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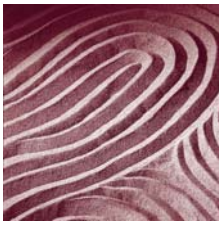

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Franchise Disclosure in Canada in 2007 and Beyond

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1. Introduction

The concept of franchising to distribute products and services has deservedly enjoyed rampant success and explosive growth in North America in the past twenty-five years. Franchising permits franchisors to distribute their wares or services in a rapid and significantly less capital and risk intensive fashion than more direct means might allow. Significantly, franchising as an avenue for distribution has partially germinated and closely followed the ascendancy of the "brand culture" that is so dominant in today's consumer society. Franchises are ubiquitous and between coffee, gasoline and food service, most adult members of North American society patronize franchised businesses daily.

The corollary of all of this franchise activity has been the advent of franchise disclosure laws, consumer protection styled legislation designed to level the bargaining position of franchisors to franchisees. While franchise disclosure legislation has been a fact of the Alberta landscape since as early as 1971, and in more modern form since 1995, Ontario franchisors and practitioners have only recently been required to navigate the minefields of disclosure legislation. Many franchisors who were late in complying with the legislation, or who wilfully ignored it did so to their peril as recent caselaw has shown[1]. Moreover, commercial lawyers slow to educate themselves could find themselves facing negligence suits for failing to advise franchisors of the dangers of non-disclosure and for neglecting to advise franchisees of their rights to disclosure and timely rescission.

The purpose of this paper is to provide a current in depth survey of disclosure laws in Canada, the principal elements of disclosure, the methods of providing proper disclosure and the remedies for failing to disclose. This discussion will also canvass the direction of regulatory reform in the Province of Ontario.

2. Background of Pre-Sale Disclosure Legislation

(a) United States

Franchise legislation saw its origin in the United States in response to growing abuses. California enacted the *California Franchise Investment Law* in 1970, followed in the mid 1970s by the enactment by many states of franchise relationship laws designed to curb abuses perpetrated by unscrupulous franchisors. The U.S. Federal Trade Commission ("**FTC**") adopted its Franchise Rule in 1979[2] (the "**FTC Rule**") which requires all U.S. franchisors to adopt minimum statutory pre-sale disclosure requirements as prescribed. Subsequent to the adoption of the FTC Rule, many states enacted their own forms of franchise specific legislation which met

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[1] See *1490664 v. Dig this Garden Retailers Ltd.*, [2004] O.J. NO. 3008 (S.C.J.), appeal dismissed [2005] O.J. No. 3040, (C.A.**);** *Personal Service Coffee Corp. v. Beer (c.o.b. Elite Coffee Newcastle)*, [2005] O.J. No. 3043 (C.A.)*; Bekah v. Three for One Pizza & Wings (Canada) Inc.*, 67 O.R. (3d) 305, 2003 CarswellOnt 5778 (S.C.J.); *1368714 Ontario Inc. v. Triple Pizza (Holdings) Inc.* (May 29, 2003), Dec. 02-CV-236784, 2003 CarswellOnt 1995 (S.C.J.); *MAA Diners Inc. v. 3 for 1 Pizza & Wings (Canada) Inc.*, [2003] O.J. No. 430 (S.C.J.).

[2] "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," took effect on October 21, 1979, and appears at 16 C.F.R. Part 436.

or exceeded the standards of the FTC Rule. In total there are fifteen states which have passed laws which specifically regulate the offer and sale of franchises, including California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Oregon, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin. At the outset, these states adopted a specific disclosure format known as the uniform franchise offering circular[3] ("**UFOC**"), which the FTC permitted franchisors to use instead of the FTC Rule disclosure in order to facilitate compliance with both state and federal requirements.

In 1993, the North American Securities Administrators Association ("**NASAA**") amended the UFOC Guidelines and the form of the UFOC. The FTC approved the use of the new Guidelines and UFOC in the same year. By the end of 1995, all states requiring registration of their UFOCs with the relevant state administrator had approved the use of the amended UFOC Guidelines for compliance with state disclosure requirements. The UFOC has become the standard format of disclosure document produced by U.S. franchisors in order to comply with the FTC Rule and state registration requirements. UFOCs used in many states often have addenda which outline the specific statutory requirements of individual states.

(b) Alberta

North of the 49th parallel, the Province of Alberta enacted the Alberta *Franchises Act*[4] in 1971 based upon California's prospectus style disclosure model. Alberta franchisors' disclosure documents were subject to the oversight and approval of the Alberta Securities Commission. The legislation required prospectus registration and annual renewals as well as the registration of the franchisor's salespersons.

Alberta's modern era of disclosure began on November 1, 1995 with the proclamation in 1995 of the *Franchises Act*[5] (with its regulations and as amended, the "**Alberta Act**"). This legislation obviated the cumbersome registration requirements of its predecessor but continued to require presale disclosure of information to prospective franchisees. The Alberta Act grants to franchisees the right to associate, imposes on each party to a franchise agreement a duty of fair dealing, and requires disclosure of "all material facts including material facts relating to the matters set out in Schedule 1" of the regulation. Schedule 1 lists the typical disclosure elements which will be discussed later in this paper, as will some of the salient differences between the Alberta and Ontario legislation. The current Alberta Franchise Regulation expires November 30, 2015 upon which it will be reviewed for relevancy and necessity[6].

(c) Ontario

In Ontario in the early 1970s, Arthur Wishart, then provincial Minister for Sault Ste. Marie and Minister of Consumer and Commercial Affairs, initiated the Grange Commission to investigate

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[3] The original UFOC was developed by the Midwestern Securities Commissioners Association in response to the need to harmonize various state disclosure requirements into one acceptable format.

[4] S.A. 1971, c.38.

[5] R.S.A. 1995 c.F-17.1.

[6] Franchises Regulation, Alberta Regulation 240/95, s.9, as amended.

the so-called "evils of franchising"[7]. The Grange Report proposed the implementation in Ontario of disclosure legislation modeled upon the securities laws based, prospectus-style disclosure systems of California and Alberta. The recommendations in the report were shelved and franchise legislation forgotten in Ontario until the emergence of Bill 33, the *Franchises Disclosure Act, 1999*, eventually enacted as the *Arthur Wishart Act* (*Franchise Disclosure), 2000* (herein, with its regulations, the "**Ontario Act**") whose disclosure obligations were proclaimed into force on January 31, 2001. The Ontario Act contains many similarities to the Alberta Act, including the right of association, the duty of fair dealing (expressed in terms of commercial reasonableness), and the obligations of franchisors to disclose material facts relating to the franchise opportunity. The disclosure requirements of the Ontario Act and its regulation (the "**Ontario Regulation**")[8] will be discussed in detail below.

(d) Prince Edward Island

The legislature of the Province of Prince Edward Island ("**PEI**") granted royal assent to Bill Number 43, the *Franchises Act*[9] on June 7, 2005 (the "**PEI Act**"). The Act and Regulations were approved on April 24, 2006 and came into force on July 1, 2006 excepting the disclosure provisions which come into force on January 1, 2007. The legislation, and in particular the disclosure obligations, follow the format of the Ontario Act while incorporating certain of the improvements set out in the *Uniform Franchises Act* as adopted in principle by the Uniform Law Conference of Canada in August of 2004. The improvements include the exclusion of distribution arrangements for the sale of goods and services at reasonable wholesale prices from the definition of "franchise" and the exclusion of confidentiality agreements and site selection arrangements from the definition of "franchise agreement". Certain additional refinements in the PEI Act include (i) the right to deliver disclosure documents electronically; (ii) the right to use another jurisdiction's disclosure document, such as a UFOC, with an addendum supplementing the specific requirements of the PEI Act (also known as a "wrap-around"); and (iii) the inclusion of a "substantial compliance" of disclosure obligations provision similar to Alberta's legislation.

While the PEI Act's disclosure requirements in many ways mirror those of Ontario, the discussion below will seek to point out the legislation's specific nuances.

(e) Quebec

Quebec has no franchise specific legislation. Article 1375 of Quebec's *Civil Code* requires that parties must act in good faith at the time of entering into an obligation and in the course of its performance and completion. This has been interpreted by some commentators[10] and the courts[11] to mean that the failure to disclose certain significant material information to a

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[7] *Hansard*, Legislative Assembly of Ontario, Subcomittee report of the Standing Committee on Regulations and Private Bills, April 19, 2000.

[8] Ontario Regulation 581/00, as amended.

[9] R.S.P.E.I. 1988, c. F-14.1.

[10] See Jones, Paul, "International Legal Developments Affecting Franchising", 4th Annual Franchise Law Conference, Ontario Bar Association, October 29, 2004.

prospective purchaser in the midst of pre-contractual negotiations can constitute an actionable failure of this duty.

In addition to the above, the *Civil Code* of Quebec provides special rules for "contracts of adhesion" which are contracts where the form is essentially settled and not subject to negotiation (i.e. franchise agreements). Some provisions of such a contract can be voided if they are drafted in a manner which might prejudice an unsophisticated contracting party. Personal guarantees in Quebec are also subject to special rules and contain specific requirements.

Finally, the Quebec *Charter of the French Language* imposes specific rules on businesses operating in Quebec. The rules govern whether business names, signs, posters, commercial advertising, etc. must be translated into French (in the Province of Quebec). Franchise agreements must be in French unless the parties agree in writing in the document that an English version may be used.

(f) NB

New Brunswick had proposed a new *Franchises Act*, Bill C-6, which passed first reading on December 7, 2005. Second Reading was expected to occur earlier this year as the Province's 55th legislature had resumed sitting on March 28, 2006. The legislature's Law Amendments Committee solicited public comments to the Bill until July 31, 2006, however the legislature dissolved in the fall of 2006 for elections and the opposition Liberals were victorious. The Bill then died on the order table, although it was supported by the former opposition, now the ruling party, and may be picked up by the new legislature although possibly embodied in a new Bill.

The proposed legislation of former Bill C-6 is similar to Ontario's *Arthur Wishart Act (Franchise Disclosure)*. Some interesting differences include the prescribed definition of "material fact" which includes information that would reasonably be expected to affect the price of the franchise or the decision to acquire the franchise. In addition, unlike the Ontario Act, the Bill excludes standard wholesale distribution arrangements from the definition of "franchise". The Bill also excludes confidentiality agreements from the definition of "franchise agreement". Lastly, the Bill proposes a dispute resolution procedure whereby any party to the franchise agreement may deliver a notice to the other party setting out the dispute. The parties have 15 days within which to seek to resolve the dispute. After the expiry of such period, either party may deliver a notice to mediate to the other parties to the franchise agreement. Mediation procedures were to be as prescribed in the regulation.

(g) Other provinces

No other province or territory in Canada has specific legislation which governs the relationships of franchisees and franchisors. It is common and prudent however for franchisors operating in such provinces to adopt the disclosure model used in one of the regulated provinces in order to

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[11] See *Cadieux c. St.-A. Photo Corporation*, Cour supérieure 500-05-006829-947 (April 9, 1997); and *Investissements Stanislaus et Patricia Bricka Inc. c. Groupe CDREM Inc.*[2001] J.Q. no. 3346, Cour d'appel du Québec, District de Montréal, (July 23, 2001), and more generally, *Bank of Montreal v. Bail Limitée*, [1992] 2. S.C.R. 554.

build the goodwill of their brand in that jurisdiction and more importantly to embrace practices which will reduce unnecessary exposure to litigation for misrepresentation.

3. Elements of Disclosure – The Basic Obligation

The Ontario Act requires a franchisor to deliver a disclosure document[12] to a prospective franchisee not less than 14 days before the earlier of (i) the signing of any franchise agreement or any other agreement relating to the franchise; and (ii) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor its associate[13]. The Ontario Act states that the disclosure document must contain all "material facts" as defined, financial statements, franchise agreements, and all other statements, documents and facts as prescribed in the legislation and regulations. [14]

The Alberta Act contains a similarly worded requirement. Significantly, the Alberta Act specifically excludes deposit agreements, confidentiality agreements and site selection agreements from the definition of "agreement relating to a franchise". The effect of this is to permit the execution of these types of agreements prior to the expiry of the 14 day window. In addition, the Alberta Act excludes from the definition of "consideration" the payment of a fully refundable deposit. These elements, with the exception of the provision for non-refundable deposits and deposit agreements, are also features of the PEI Act and proposed New Brunswick legislation, are absent in the Ontario legislation. In consequence, franchisors doing business in Ontario cannot accept deposits from franchisors until the expiry of the 14 days, nor can they enter into deposit agreements, site selection agreements or, perhaps most importantly, confidentiality agreements. In the absence of the ability to secure some form of initial financial commitment or confidentiality covenant from prospective franchisees, the Ontario franchisor must be more wary of "tire kickers" or potential competitors who wish to collect information and documents without serious intentions to proceed.

The Ontario Act requires that all information in a disclosure document and a statement of material change be accurately, clearly and concisely set out[15]. There has been some debate amongst practitioners as to whether or not an amended UFOC fulfills this requirement, or whether an entirely new document must be created which discloses information in the order set out in the Ontario Regulation. To the writer's knowledge this issue has never been squarely addressed by the courts. Another common debate centers around whether or not it is contrary to this requirement to "cut and paste" passages from the franchise agreement to complete the disclosures in the document, or whether these passages, relating to termination and renewal by way of common example, must be paraphrased in "layperson's terms". Since disclosure legislation is quasi consumer protection legislation intended to benefit relatively unsophisticated prospective purchasers, the latter option is the preferred one.

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[12] "Disclosure document" is defined in s.1(1) of the Ontario Act as "the disclosure document required by section 5."

[13] Section 5(1)(a) and (b) of the Ontario Act.

[14] Section 5(4)(a) of the Ontario Act.

[15] Section 5(6) of the Ontario Act.

4. Exemptions from the Requirement to disclose

(a) Application of the legislation

The Ontario Act and the PEI Act exempt the following continuing commercial relationships from the definition of "franchisor" and therefore from the obligation to make disclosure:

i. Employer-employee relationships;

ii. Partnerships;

iii. Memberships in a co-operative association;

iv. An arrangement arising from an agreement to use a trade-mark, service mark, trade name, logo or advertising or other commercial symbol designating a person who offers on a general basis, for consideration, a service for the evaluation, testing or certification of goods, commodities or services;

v. An arrangement arising from an agreement between a licensor and a single licensee to license a specific trade-mark, service mark, trade name, logo or advertising or other commercial symbol where such licence is the only one of its general nature and type to be granted by the licensor with respect to that trade-mark, service mark, trade name, logo or advertising or other commercial symbol;

vi. An arrangement arising out of a lease, licence or similar agreement whereby the franchisee leases space in the premises of another retailer and is not required or advised to buy the goods or services it sells from the retailer or an affiliate of the retailer;

vii. 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;

viii. A service contract or franchise-like arrangement with the Crown or an agent of the Crown.

The PEI Act omits the exemption in (vi) above but includes the exemption for wholesale purchase arrangements for goods and services between parties for reasonable wholesale price. The Alberta Act also includes the wholesale purchaser exemption.

The PEI Act exempts the Crown in its entirety. The Ontario Act exempts service contracts or "franchise-like" arrangements with the Crown or an agent of the Crown. Alberta has no exemption for the Crown.

(b) Statutory exemptions to the obligation to disclose

The following activities may constitute franchised activities (and therefore leave the parties subject to the duty of fair dealing and right of association) but do not engage the obligation to make disclosure under the legislation:

i. The grant or sale by a franchisee of its franchise to another party for its own account and without the substantial involvement of the franchisor.

ii. The grant by a master franchisee, for its own account, of the entire master franchise.

iii. The grant of a franchise to a person who has been an officer or director of the franchisor or its associate for at least six months, for that person's own account.

iv. The grant of an additional franchise to an existing franchisee if there has been no material change since the latest agreement, renewal or extension was entered into.

v. The grant of a franchise, usually in the context of a bankruptcy or insolvency, 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.

vi. 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 do not exceed 20% of the total business. Under the PEI Act, the proportion is calculated with reference to the first year of operations.

vii. The renewal or extension of a franchise agreement where there has been no interruption in the operation of franchise or or material change since the latest agreement, renewal or extension. The Alberta Act provides an unconditional exemption for renewals or extensions.

viii. The grant of a franchise to a small purchaser who is required to invest less than $5000 per year to acquire and operate the franchise.

ix. The grant of a franchise of less than one year which does not involve the payment of a non-refundable franchise fee. The PEI Act qualifies this by applying only if the franchisor or its associate provides site selection assistance to the franchisee.

x. The franchisor is a multi-level marketing plan governed by the *Competition Act* (Canada). and

xi. The prospective franchisee is investing more than $5,000,000 over a one year period. This is not an element of the PEI Act or the Alberta Act.

5. Scope of disclosure

(a) "Material fact" and the standard of disclosure

As earlier noted, an Ontario disclosure document must contain all material facts, including "material facts as prescribed"[16], financial statements as prescribed, all agreements relating to the franchise, required statements as prescribed and all other items and information as prescribed in the regulation. "Material fact" is defined in the Ontario Act as:

> "any information about the business, operations, capital or control of the franchisor or franchisor's 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 granted or the decision to acquire the franchise;"

The scope of what might constitute a "material fact" pursuant to this definition is limitless and there exists an ongoing debate between certain commentators as to the standard of disclosure required under the existing legislation particularly in light of the open-ended disclosure requirement. The Ontario Act introduces confusion by deeming as material facts the prescribed disclosures required in the regulation, effectively requiring their disclosure whether actually material or not. The reaction of franchisors and the franchise bar to this wording has been in some cases to interpret the regulation as definitive of the standard of disclosure in similarity with the rules-based UFOC Guidelines in the U.S. On this basis, many franchisors do not purport to make disclosures of any information which is not specifically requested in the regulation. At the other end of the spectrum exists the school of thought that all facts howsoever vaguely material should be disclosed, including for example litigation that may have been settled decades earlier, or the number of franchised units maintained by the franchisor in a separate jurisdiction under a separate brand, to the extent that these might in some small way influence a franchisee in its decision to acquire a franchise. Clearly, the scope of disclosure is critical and the advice of experienced franchise counsel is essential to ensure that a franchisor makes accurate and fulsome disclosure necessary to prevent a franchisee from later seeking rescission for a failure to disclose all material fact as required.

(b) Material facts as prescribed

(i) Introduction

The following is a cursory survey and discussion of the prescribed categories of disclosure set out in the Ontario, Alberta and PEI Acts.

(ii) Background of the franchisor

The franchisor must disclose the name and address of the franchisor, the name under which it engages in business, the principal business address and address of agent for service in Ontario (if any), the business form of the franchisor, the name and principal address of the parent, the length of time the franchisor has engaged in the business of the franchise, the length of time the franchisor has operated the franchised business, and if the franchisor has offered franchises in other lines of business, the length of time it has done so and the number of franchises of each line it has sold in the immediately preceding 5 years.

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[16] *Ibid.* Note that the Alberta Act requires disclosure of all "material facts including all material facts relating to the matters set out [in the regulation]."

The Alberta Act, unlike the Ontario Act specifically requires a description of the franchisor's business. This is obviously a material fact and should be an element of any Ontario disclosure document.

(iii) Background of the officers and directors of the franchisor

The Ontario disclosure document must contain the name and current position of the directors, general partners and officers of the franchisor. The information must include a description of prior each person's prior relevant experience, the length of time each person has engaged in the business of the franchise and the principal occupation of each person during the preceding 5 years.

The Alberta Act limits the disclosure to directors, general partners and officers "who will have day to day management responsibilities relating to the franchise."

(iv) Litigation

A franchisor must disclose any convictions within the 10 prior years for fraud, unfair or deceptive business practices, or violations of or pending charges in respect of laws regulating franchises or businesses. All administrative orders or penalties as well as any pending administrative actions must be disclosed, as well as any findings of liability in any civil action of misrepresentation, unfair or deceptive business practices or of violating a law that regulates franchises or businesses, including failure to provide proper disclosure, and any pending civil actions.

The Ontario Act requires such disclosure in respect of the franchisor, the franchisor's associate[17], or a director, general partner or officer of the franchisor. The Alberta Act and the PEI Act limit such disclosures respecting directors, general partners and officers to only those with management responsibilities relating to the franchise.

While convictions in the last 10 years preceding the date of the disclosure document must be set out, there is no time limit in the Ontario or Alberta legislation in respect of past administrative orders or penalties or findings of civil liability. In addition, the scope of disclosure in relation to "laws regulating franchises or business" is considered overbroad and can have an absurd result given that all commercial laws regulate businesses. The Ontario franchise bar has identified these weaknesses as targets for reform and each may be an element of future amendments.[18] The PEI Act addresses this shortcoming by limiting the time frame for such disclosures to the previous 10 years.

(v) Bankruptcy

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[17] A party which controls, is controlled by the franchisor, or is under common control, and includes a person who is directly involved in the sale of the franchise. (See Ontario Act, section 1.(1).)

[18] "Disclosure under the *Wishart Act* and Interim Report from the Statutory Amendments Task Force", Ontario Bar Association Joint Subcommittee on Franchising, April 19, 2005.

Each of the Ontario Act and the Alberta Act requires details of any bankruptcy or insolvency proceeding occurring in the previous 6 years against the franchisor, its associates, and any corporation or partnership whose directors or partners are directors, officers or partners of the franchisor or included such a person at the time of the bankruptcy or insolvency. The Ontario Act also requires details of any bankruptcy or insolvency against directors, officers or general partners of the franchisor in their personal capacity.

(vi) Financial Statements

The franchisor must include in its disclosure document its most recently completed financial statements prepared on an audited or review engagement in accordance with generally accepted auditing or review and reporting standards that are at least equivalent to those set out in the *Canadian Institute of Chartered Accountants Handbook*. Therefore, financial statements prepared according to the accounting standards of other jurisdictions may be used provided that they meet the standards.

The franchisor may provide the financial statements for the previous fiscal year if it has not prepared its financials for the most recently completed fiscal year and less than 180 days have passed since the end of such year.

The franchisor must provide an opening balance sheet in its disclosure document if it has not yet completed a fiscal year or if less than 180 days have passed since the end of its first completed fiscal year.

Large franchisors may in their disclosure documents declare themselves exempt from the requirement to provide financial disclosure if they have been operating in the line of business for at least 5 years with no less than 25 franchises active in a single jurisdiction in such 5 years and they have a consolidated net worth of no less than five million dollars. (This requirement is reduced to $2 million under the PEI regulations.) During such 5 year period, the franchisor, its associates, or a director, officer or general partner of the franchisor cannot have been convicted of fraud, unfair or deceptive practices or a law regulating franchises in Canada or in any other relevant jurisdiction.

(vii) Required statements

The Ontario Act requires the following statements at the beginning of the disclosure document:

1. A commercial credit report is a report which may include information on the franchisor's business background, banking information, credit history and trade references. Such reports may be obtained from private credit reporting companies and may provide information useful in making an investment decision.

2. Independent legal and financial advice in relation to the franchise agreement should be sought prior to entering into the franchise agreement.

3. A prospective franchisee is strongly encouraged to contact any current or previous franchisees prior to entering into the franchise agreement.

> 4. The cost of goods and services acquired under the franchise agreement may not correspond to the lowest cost of the goods and services available in the marketplace.[19]

The Alberta Act provides that sections 9, 13 and 14 must be quoted. These sections relate to the notice of rescission, the effect of cancellation of the contract and the right of action for damages for misrepresentation.

The PEI Act mandates the disclosure at the beginning of the disclosure document of the "risk warnings" set out in Part 1 of Schedule 1 of the regulation. These urge the franchisee to perform adequate due diligence by performing background checks on the franchisor, by retaining adequate professional advisors, by contacting current and former franchisees and by referring to the lists of the latter in the disclosure document.

(viii) Alternative dispute resolution

The Ontario franchisor must disclose any internal or external mediation or other alternative dispute resolution process and the circumstances when the process may be invoked. Section 5(2) of the Ontario Regulation also mandates the following statement respecting mediation:

> Mediation is a voluntary process to resolve disputes with the assistance of an independent third party. Any party may propose mediation or other dispute resolution process in regard to a dispute under the franchise agreement, and the process may be used to resolve the dispute if agreed to by all parties.

(ix) Costs to establish and operate the franchise

Until recently, the Ontario Act required the franchisor to disclose the costs of establishing *and* operating the franchise. Presently, the franchisor must disclose the costs of establishing the franchises and may at its option disclose an estimate of the costs of operating the franchise provided it describes the basis for such estimate, the assumptions upon which the estimate is based and the location of the information substantiating the estimate. In practice, this information is seldom provided as it is costly to produce and fraught with potential misrepresentations.

The costs of establishing a franchise include amounts payable to the franchisor, and estimates of leases, leaseholds, equipment, inventory, supplies and other property. The franchisor is required to provide assumptions underlying the estimates. A cautious franchisor will provide a range of costs based upon the panoply of geographic, commercial and market conditions that can affect the costs of establishing a business in one jurisdiction or another.

Disclosure of costs under the Alberta Act is worded much more simply. Franchisors in that jurisdiction must disclose all franchise fees including the initial fee and the conditions as to when it is refundable. The franchisor must also provide details of the "initial investment" required by the franchisee to start business operations. An estimate of working capital may be provided, and

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[19] O. Reg. 581/00, s. 4.

if so, it must be reasonable and supported by material assumptions. If it is not provided, a statement must be included which indicates that additional funds will be required until positive cash flow is achieved.

(x) Earnings projections

The Ontario Act and the PEI Act permit the Franchisor to provide earnings projections in its disclosure document at its option. If it does so, it must provide the basis for such projections, the assumptions upon which they are based and the location where the materials substantiating the projections may be reviewed. The PEI Act's requirements are slightly more detailed in that the assumptions must be "reasonable" and the franchisor must indicate whether the estimates are based upon actual results and that the information provided may differ if it is provided on the basis of a franchise operated by the franchisor.

The ability to provide earnings forecasts can be both a blessing and a curse for obvious reasons. There is arguably no data more material to a prospective franchisor in assessing the cost/benefit of an investment than the estimate of revenues which the franchisee is entitled to reasonably expect. The ability to provide evidence of attractive revenues would undoubtedly be a very persuasive sales tool. On the flip side, it is manifest that the provision of forecast data is most likely to be a source of liability for actionable misrepresentation in the event that actual revenues are significantly below those set out in a projection.

Nonetheless, certain franchisees may not even consider investing in a particular franchise without some disclosure of earnings or earnings estimates and as such, franchisors may be increasingly compelled to including this type of information in the disclosure package. A franchisor who wishes to include some earnings information without having to undergo the expense of determining the format of the projections, establishing a reasonable basis and properly qualifying the projections in order to allay potential liability, may simply decide to include historical earnings with the warning that historical data provides no assurance of future performance. In the event that a forecast is deemed worthwhile, much more effort will be required to ensure that the analysis is produced using reliable methods on the basis of reliable data and assumptions. Any forecasts should be significantly qualified by geographic, demographic, seasonal, market and technical factors as appropriate. Given the risks and expense associated with such a disclosure having regard to the variability of revenues and of expenses, it is very rare for franchisors to provide such projections in their disclosure documents.

Note that some commentators are of the strong view that historical earnings fall under the rubric of "material fact" which the franchisor is therefore obligated to disclose in its disclosure document pursuant to section 5(4)(a) of the Ontario Act. While this is a compelling argument, as it is unobjectionable that revenue data is a critical variable in a prospect's risk and viability assessment, there has not yet been any judicial support for this interpretation.[20]

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[20] Justice Cummings of the Ontario Superior Court of Justice made the following statement in his decision in *1518628 Ontario Inc. v. Tutor Time*, infra at Note 23: "Under Canadian common law, a franchisor, 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 franchisor knows that the prospective franchisee has

(xi) Financing

The franchisor must disclose any financing arrangements available to the franchisee. Notably, the PEI Act also requires disclosure of the franchisor's policies and practices respecting guarantees and security interests required of franchisees. This is a franchisee friendly development since the question of whether the guarantee of a spouse or other individual who is not a director, officer or shareholder of a corporate franchisee must be given is sometimes vague, despite the fact that it is a very material business consideration.

(xii) Training

Section 6(4) of the Ontario Regulation requires that the franchisor describe any mandatory or optional training program and if it is mandatory, who must bear the costs of such training. The Alberta Act contains no analogous requirement, although having regard to the value and importance of training in the context of business format franchises, it is difficult to suggest that the quality and expense of a franchisor's training program is immaterial.

The PEI Act requirement is identical to Ontario with the additional requirement to disclose the location of the training.

(xiii) Advertising fund

If the franchisee is required to contribute to an advertising fund, the Ontario Act prescribes disclosure of (i) the percentage of the fund devoted to national and local advertising and the percentage of the fund retained by the franchisor in the previous 2 years; and (ii) the projected amount of the contribution, the projected percentage of the fund to be spent on national and local advertising, and the percentage to be retained in the current fiscal year. In addition, the franchisor must disclose whether reports of the activities of the fund will be made available to the franchisee.

There is no equivalent requirement in the Alberta Franchise Regulation. Given the key importance of brand promotion to the success of franchise systems and the sometimes significant cost of such programs to franchisees, the existence of an advertising fund is within the purview of "material fact".

The PEI Act contains a simple requirement to describe any marketing fund and the amount of formula for calculating the franchisee's contribution.

(xiv) Restrictions on suppliers, products or market

The franchisor must disclose any restrictions or requirements that a franchisee must purchase or lease goods or services from the franchisor or any supplier. The franchisor must also disclose

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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." Emphasis is the author's. This passage supports the argument for disclosure of facts such as historical earnings.

any restrictions on products which may be sold and restrictions on customers to whom the franchisee's products or services may be offered.

(xv) Volume rebates

The current legislation requires disclosure of any rebates or benefits received by the franchisor or its associates in connection with the purchase of goods or services and whether such rebates or benefits are directly or indirectly shared with the franchisee. The Ontario Act and PEI Act additionally require a description of the franchisor's policy in respect of such rebates.

(xvi) Trade-marks

The Ontario Act and the PEI Act require disclosure of the rights the franchisor or its associate has to the trade-marks, trade names, logos, advertising or other commercial symbols associated with the trade-mark. The Alberta Act is silent respecting trade-marks. However, since trade-marks are typically the cornerstone of business format franchises, a description of the franchisee's rights to the marks is in most cases highly material and therefore must be disclosed.

There is no specific requirement to disclose patents or other intellectual property, although a franchisor should disclose these if they are material to the value of the franchised business.

Certain foreign franchisors entering the Canadian market have trade-mark registrations in their foreign jurisdictions but none in Canada. The franchisor should disclose this fact so that there is no allegation that that the franchisor suggested that it enjoys the same trade-mark protection in Canada as it does in the foreign jurisdiction.

(xvii) Business licences

The Ontario Act requires a description of every "licence, registration, authorization or other permission" that a franchisee must obtain from all levels of government to operate the franchise. This list can be significant having regard to the minutiae of registrations and requirements to operate a business, including business number registrations, source deductions registrations, employee health tax, retail sales tax, and so on, in addition to registrations that are specific to the type of business being operated.

Neither the Alberta Act nor the PEI Act contains a similar express requirement.

(xviii) Personal participation

The franchisor must indicate the degree to which it or its principals must participate directly or indirectly in the franchised business.

(xix) Exclusive territory, quotas and encroachment

The legislation of the three regulated provinces requires disclosure of any rights to exclusive territory granted to the franchisee and whether any minimum performance levels must be achieved to preserve such rights. The Ontario Act also requires a description of the franchisor's policy respecting territorial encroachment. Specifically, each statute requires the franchisor to

disclose how close to the franchisee (i) another franchisee; (ii) other distributors using the same trade-marks; (iii) or the franchisor or other franchisees distributing similar products or services using a different trade-mark, may establish an outlet. The Alberta Act additionally requires the encroachment policy respecting proximity to other franchisor owned outlets.

(xx) Franchisee closures

The Ontario Act and the Alberta Act require that all store closures in the previous three fiscal years must be described. The disclosure must include the reasons for departure, including whether the franchisee cancelled its agreement, was terminated by the franchisor, refused to renew, was denied renewal, or "otherwise left the system". This description of closures is not a feature of the PEI legislation.

The last known address and telephone number of each closure in the prior fiscal year must be listed. The Alberta Act and PEI Act also require a listing of franchises that were reacquired by the franchisor.

(xxi) Existing franchisees

The disclosure document must contain the name, business address and telephone number of all of the current franchisees of the franchisor in the province in which the franchisor does business. If there are less than 20 franchisees in such jurisdiction, then the franchisor shall list those franchisees which are geographically closest to the province until all or 20 franchisees are listed. The Alberta Act expressly requires disclosure of franchisor owned outlets. The PEI Act requires disclosure of all franchises in PEI, Nova Scotia and New Brunswick, and if there are less than 20 franchises in such provinces, then the franchisor must list the nearest franchises until 20 or all franchisees are provided.

(xxii) Restrictions on renewal, termination or transfer

The Ontario Act and the PEI Act requires that terms respecting renewal, termination and transfer must be described in the disclosure document. The Alberta Act only requires disclosure of the location of these terms in the franchise agreement. As indicated above, these terms must be described accurately, clearly and concisely. The requirement is important given the fact that the continuity of a franchise and the ability of a franchisee to capitalize on accrued goodwill is an important value driver. The ability of a franchisor to terminate early or refuse to renew or permit assignment can significantly impair the value of an active franchise operation.

(xxiii) Certificate

Two officers or directors of the franchisor, unless there is only one in which case that one shall sign and date a statement certifying that the disclosures contain no misrepresentations, that all material disclosures required by the respective act and its regulations have been made and, in the case of Alberta and PEI, that no material fact that is needed in order for the information not to be misleading has been omitted. The Alberta and PEI Act prescribe the wording of the certificate whereas the Ontario Act does not.

(c) Common "material" facts which are not in the regulation

As earlier noted, there exist numerous categories of information which are often material to a prospective franchisee's decision to purchase a franchise but which are not specifically prescribed in the regulation. As a result such facts typically remain undisclosed. These include:

- Background and risk factors relating to the nature of the franchised business
- Impact of regulatory, market or geographic circumstances on the operation of the franchised business
- Disclosure of settled litigation and terms of settlements
- Projections for expansion into a particular territory (this may be very relevant for franchisees who are "pioneering" a new territory for an out of jurisdiction franchisor)
- Description of methods and resources which will be devoted to supporting a franchise, including site selection, opening assistance and ongoing start-up support
- Summary of policies respecting security interests and guarantees required (as required in the PEI Act)
- Warranty, return, customer complaint and employee policies
- Historical earnings information of individual franchisees
- Patents and other material intellectual property
- Litigation or adverse claims against intellectual property
- The inclusion of a "gross up" provision requiring the franchisee to compensate a foreign franchisor for the costs of withholding taxes on royalties
- Currency and exchange information

6. Form of disclosure

(a) Single Document and Sufficiency of Disclosure

The disclosure document must be delivered as one document at one time[21] and include all contents required by the statute and regulations, including all required statements, material facts, facts required by the regulations, financial statements, copies of all agreements relating to the franchise and the certificates, in an accurate, clear and concise presentation. The Ontario courts have interpreted this requirement very technically and have determined that the disclosure in a "piecemeal fashion" of more than 70% of the information required to be disclosed pursuant to the Ontario Act was tantamount to no disclosure and afforded the franchisee the right to rescind

[21] See *MAA Diners Inc. v. 3 for 1 Pizza & Wings (Canada) Inc.*, [2003] O.J. No. 430.

its franchise agreement within two years of its delivery[22]. Justice McFarland stated in *1490664* v. *Dig this Garden Retailers Ltd.* as follows:

> "There is no issue of "substantive" versus "procedural" compliance. The requirement that disclosure occur in the form of a single document is not an empty formal requirement. The legislature clearly envisioned that the purpose of the legislation… would best be fulfilled by giving prospective franchisees the opportunity to review a single document or documents, so that all the information is before them at the same time."

Unlike Ontario, the Alberta Act and the PEI Act provide that a disclosure document is properly given if it is "substantially complete". While the precise meaning of this provision has not yet been exactly defined, the Alberta Court of Queen's Bench pronounced generally on the scope of "substantial completion" in *Emerald Developments Ltd. v. 768158 Alberta Ltd.* [23]:

> "…I think the first step in interpreting whether a disclosure document is "substantially complete" is to look to the purpose of the Act in general and the provisions in question in particular; secondly the provision must be read in the context of the entire act; third, I must consider the course of the parties negotiations."

In the above case, the courts addressed the question of whether a franchisee could rescind its franchise agreement for non-disclosure where it received a correct disclosure document from one company but ultimately contracted with another company which in essence assumed the franchised business from the first. The courts determined that the substantive purposes of the Alberta Act had been met and that the franchisee had received proper disclosure knowing that it was intended to have been delivered in respect of the actual franchisor. The court denied the franchisee's motion for summary judgment. Clearly, this case dealt with the quality, and not the quantity of disclosure, as in the Ontario case cited above.

More recently, the Ontario courts decided in a motion for partial summary judgment that a U.S. UFOC delivered to a Canadian franchisee for informational purposes did not constitute disclosure for the purposes of the Ontario Act[24]. The franchisor in that case had delivered its UFOC to the prospective purchaser of a franchise from an existing franchisee. The UFOC was delivered to comply with the requirements of the existing franchisee's franchise agreement and not *qua* disclosure to comply with the Ontario Act, as the franchisor believed that it was exempt from disclosure given that the sale was from one franchisee to another[25]. Nonetheless, the courts found for other reasons that the sale of the franchise from one franchisee to the other was effected "by or through" the franchisor and consequently, the franchisor had a disclosure obligation which was not discharged by the delivery of the UFOC, despite the fact that the judge

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[22] Supra at note 1.

[23] [2001] ABQB 143 (Q.B.), Madame Justice L. Smith.

[24] *1518628 Ontario Inc. v. Tutor Time Learning Centres, LLC*, [2006] CanLII 25276 (ON S.C.).

[25] See Section 5(7)(a) of the Ontario Act.

admitted that the "U.S. UFOC does provide much of the information required of an Ontario UFOC"[26].

(b) Electronic disclosure document

Neither the Ontario Act nor the Alberta Act provides that a disclosure document may be in electronic format. Accordingly, the traditional method is to prepare and deliver a voluminous paper disclosure package which must be signed and dated by two officers or directors of the corporation and hand delivered or sent by registered mail to the prospect. This method no longer accords with emerging commercial reality, where electronic commerce and technology permits the storage, processing, instantaneous and efficient delivery and retrieval of large document files. The practical reaction is that such a disclosure document would not be capable of being signed and dated as required. This is no longer, in the writer's view a correct objection. The PEI Act, for example, permits the delivery of a disclosure document in electronic format and is at the vanguard of modern commercial reality[27].

The *Electronic Commerce Act* (Ontario) (the "**ECA**") governs the use of electronic commercial agreements in the Province of Ontario. The ECA is a technology neutral statute which provides that a contract will be valid irrespective of the media in which it is created, recorded, transmitted or stored. Electronic contracts formed by valid offer and acceptance, for consideration, by parties having capacity and intending to create legal relations will be valid and enforceable as long as they are accessible so as to be usable for subsequent reference, are capable of being retained by the recipient and are in the same format as the one in which the written document was created, sent or received or in a format that accurately represents the information contained therein. In addition, the ECA states that an electronic signature may be used in the place of a handwritten signature. There is ample caselaw as to what may constitute a legal signature, ranging from the clicking of an icon on a computer screen, to a digitized copy of a handwritten signature, to a number or private key generated using public key cryptography. The ECA stipulates that an electronically signed document will satisfy a requirement that the document be signed if the electronic signature is reliable for the purpose of identifying the person, and the association of the electronic signature with the relevant document is reliable. Finally the ECA states that an offer, the acceptance of an offer or any other matter that is material to the formation or operation of a contract may be expressed by means of electronic information or an electronic document (such as an email), by the clicking of an icon, or by speech.

Based on the foregoing, it would appear that a disclosure document with all the necessary elements embodied in one file and electronically signed and dated as required by the relevant statute, would likely constitute an effective disclosure document provided that the file is accessible so as to be usable for subsequent reference, is capable of being retained by the recipient and is in the same format as the one in which the written document was created, sent or received or in a format that accurately represents the information contained therein. Practically, should a franchisor choose to adopt this practice, it should ensure that it has consulted counsel to review its proposed practice and should further ensure that it obtains from the prospective

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[26] Note 23, supra, Cummings, J. at page 14.

[27] See Section 2(b) of the P.E.I. Franchises Act Regulation.

franchisee a consent to the use of electronic versus paper disclosure, a confirmation from the prospect that it has the hardware required to review and print the document, and finally, an acknowledgment in writing that it has in fact been successful in retrieving the document for review.

(c) Adapting disclosure documents from other jurisdictions

The Alberta and PEI Acts expressly permit the use of a "wrap around" or supplementary addendum to a UFOC or disclosure document of another jurisdiction. The addendum must contain all information and statements which are specifically required by the province's legislation.

The Ontario Act however is silent on the use of a consolidated disclosure document. This has prompted endless discussion between commentators as to the appropriateness of using a "wrap around" to adapt a UFOC or the disclosure document of another jurisdiction for use in Ontario. The uneasy truce appears to be that provided that the UFOC or other form is accurate, clear and concise and contains all required disclosure elements, documents and statements, then most detractors begrudgingly permit that an Ontario addendum can theoretically be used. In actual practice, the counsel of perfection (although not of economic efficiency) is the creation of an entirely separate Ontario specific disclosure document whose contents track the order set out in the Ontario regulation. The alternative method (and the friendlier approach from the foreign franchisor's perspective) is the adaptation of the contents of the UFOC or other form to fulfill the substantive requirements of the Ontario Act in an accurate, clear and concise manner without radically altering the form or order of the UFOC Guidelines disclosures.

7. Method of delivery and receipt

(a) Delivery

The Ontario Act requires that the disclosure document be delivered in person, by registered mail, or by other prescribed means. No other means have been prescribed. The Alberta Act simply requires that the franchisor "give" the document to the prospective franchisee.

Only the PEI Act's regulations reflect modern reality in that they permit, in addition to personal and mail delivery, delivery by courier provided a receipt is given, and electronic delivery. Electronic disclosure may be used provided the document is in a single integrated document or file, has no extraneous content beyond what is required by law, has no links to or from external documents or content, is capable of being stored, retrieved and printed, conforms to legal form and content requirements, is recorded by the franchisor and is acknowledged by the franchisee in writing.

For the reasons expressed in 6(b) above, it is conceivable that electronic delivery of a disclosure document may not be contrary to either the spirit or the letter of the Ontario and Alberta Acts, particularly where the prospective franchisee receives wholly the substance of what is required to be delivered under the statutes. However, until the electronic delivery is prescribed in Ontario, the safest approach is to slavishly comply with the anachronistic requirements. Some franchisors

may willingly opt for the risk of technical non-compliance by adapting a practice of electronic disclosure which does not prejudice the franchisee in any way.

(b) Receipt

The provincial legislation specifies that the disclosure document shall be provided and the prospective franchisee shall receive the document not less than 14 days prior to the execution of any agreement or the receipt of any payment. Therefore, the receipt, and not the delivery of the disclosure document is the moment which triggers the cooling off period. In order to confirm that the period is running, a franchisor must obtain a written receipt from the franchisee acknowledging that it has received a complete copy of the relevant disclosure document together with all attachments.

8. Statement of material change

A franchisor must deliver to a prospective franchisee a written statement detailing any material change as soon as practicable after such change and before the earlier of the signing of any agreement relating to the franchise and the payment of any consideration in relation to the franchise. Material change is defined in the Ontario Act as:

> "a change in the business, operations, capital or control of the franchisor or franchisor's associate, a change in the franchise system or a prescribed change, that would reasonably be expected to have a significant adverse effect on the value or price of the franchise to be granted or on the decision to acquire the franchise and includes a decision to implement such a change made by the board of directors of the franchisor or franchisor's associate or by senior management of the franchisor or franchisor's associate who believe that confirmation of the decision by the board of directors is probable;"

The provincial legislation does not specify whether the prospective franchisee is afforded an additional 14 days from the date of the statement within which to contemplate the new facts. It is reasonable to conclude that the prospective franchisee should be given sufficient time to review the changes and consult with their professional advisors as to the effect of any change.

The format of the statement is not prescribed, although the statement should conform and refer to the original disclosure document in order to be accurate, clear and concise. The statement should be certified in the same manner as the original disclosure document and should be delivered in a manner which is permitted by the applicable regulations.

9. Correcting a disclosure document after the fact

There is no statutory provision or common law principle that permits a party to cure a failure to disclose or deficient disclosure. Where a disclosure document is merely deficient (it being acknowledged that the courts have yet to precisely define the scope of deficiency), then the franchisor might simply wait until the 60 day rescission window has expired. If there is an actionable misrepresentation, no disclosure whatsoever, or a deemed failure to disclose, then the franchisor is exposed to rescission throughout the two year period beginning from the date of signature of the franchise agreement.

It has been proposed[28] that a franchisor might in the latter case present to a franchisee an offer to rescind its franchise agreement accompanied by proper disclosure, wait fourteen days and then present to the franchisee for execution replacement contracts on the same terms as the original contracts dated the date of their actual delivery. In this case, there would be a novation of the original contract, there would arguably be no original "grant" left to rescind and section 7 damages under the Ontario Act would be nominal. At present time, this formula has not to the writer's knowledge been judicially tested. It may be advisable, in addition to the above, to obtain an acknowledgment that the consideration for the novation and the new "grant" of the franchise is the discharge of the existing contract since it is unlikely that the parties will undergo the process of again paying an initial franchise fee to pursuant to the replacement franchise agreement.

10. Remedies for Non-disclosure

Section 6(1) of the Act permits an aggrieved franchisee to rescind the franchise agreement without penalty or obligation, 60 days from the date the disclosure document was received, where the document was not provided within the time required or where the contents of the disclosure document did not meet the requirements of the statute and regulations. Practically, this means that a franchisee may terminate where it has paid consideration or signed an agreement prior to the lapse of 14 days from the date of receipt of the disclosure document, or where any required information is false, misrepresentative or omitted. The foregoing is qualified to the extent that the Alberta Act allows non-refundable deposits, and deposit agreements and the PEI Act and the Alberta Act both permit site selection agreements and confidentiality agreements within the 14 day period without contravening their respective statutes.

Where the disclosure document is not provided at all, the franchisee may rescind the agreement without penalty or obligation within two years of entering into the franchise agreement. Rescission is the cancellation of the contractual obligations of the parties with the effect of restoring the franchisee to the position that it was in prior to the agreement.

The Ontario and PEI Act require the franchisor, within 60 days of the date of rescission, to repay to the franchisee all amounts paid to the franchisor (other than amounts for inventory, supplies and equipment), purchase from the franchisee all inventory, supplies and equipment and further compensate the franchisee for any losses that the franchisee incurred in acquiring, setting up and operating the franchise. The Alberta Act requires the franchisor to compensate the franchisee for "net losses" incurred in establishing and operating the franchise. Rescission is effected by delivery of notice of rescission under the Ontario and PEI Acts and notice of cancellation under the Alberta Act.

The aforementioned remedies underscore the requirement to take the disclosure process very seriously and to understand not only the specific regulatory requirements of compliance, but also the potential ramifications of non-compliance. A well-founded rescission can be a very costly

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[28] Trebilcock, Arthur, "Draft Disclosure Documents: Some Issues and Tips", 5th Annual Franchise Law Conference, Ontario Bar Association, September 21, 2005, pp.15-16.

exercise for a franchisor, and one which it will likely not wish to endure again, especially if it can be avoided by making proper disclosure in accordance with applicable law.

Franchisors must also be mindful of the franchisee's right to damages for misrepresentation against the franchisor which is embodied in the legislation of the three regulated provinces. In Ontario and PEI, the right is effective as against the franchisor, its agents, associates, brokers and everyone who signed the disclosure document or statement of material change. In Alberta, the right is effective against the franchisor and the parties who signed the disclosure document. The Ontario and PEI Act elaborate further to provides that a franchisee has a right of action for damages against the franchisor, its associate, its broker and every person who signed the disclosure document, where the franchisee suffers a loss because of a misrepresentation in the disclosure, in any statement of material change, or as a result of the franchisor's failure to comply with the disclosure requirements. All persons found liable are jointly and severally liable for any misrepresentation.

Franchisors should be aware that a franchisee who suffers loss in the face of such a misrepresentation will be statutorily deemed to have relied upon the misrepresentation and will not be required to prove such reliance before a court.

11. Regulatory Reform – The shape of things to come

The PEI Act, although based in large measure on the Ontario legislation, contains many elements of the Alberta Act and some innovations which make it in many ways to the state of the art of franchise disclosure legislation in Canada. These elements, which are not provided in the Ontario Act, include:

- The exemption of the purchase and sale of goods and services for reasonable wholesale prices from the application of the statute (also in the Alberta Act);

- The prescription of electronic disclosure documents, electronic delivery and delivery by courier;

- The disclosure of information relating to officers, directors and general partners with "day to day management responsibility" only (also in the Alberta Act);

- The provision for the execution of non-competition agreements and site-selection agreements prior to the expiry of the 14 day window (also in the Alberta Act);

- The provision for the use of a PEI "wrap around" with the disclosure document of another jurisdiction (also in the Alberta Act);

- The provision for the delivery of a disclosure document that is "substantially complete" (also in the Alberta Act);

- The requirement to provide the background of only those officers and directors who have day to day management of the franchise (also in the Alberta Act);

- Ten year time limits on disclosure of past administrative and civil actions; and

- A more elaborate set of criteria for the optional disclosure of earnings projections.

In April of 2005, the Ontario Bar Association's joint subcommittee on franchising issued the interim report of the Statutory Amendments Task Force. The Task Force formulated amendments to the Ontario regulation which addressed many of the features set out above. In addition, the Task Force recommended the following:

- An expanded description of the nature of the business and market conditions relating to the franchisor's business;

- Disclosure of the parents, predecessors, affiliates and associates of the franchisor and the length of time they have been involved in the line of business, the franchised business, other franchises;

- The narrowing of the language requiring disclosure of convictions, administrative actions and civil actions relating to "a violation of a law that regulates franchises or businesses";

- The disclosure of all civil actions, arbitration proceedings and settlements; and

- The disclosure of bankruptcy and insolvency proceedings relating to officers, directors and general partners "having management responsibilities relating to the franchise".

The Task Force has completed its final report which is to be presented to the Ontario Ministry of Government Services. It is not known at the time of writing whether this report has been presented to the Ontario government for consideration in conjunction with the much sought-after reform of the Ontario franchise regulation.

12. Conclusion

The law and practice of franchise disclosure in Canada has garnered significant attention in recent years. Franchisor and franchise practitioners follow with eager anticipation the provincial legislatures' progress with new franchise related bills, as well as any whisper of regulatory reform. Court decisions relating to franchise disputes, although still relatively rare, have been of great assistance in providing guidance as to proper and effective procedures for disclosure. Given the significant and increasing levels of activity and complexity in the domain of franchise practice and disclosure, it is more critical than ever that franchisors and their counsel remain abreast of the vagaries and nuances of each of the provincial disclosure regimes.

Richard D. Leblanc