission, at a price equal to the purchase price paid by the franchisee;
- (c) purchase from the franchisee any supplies and equipment that the franchisee had purchased pursuant to the franchise agreement, at a price equal to the purchase price paid by the franchisee; and
- (d) compensate the franchisee for any losses that the franchisee incurred in acquiring, setting up and operating the franchise, less the amounts set out in clauses (a) to (c).¹¹²

The obligation to compensate a franchisee on rescission of the franchise agreement includes the obligation to repay, among other things, initial franchise fees,¹¹³ advertising and service fees,¹¹⁴ royalties, the amount paid for the business,¹¹⁵ and rent.¹¹⁶ The franchisee is entitled to recover these amounts even if it did not suffer a loss in the acquiring, setting up, and operating the franchise.¹¹⁷

109. *Id.* para. 38.

110. *Id.* para. 39.

111. *Id.* para. 28.

112. Ontario Statute, s. 6(6); PEI Statute, s. 6(6); New Brunswick Statute, s. 6(6); Manitoba Statute, s. 6(5).

113. *Melnychuk v. Blitz Ltd.*, [2010] O.J. No. 306, para. 25 (Can. Ont. Sup. Ct. J.); *Payne Envtl. Inc. v. Lord and Partners Ltd.*, [2006] O.J. No. 273 (Can. Ont. Sup. Ct. J.); *Rocha v. Panda Flowers (1999) Ltd.*, [2005] A.J. No. 1098 (Can. Alta. Q.B.).

114. *1159607 Ont. Inc. v. Country Style Food Servs. Inc.*, [2012] O.J. No. 1241, paras. 114–18 (Can. Ont. Sup. Ct. J.).

115. *Id.* para. 118; *MAA Diners Inc. v. 3 for 1 Pizza & Wings (Canada) Inc.*, [2003] O.J. No. 430 para. 33 (Can. Ont. Sup. Ct. J.); *Sovereignty Inv. Holdings, Inc. v. 9127-6907 Que. Inc.*, [2008] O.J. No. 4450, paras. 5, 66 (Can. Ont. Sup. Ct. J.).

116. *Melnychuk*, [2010] O.J. No. 306, para. 25.

117. *Payne*, [2006] O.J. No. 273, para. 14; *2189205 Ont. Inc. v. Springdale Pizza Depot Ltd.*, [2013] O.J. No. 1080, paras. 5, 30 (Can. Ont. Sup. Ct. J.) (on motion to op-

Under the Alberta statute, the term “cancellation” is used in place of “rescission.”¹¹⁸ The franchisor or its associate, as the case may be, must, within thirty days after receiving a notice of cancellation, “compensate the franchisee for any net losses that the franchisee has incurred in acquiring, setting up and operating the franchised business.”¹¹⁹

VI. DAMAGES FOR MISREPRESENTATION OR A FAILURE TO COMPLY WITH THE DISCLOSURE OBLIGATION

A franchisee has a right of action in damages where it suffered a loss because of a misrepresentation contained in a disclosure document.¹²⁰

In Ontario, PEI, New Brunswick, and Manitoba, a franchisee also has a right of action in damages if it suffers a loss as a result of the franchisor’s failure to comply, in any way, with the disclosure section of the applicable statute.¹²¹

These damages for misrepresentation or failure to comply with the disclosure obligation are in addition to the compensation available to franchisees that have rescinded or cancelled their franchise agreements.¹²² If a franchisee purports to rescind its franchise agreement and the franchisor refuses to repurchase the franchisees’ supplies, equipment, and inventory or to pay the compensation required to be paid under the statutes, then the franchisee can seek damages for the failure on the part of the franchisor to comply, in any way, with its obligation to disclose.¹²³ These damages may be equal to the amounts that the franchisee sought to be paid when it rescinded its franchise agreement or in addition to those amounts.¹²⁴ Implicit in the language of this damages section of the statutes is the need to prove a causal connection between the loss suffered and the misrepresentation or failure to disclose, unlike the rescission section which provides the franchisee with an automatic right to compensation where a valid notice of rescission is delivered.

The statutes define “‘misrepresentation’ [as including]:

- (a) An untrue statement of a material fact, or
- (b) An omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of

pose confirmation of a reference as to damages); *aff’d*, [2013] O.J. No. 4664 (Can. Ont. C.A.).

118. Alberta Statute, ss. 9–19.

119. Alberta Statute, s. 14(2); 1448244 Alta. Inc. v. Asian Concepts Franchising Corp., [2013] A.J. No. 350, para. 1 (Can. Alta. Q.B.).

120. Alberta Statute, s. 9(1); Manitoba Statute, s. 7(1); New Brunswick Statute, s. 7(1); Ontario Statute, s. 7(1); PEI Statute, s. 7(1).

121. Manitoba Statute, s. 7(1); New Brunswick Statute, s. 7(1); Ontario Statute, s. 7(1); PEI Statute, s. 7(1).

122. 1490664 Ont. Ltd. v. Dig This Garden Retailers Ltd., [2005] 256 D.L.R. 4th 451, paras. 36–40 (Can. Ont. C.A.).

123. *Id.* paras. 38–39.

124. 6862829 Can. Ltd. v. Dollar It Ltd., [2010] O.J. No. 214, para. 7 (Can. Ont. C.A.).

the circumstances in which it was made.”¹²⁵

“If a disclosure document or statement of material change contains a misrepresentation, a franchisee who acquired a franchise to which the disclosure document or statement of material change relates [is] deemed to have relied on the misrepresentation.”¹²⁶

“A person is not liable in an action . . . for misrepresentation if the person proves that the franchisee acquired the franchise with knowledge of the misrepresentation”¹²⁷ or, in the case of the provinces other than Alberta, with knowledge of the material change.¹²⁸

VII. JOINT AND SEVERAL LIABILITY

The damages described in the previous section of this paper may be sought against the franchisor¹²⁹ and anyone who signed the disclosure document.¹³⁰ In Ontario, PEI, New Brunswick, and Manitoba, such a claim can also be made against a “franchisor’s associate” or “franchisor’s broker”¹³¹ and, in the case of Ontario only, against a “franchisor’s agent” as well.¹³² The franchisor, franchisor’s associate, franchisor’s broker, and franchisor’s agent, as the case may be, are jointly and severally liable for any such damages.¹³³

A “franchisor’s associate” means a person who: (a) directly or indirectly, controls the franchisor and (b)(i) was involved in the grant of the franchise “by being involved in reviewing or approving the grant of the franchise” or “by making representations to the prospective franchisee on behalf of the franchisor for the purpose of granting the franchise, marketing the franchise or otherwise offering to grant the franchise” or (ii) “exercises significant operational control over the franchisee and to whom the franchisee has a continuing financial obligation in respect of the

125. Alberta Statute, s. 1(1)(q); Manitoba Statute, s. 1(1); New Brunswick Statute, s. 1(1); Ontario Statute, s. 1(1); PEI Statute, s. 1(1)(n).

126. Alberta Statute, s. 9(2); Manitoba Statute, s. 7(2); New Brunswick Statute, s. 7(2); Ontario Statute, s. 7(2); PEI Statute, s. 7(2).

127. Alberta Statute, s. 10(1); Manitoba Statute, s. 7(4); New Brunswick Statute, s. 7(4); Ontario Statute, s. 7(4); PEI Statute, s. 7(4).

128. Manitoba Statute, s. 7(4); New Brunswick Statute, s. 7(4); Ontario Statute, s. 7(4); PEI Statute, s. 7(4).

129. Alberta Statute, s. 9(1)(a); Manitoba Statute, s. 7(1)(a); New Brunswick Statute, s. 7(1)(a); Ontario Statute, s. 7(1)(a); PEI Statute, s. 7(1)(a).

130. Alberta Statute, s. 9(1)(b); Manitoba Statute, s. 7(1)(d); New Brunswick Statute, s. 7(1)(d); Ontario Statute, s. 7(1)(e); PEI Statute, s. 7(1)(d).

131. Manitoba Statute, s. 7(1)(b)–(c); New Brunswick Statute, s. 7(1)(b)–(c); Ontario Statute, s. 7(1)(c)–(d); PEI Statute, s. 7(1)(b)–(c). A “franchisor’s broker” is defined in these statutes as “a person other than the franchisor, franchisor’s associate, franchisor’s agent or franchisee, who grants, markets or otherwise offers to grant a franchise, or who arranges for the grant of a franchise.” *Id.*

132. Ontario Statute, s. 7(1)(b). In Ontario, “franchisor’s agent” is defined as “a sales agent of the franchisor who is engaged by the franchisor’s broker and who is directly involved in the granting of a franchise.” Arthur Wishart Act (Franchise Disclosure), 2000, O. Reg. 581/00, s. 0.1.

133. Alberta Statute, s. 12; Manitoba Statute, s. 8(1); New Brunswick Statute, s. 9(1); Ontario Statute, s. 8(1); PEI Statute, s. 9(1).

franchise.”¹³⁴ In the *Dig This Garden* case, the individual defendants argued that neither of them “controlled” the franchisor because they owned the shares of the franchisor company equally.¹³⁵ The court rejected this argument as did a higher court, on appeal:

In my view, both Mr. Harper and Ms. Burton meet the statutory definition of “franchisor’s associate.” First, they each admit to holding 50 per cent of the shares of Dig This Garden, they are both officers and directors of Dig This Garden, and both were directly involved in granting the franchise to the respondents by making representations to the respondents on behalf of Dig This Garden. On these facts, it was open to the trial judge to find that Mr. Harper and Ms. Burton directly controlled Dig This Garden. Together they held 100 per cent of its shares and ran all aspects of the company. In such circumstances it would be difficult to come to any other reasonable conclusion.¹³⁶

In *MBCO Summerhill Inc. v MBCO Associates Ontario Inc.*,¹³⁷ the Court of Appeal for Ontario held that an individual who owned “50 [per cent] of the shares of the franchisor, ran the day-to-day business of the franchisor in Ontario, acted for the franchisor in negotiating the franchise agreement and executing the agreement on behalf of the franchisor” was a “franchisor’s associate.”¹³⁸

The provincial legislatures that enacted this legislation, by imposing civil liability for breaches of the statutes on individuals who control the franchisor, who sign the FDD, or who are involved in the marketing and granting of franchises, were bringing home a message to these individuals that they have a responsibility to ensure that the disclosure requirements of the legislation are fulfilled and that the preparation, certification, and delivery of an FDD is not a mere formality or a duty to be delegated without oversight.

As the Court of Appeal for Alberta wrote:

In a large organization, information does not always reach every person it should. Where factual statements come (or should come) to outsiders from a number of people in the organization, sometimes there are omissions or misstatements. Often no one person in the organization is insincere or even careless; but the net result is misstatements or non-disclosures by the organization. How can one prevent that? By legislation requiring that two (or more) people personally investigate and then certify correctness and completeness. Requiring that they be directors or officers, ensures that they have

134. Manitoba Statute, s. 1(1); New Brunswick Statute, s. 1(1); Ontario Statute, s. 1(1); PEI Statute, s. 1(1).

135. 1490664 Ont. Ltd. v. Dig This Garden Retailers Ltd., [2005] 256 D.L.R. 4th 451, para. 27 (Can. Ont. C.A.).

136. 1490664 Ont. Ltd. v. Dig This Garden Retailers Ltd., [2005] 256 D.L.R. 4th 451, para. 43 (Can. Ont. C.A.) (quoting MacFarland, J.A.).

137. *MBCO Summerhill Inc. v. MBCO Assocs. Ont. Inc.*, [2011] O.J. No. 1289 (Can. Ont. C.A.).

138. *Id.* para. 2.

enough legal power to get access to all information and enforce compliance with their instructions.¹³⁹

It is incumbent on the officers and directors of franchisors to ensure that the FDD is prepared and delivered in accordance with the legislation and that proper receipts are maintained that set out what was delivered to each franchisee candidate and when in order to enable the franchisor to be in a position to be able to respond to a claim for rescission and/or damages. The franchisor has the onus of demonstrating that a proper FDD was delivered to and received by the franchisee.¹⁴⁰

VIII. GOOD FAITH AND FAIR DEALING

A. STATUTORY PROVISIONS

The franchise statutes impose on each party to a franchise agreement a duty of fair dealing in its performance and enforcement.¹⁴¹

The statutes in Ontario, Manitoba, PEI, and New Brunswick provide that "the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards."¹⁴²

In Manitoba, PEI, and New Brunswick, this duty is expressly extended to include "the exercise of a right under the agreement."¹⁴³

A party to a franchise agreement in Ontario, Manitoba, PEI, or New Brunswick "has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing."¹⁴⁴ There is no such statutory right in Alberta, though a party to a franchise agreement there or anywhere else in Canada is not prevented from commencing a proceeding at common law for breach of the implied contractual duty of good faith.

B. WHAT DOES THE DUTY ENTAIL?

The duty of fair dealing arises from the agreement between the parties.¹⁴⁵

139. *Hi Hotel Ltd. P'ship v. Holiday Hospitality Franchising Inc.*, [2008] A.J. No. 892, para. 77 (Can. Alta. C.A.).

140. *MAA Diners Inc. v. 3 for 1 Pizza & Wings (Canada) Inc.*, [2003] O.J. No. 430 paras. 33-34 (Can. Ont. Sup. Ct. J.) *aff'd*, [2004] O.J. No. 297 (Can. Ont. C.A.). ("Non-compliance with the disclosure requirement under the Act exposes franchisors to significant consequences, including rescission of franchise agreements. One would therefore expect franchisors to be very careful to keep records of their disclosure documentation, and to be able to produce these records when called upon to do so, such as in an action contesting a notice of rescission under the Act.") (Speigel, J.) (The author represented the applicant in this case).

141. Alberta Statute, s. 7; Manitoba Statute, s. 3; New Brunswick Statute, s. 3; Ontario Statute, s. 3; PEI Statute, s. 3.

142. Manitoba Statute, s. 3(3); New Brunswick Statute, s. 3(3); Ontario Statute, s. 3(3); PEI Statute, s. 3(3).

143. Manitoba Statute, s. 3(3); New Brunswick Statute, s. 3(3); PEI Statute, s. 3(1).

144. Manitoba Statute, s. 3(2); New Brunswick Statute, s. 3(2); Ontario Statute, s. 3(2); PEI Statute, s. 3(2).

145. *Personal Serv. Coffee Corp. v. Beer (c.o.b. Elite Coffee Newcastle)*, [2005] O.J. No. 3043, para. 37 (Can. Ont. Sup. Ct. J.).

Canadian courts have not recognized a stand-alone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from those provisions. The implication of a duty of good faith has not gone so far as to create new, unbargained-for rights and obligations. Nor has it been used to alter the express terms of the contract reached by the parties. Rather, courts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties, or as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into.¹⁴⁶

The duty of good faith requires that a party to a contract “act fairly and take all reasonable steps to achieve the objectives of the agreement”¹⁴⁷ It cannot act in such a way as to undermine or defeat the objectives of the agreement.¹⁴⁸

The duty of good faith permits a party to act self-interestedly, but in doing so they must also have regard to the interests of the other party.¹⁴⁹ “Good faith is 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.”¹⁵⁰ Whenever a contract grants discretionary powers to a party, that discretion must be exercised in good faith.¹⁵¹ A discretion under a contract must be exercised reasonably, fairly, and with regard to how the other party’s interests are affected.¹⁵²

The statutory duty of fair dealing simply codified the duty of good faith at common law.¹⁵³ “Fair dealing” was not a concept that existed at common law.¹⁵⁴

Because the duty of fair dealing arises from the franchise agreement, a party that conducts itself strictly in accordance with the agreement should not face a claim for breach of the duty of fair dealing. But the duty addresses an issue that is different from a breach of a contractual term. It addresses whether the term was performed or enforced in a manner that was honest, reasonable, fair, and in good faith.

146. *Transamerica Life Can. Inc. v ING Can. Inc.*, [2003] O.J. No. 4656, para. 53 (Can. Ont. C.A.).

147. *CivicLife.com Inc. v. Canada (Att’y Gen.)*, [2006] O.J. No. 2474, para. 24 (Can. Ont. C.A.).

148. *Id.* para. 48.

149. *1117304 Ont. Inc. v. Cara Operations Ltd.*, [2008] O.J. No. 4370, para. 68 (Can. Ont. Sup. Ct. J.).

150. *Id.*

151. *CivicLife.com*, [2006] O.J. No. 2474, paras. 49–50.

152. *Shelanu Inc. v. Print Three Franchising Corp.*, [2003] O.J. No. 1919, para. 96 (Can. Ont. C.A.) (citing J.D. McCamus, *The Duty of Good Faith Contractual Performance*, N.J.I.: Civil Law Seminar, Contract Law: From Form to Remedies, Osgoode Hall Law School (2000)).

153. *Machias v. Mr. Submarine Ltd.*, [2002] O.J. No. 1261, paras. 110, 113 (Can. Ont. Sup. Ct. J.).

154. *See Amaren Corp. v. Cara Operations Ltd.*, [1999] O.J. No. 365, para. 7 (Can. Ont. Gen. Div.).

C. EXAMPLES OF BAD FAITH CONDUCT

A franchisor was held to have acted in breach of the duty of fair dealing when it deliberately concealed a fundamental piece of information from the franchisee regarding the length of the term of the lease that would have had an impact on the franchisee's decision to renew the franchise agreement.¹⁵⁵

Similarly, a franchisor was held to have breached the duty of fair dealing when it "actively misled" the franchisee about an opportunity to renew a lease at a mall location.¹⁵⁶ The franchisor deliberately kept the franchisee in the dark about its intention to renew the lease albeit at another location within the same mall and gave the opportunity to operate that business to someone else when it had a contractual obligation to give it to the plaintiff.¹⁵⁷

D. EXAMPLES OF GOOD FAITH CONDUCT

The refusal to renew or extend an agreement, where there was no contractual obligation to do so, has been held not to be a breach of the duty of good faith.¹⁵⁸

A class proceeding commenced by franchisees of the Tim Hortons donut chain¹⁵⁹ was dismissed on a motion for summary judgment on the grounds that the franchisor's changes to the franchise system were permitted by the franchise agreement and carried out in good faith.¹⁶⁰

The franchisees had complained that Tim Hortons' conversion from in-store baking to a central baking/distribution system called "Always Fresh," where goods were par-baked to be baked to completion in-store,

155. 1159607 Ont. Inc. v. Country Style Food Servs. Inc., [2012] O.J. No. 1241, paras. 107 (Can. Ont. Sup. Ct. J.).

156. Salah v. Timothy's Coffees of the World, Inc., [2010] O.J. No. 385, para. 122 (Can. Ont. Sup. Ct. J.), *aff'd*, [2010] O.J. No. 4336 (Can. Ont. C.A.).

157. *Id.*

158. TDL Group Ltd. v. 1060284 Ont. Ltd., [2000] O.J. No. 1239, para. 17 (Can. Ont. Sup. Ct. J.); 530888 Ont. Ltd. v. Sobeys Inc., [2001] O.J. No. 723, para. 10 (Can. Ont. Sup. Ct. J.). This issue is currently under consideration by the Supreme Court of Canada which recently granted leave to appeal from a decision of the Court of Appeal for Alberta. Bhasin v. Hrynew, [2013] A.J. No. 639, paras. 32-35, *app. for leave granted*, [2013] S.C.C.A. No. 242. In the *Bhasin* case, the Court of Appeal ruled that the corporate defendant did not have to act in good faith in exercising a right to give notice to end a contract. *Id.* para. 31. The contract provided for an initial term of three years that automatically renewed for successive three year periods, unless either party notified the other at least six months prior to the end of the current term that it wanted to end the agreement. *Id.* para. 11. The Court refused to imply a term in the agreement that a party seeking to terminate it must have good reason for doing so. *Id.* para. 32. As the Court wrote: "[t]he parties did not intend or presume a perpetual contract, as they contracted that either party could unilaterally cause it to expire on any third anniversary." *Id.*

159. Tim Hortons is an iconic brand with over 3,000 locations in Canada. *About Us*, TIM HORTONS, <http://www.timhortons.com/ca/en/about/index.html> (last visited Apr. 13, 2014).

160. Fairview Donut Inc. v. TDL Group Corp., [2012] O.J. No. 834, paras. 366, 516, 527 (Can. Ont. Sup. Ct. J.), *aff'd*, [2012] O.J. No. 5775 (Can. Ont. C.A.), *app. for leave to appeal dismissed*, [2013] S.C.C.A. No. 47(Can.).

increased costs to franchisees.¹⁶¹ They also complained that the cost of goods used to prepare the Lunch Menu were too high with the result that they only broke even or lost money on the Lunch Menu.¹⁶²

The plaintiffs' suggestion that every new concept introduced by Tim Hortons had to be profitable was held to be wrong, as "[t]he franchisor is entitled to consider the profitability and prosperity of this system as a whole."¹⁶³

In order to keep the system healthy and competitive, the franchisor must be permitted to introduce new products, new methods of production or sale, new techniques or systems during the life of a franchise agreement. The franchisees have an expectation that this will be done. The franchise agreement contemplates this and allows this. It is done for the benefit of both the franchisor and the franchisee. It would not be commercially reasonable to require that the franchisor can only implement system-wide changes over the life of a particular franchise agreement if the proposed change is demonstrated to be an improvement that benefits that particular franchisee. Nor would it be commercially reasonable to require the franchisor to demonstrate that every such change will be a financial benefit for every franchisee.¹⁶⁴

The Court held that the Always Fresh Conversion and the Lunch Menu were operational changes permitted by the franchise agreement. They neither took away legal rights nor imposed new legal obligations.¹⁶⁵ Tim Hortons was not limited to making changes that only benefited the franchisees financially. The Court further concluded that it was commercially reasonable for Tim Hortons to have implemented the Always Fresh Conversion and the Lunch Menu and that these were decisions that Tim Hortons was entitled to make, having regard to its own interests and to the interests of its franchisees.¹⁶⁶

Franchisors generally include provisions in their franchise agreements that allow them to make system or operational changes in order to keep pace with changing consumer demands and competitive forces. Tim Hortons was no exception. Its franchise agreement and operations manual permitted it to make the changes it made to its system. Tim Hortons did not need to demonstrate that the changes it proposed would be necessarily profitable to its franchisees or that the proposed improvements would benefit a particular franchisee. It was not for franchisees or their experts to tell Tim Hortons how it should manage its franchise system. The evidence demonstrated that the franchisor had taken the interests of its franchisees into account in making these system changes.

161. *Id.* para. 425.

162. *Id.* para. 515.

163. *Id.* para. 425.

164. *Id.* 427.

165. *Id.* para. 435.

166. *Id.* para. 427-29.

E. DAMAGES FOR BREACH OF THE DUTY OF FAIR DEALING

Damages for breach of the duty of fair dealing need not be compensatory. The courts in Ontario have awarded general damages for breach of this duty.¹⁶⁷

The purpose of the statute is clear: it is intended to redress the imbalance of power as between franchisor and franchisee; it is also intended to provide a remedy for abuses stemming from this imbalance. 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.

The right of action provided under s. 3(2) of the [Ontario] Act against a party that has breached the duty of good faith and fair dealing is meant to ensure that franchisors observe their obligations in dealing with franchisees. In that regard, the conduct that the trial judge found egregious in the present case is precisely the mischief that this legislation was enacted to remedy.¹⁶⁸

A trier of fact may take into account the bad faith conduct of one party in assessing (and reducing) damages for the breach of this duty by the party opposite.¹⁶⁹

IX. RIGHT TO ASSOCIATE

The Ontario, Manitoba, PEI, and New Brunswick statutes protect the right of franchisees to associate with other franchisees and to enable them to form or join an organization of franchisees.¹⁷⁰

Though the language of the provincial statutes differ somewhat, all of them prohibit a franchisor or its associate from interfering with, prohibiting, or restricting a franchisee from forming or joining an organization of franchisees, from associating with other franchisees,¹⁷¹ or from penalizing a franchisee for exercising its right to associate.¹⁷²

The Ontario, Manitoba, PEI, and New Brunswick statutes provide that “any provision in a franchise agreement or other agreement relating to a franchise which purports to interfere with, prohibit, or restrict a fran-

167. *Salah v. Timothy's Coffees of the World, Inc.*, [2010] O.J. No. 385, para. 160 (Can. Ont. Sup. Ct. J.) (“\$50,000 for breach of the duty of good faith and mental distress”); 1159607 Ont. Inc. v. Country Style Food Servs. Inc., [2012] O.J. No. 1241, para. 131 (Can. Ont. Sup. Ct. J.) (\$25,000).

168. *Salah*, [2010] O.J. No. 385, paras. 26–27.

169. *Healy v. Canadian Tire Corp.*, [2012] O.J. No. 263, para. 63 (Can. Ont. Sup. Ct. J.) (affirming an arbitral award).

170. Manitoba Statute, s. 4(1); New Brunswick Statute, s. 4(1); Ontario Statute, s. 4(1); PEI Statute, s. 4(1).

171. Alberta Statute, s. 8(1); Manitoba Statute, s. 4(2); New Brunswick Statute, s. 4(2); Ontario Statute, s. 4(2); PEI Statute, s. 4(2) (all except Alberta add the words “shall not” or “must not” “interfere with”).

172. Alberta Statute, s. 8(2); Manitoba Statute, s. 4(3); New Brunswick Statute, s. 4(3); Ontario Statute, s. 4(3); PEI Statute, s. 4(3).

chisee from exercising any right under this section is void.”¹⁷³

In the *Midas* case, the same provision of the franchise agreement that required franchisees to release Midas on renewal or transfer of a franchise agreement, discussed above, was declared void to the extent that it interfered with the franchisees’ right to associate as members of a class proceeding. The court held that the right to associate encompassed the right to participate in a class proceeding and enforce their rights through collective action.¹⁷⁴

Requiring franchisees to provide Midas with releases on renewal or transfer of their franchise agreements would, over time, erode the class and prevent the franchisees from pursuing their statutory remedies.¹⁷⁵

If a franchisor or franchisor’s associate contravenes the sections of the statutes that protect the right to associate, a franchisee has a right of action for damages against the franchisor or franchisor’s associate, as the case may be, in Ontario, Manitoba, PEI, and New Brunswick, though there have been no decided cases that have considered such a claim.¹⁷⁶

173. Manitoba Statute, s. 4(4); New Brunswick Statute, s. 4(4); Ontario Statute, s. 4(4); PEI Statute, s. 4(4)

174. See 405341 Ontario Ltd. v. Midas Canada Inc., [2009] O.J. No. 4354, para. 17, 28 (Can. Ont. Sup. Ct. J.); 405341 Ontario Ltd. v. Midas Canada Inc., [2010] O.J. No. 2845, para. 39 (Can. Ont. C.A.).

175. Settlement of the Midas claim was approved by the Court on September 12, 2013. 405341 Ont. Ltd. v. Midas Can. Inc., [2013] O.J. No. 4107 (Can. Ont. Sup. Ct. J.).

176. Manitoba Statute, s. 4(5); New Brunswick Statute, s. 4(5); Ontario Statute, s. 4(5); PEI Statute, s. 4(5)

