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FRANCHISE LAW

Franchise 101

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FRANCHISE 101:

Topics Relevant to New Lawyers Advising New Franchisors and New Franchisees

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Note: This paper solely reflects the views of its authors, and does not necessarily reflect the views of any other party. This paper does not constitute legal advice, and is presented solely as an illustrative aide.

INTRODUCTION[1]

The purpose of this paper is to provide newer lawyers, and those who do not have extensive knowledge of franchise law fundamentals, with an overview of important considerations when advising start-up franchisor and franchisee clients. Additionally, this paper will outline key challenges when advising clients of establishing and operating start-up franchise systems.

This paper consists of six parts:

- initial considerations with respect to establishing new franchise systems;
- disclosure basics;
- advising a first time franchisor;
- preparing the first franchise disclosure document;
- managing the franchise sales process; and
- advising new franchisee clients on the purchase of their first franchise.

The authors have also included best practices and suggested methods of ensuring that counsel is meeting their professional obligations throughout the paper.

As both of the authors of this paper are situated in the Province of Ontario, this paper will generally refer to, and cite from, the *Arthur Wishart Act (Franchise Disclosure)*, *2000* (the "**Wishart Act**"),

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as well as the accompanying regulations, O. Reg. 581/00: General (the "**Wishart Act Regulation**"). Worth noting is that five (5) other provinces, namely British Columbia, Alberta, Manitoba, New Brunswick, and Prince Edward Island have also established their own franchise legislation and corresponding franchise regulations. For the purposes of this paper, the authors refer to the six (6) franchise acts in the aforementioned provinces collectively as the "**Acts**", and the accompanying regulations as the "**Regulations**".

PART 1: INITIAL CONSIDERATIONS WHEN CLIENTS EXPRESS AN INTEREST IN FRANCHISING

"Should I franchise my business?" is a question that should generate considerable discussion between a client and their counsel before a final decision is made. Counsel retained to advise on this topic should be able to speak to the advantages and cautions of franchising, as well as the necessary prerequisites to starting a viable franchise system. Counsel should also be well-versed on the different types of franchising formats so they can recommend and speak to the method that would best align with their client's goals, specifics, and resources.[2]

Counsel may also be faced with a situation where a client approaches them to ask for advice on becoming a first time franchisor, only to realize that they have already been operating as such (known in the industry as an "**accidental franchise**"). In this circumstance, although it may not have been the intention of your client, in the eyes of the law, a franchise relationship may already exist and your client may indeed be an "**accidental franchisor**." Consequently, your client will be held to the obligations of being a franchisor and to the consequences of failing to fulfill their obligations under the Wishart Act (or one of the other Acts). It is important to identify the elements that would constitute your client's business arrangements as a franchise before trouble arises.

Lastly, this section will also address circumstances where clients may be too eager to franchise and counsel has to discuss whether franchising is premature.

[2] Although an in-depth exploration of the various forms of franchise grants and models, including unit franchises, master franchises, and area developers, is beyond the scope of this paper, the authors would recommend (among other resources) a review of *Fundamentals of Franchising, Canada* (Chicago: American Bar Association, 2005), Section II-D, for further information.

To Franchise or not to Franchise

It is important to discuss the pros of franchising as well as the caution points with your client, so that they may assess whether they should franchise their business.

ADVANTAGES OF FRANCHISING

Franchising has a number of advantages over other forms of business development and organization. For the franchisor, it offers:

- Opportunity to expand your business without the requirement of injecting significant additional capital for development.

- Operation of your brand's business locations by individuals with 'skin in the game' (i.e., an ownership interest), who will be motivated to achieve better business results for themselves and for you than, arguably, a corporate manager or employee.

- Expansion into territories farther from your corporate base (whether domestic or international) without having to invest in the additional local management structures generally required for non-franchise corporate growth and ongoing operations.

- Compounding effect of a larger brand size and its advantages, including (ideally) through the collection of cumulatively larger royalty and advertising fund amounts and higher brand recognition (through the use of a brand fund and franchisee local advertising).

CAUTIONS OF FRANCHISING

There are a number of considerations that entrepreneurs or corporate executives should be aware of prior to deciding to develop a franchise system, or converting their business to a franchise system, including:

- Franchising will require a shift in mindset for any corporate executive or entrepreneur accustomed to a 'command and control' style of management. Franchisees that are living

and breathing their businesses may well believe they understand the business better than the principal does, and may challenge the principal's methods and decisions. Rather than looking for direction, they may be asking: 'what have you done for me lately?' If a brand owner or corporate executive cannot accept that they will lose a degree of control over their brand and business, franchising their business may not be the right choice.

- For an entrepreneur that has created and developed the business, he or she will have to reallocate their time away from personal hands-on business operation at the unit level (such as spending time in the kitchen developing recipes), to instead spending time supporting, visiting, interacting with, and recruiting franchisees. This can be a difficult transition for some and requires a different skill set. Would-be franchisors should understand that they are entering a new industry altogether when they decide to franchise.

- For an entrepreneur accustomed to implementing rapid changes in the operation of the brand, he or she will feel they are now 'turning an ocean liner rather than a speed boat' in implementing changes, particularly if investment is required at the business unit level.

- Franchised operations will likely result in a lower ongoing cash flow per location for the franchisor than the operation of corporate units. This can be particularly the case for the conversion of corporate units to franchised units.

- The difficulty of cultivating new suppliers and supply chain logistics in new markets, if the existing supply chain cannot support those new markets, should not be underestimated.

- Becoming a franchisor subjects your client to the Acts and Regulations, which entails significant time and attention for the legal administration of franchise agreements and franchise disclosure documents, ensuring ongoing compliance by franchisees, and for moving bad actors out of the system. Initial legal expenses can be in the tens of thousands of dollars.

The Accidental Franchisor

Whether a business arrangement in Ontario constitutes a franchise is determined by the definition of a franchise under the Wishart Act. The absence of an intention to create a franchise relationship or the presence of a provision in an agreement stating that the agreement does not constitute a franchise will not have an impact on the analysis of whether a franchise relationship exists. Moreover, franchisees cannot waive their rights under the Wishart Act.[3] Any business relationship that a client is a party to may be considered a franchise if it meets the components of either of the two-part definition of a "franchise" in section 1(1) of the Wishart Act:

> "Where the franchisee is required by contract or otherwise to make a payment or continuing payments, whether direct or indirect, or a commitment to make such payment or payments, to the franchisor, or the franchisor's associate, in the course of operating the business or as a condition of acquiring the franchise or commencing operations and,
>
> (a) in which,
>
> (i) the franchisor grants the franchisee the right to sell, offer for sale or distribute goods or services that are substantially associated with a trade-mark, trade name, logo or advertising or other commercial symbol that is owned by or licensed to the franchisor or the franchisor's associate, and
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> (ii) the franchisor or the franchisor's associate has the right to exercise or exercises significant control over, or has the right to provide or provides significant assistance in, the franchisee's method of operation, including building design and furnishings, locations, business organization, marketing techniques or training;[4] or,
>
> (b) in which,
>
> (i) the franchisor, or the franchisor's associate, grants the franchisee the representational or distribution rights, whether or not a trade-mark, trade name, logo or advertising or other commercial symbol is involved, to sell, offer for sale

[3] *Arthur Wishart Act (Franchise Disclosure), 2000*, SO 2000, c 3, s 11 [*Wishart Act*].
[4] This type of arrangement is often referred to as "business format" franchising.

> or distribute goods or services supplied by the franchisor or a supplier designated by the franchisor, and
>
> (ii) the franchisor, or the franchisor's associate, 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."[5]

Often, the finding of an accidental franchise is made only once the existing relationship between two parties sours. In this situation, the purported franchisee asserts its rights and remedies under the Wishart Act (or the other Acts), including the right of rescission. Therefore, it is important for counsel to recognize a franchise structure even when it has been characterized as something else. Regardless of what the parties call their relationship, there is a risk the court will find if it walks like a duck, swims like a duck, and quacks like a duck… then it is probably a duck.

If a client presents a proposed business arrangement that constitutes a franchise in Ontario, but does not intend for it to be, there may be an opportunity to restructure the arrangement such that it does not constitute a franchise. A not uncommon situation is an intended distribution arrangement that meets the definition of a franchise. Counsel can suggest to the client that it re-assess whether its business objectives actually require that the client exercise significant control over, or provide significant assistance with respect to, the other party's method of operation. If not, those rights may be removed from the agreement and the arrangement may no longer qualify as a franchise.

Dealing with an Unproven Concept: When is it too Early to Start Franchising?

After discussing the advantages of franchising, points of caution as well as the different types of franchise formats, the next question counsel should explore with their client is whether it would be an appropriate time to franchise, or if franchising would be premature at this stage. Counsel would be well advised to keep in mind that they are not serving specifically as a business advisor

[5] This type of arrangement is often referred to as "product distribution" franchising and is more rarely used than business format franchising. Counsel should remain vigilant so they can recognize if they do come across such an arrangement.

to their client, but their experience in the franchise space, and familiarity with the law, will hopefully make them a key member of their client's decision-making team.

Individuals that buy into a franchise system, as opposed to developing their own business, are doing so with the intent of buying into an already developed system. A 'system' is the cumulative result of the franchisor's efforts in developing a marketing plan, business format, confidential methods and know-how, specifications, standards and operating procedures. Consumers generally expect to receive the same experience every time they interact with a franchised brand, and consistency is a key factor in generating return business to the same brand, whether at an outlet in Kenora or Keswick.[6]

Similarly, franchisors seek to rapidly expand their brand recognition by consistently replicating experiences that remain true to, and accurately reflect, the standardized system.[7] The success of a system depends, in large part, on the ability of consumers to identify a specific location, whether franchised or not, as an identical part of a larger system. Therefore a key question for a nascent franchisor to consider before franchising its business is whether it has developed and documented its systems, processes, and techniques in a manner that can be learned and replicated by its new franchisees, many of whom may have limited experience in the industry space in question.

Further, has the franchisor developed a training program to convey that knowledge? Franchisees are also generally looking to buy into a system that has already developed public brand recognition. A good indication that a business may be successfully franchised is if there is a demand, often arising from family, friends, or close business associates, to establish a business identical to that of the first outlet in another location or community.[8] When a business is still in its infancy and there is little to no brand awareness, franchisors will essentially be asking prospective franchisees to buy into their dream, or at least into a strong marketing pitch.[9]

Initial questions counsel can ask their first time franchisor client to asses the strength or readiness of their system include:

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[6] Darrell Jarvis, "The Freedoms of Franchising: How Much Flexibility Will You Have as a Franchisee?", *Franchise Entrepreneur* (January/February 2011) 14 at 15.
[7] *Ibid.*
[8] Larry Weinberg & John Woodburn, *How to Franchise Your Business* (Toronto: Canadian Franchise Association, 2002) at 15.
[9] *Ibid.*

- Have you registered, or applied to register, an identifiable trademark for business?

- Have you assembled the appropriate human capital and expertise to establish and operate a franchise system?

- Do you have sufficient working capital and/or financing to support the franchising of your business, and the additional costs you will incur as a result?

- Have you studied whether there is a market for the franchise grant you are offering?

- Have you documented your processes and techniques for the operation of the business, including in the form of operations and training manuals, as well as a training program?

- Have you developed identifiable designs and a specific 'look', as well as processes and procedures, that can be replicated at other units?

- Have you considered and researched the potential unit level economics your franchisees may encounter, and established your practices and model accordingly?

The above list is by no means exhaustive, but aims to demonstrate the types of considerations that franchisor counsel should raise to the client in assessing a business' readiness to be franchised.

Trademarks

Understanding the landscape around trademarks, including how trademarks can be protected and used, is crucial for any franchisor (and their counsel) to understand. Most franchisors understand that one of the most important and valuable assets of the franchise system is the trademark(s) used to distinguish their business from others. Although trademark owners are afforded common-law rights in Canada, the most rigorous protection available to a franchisor for their trademarks is obtaining registration pursuant to the *Trade-Marks Act* ("**TMA**").[10] By registering under the TMA,

[10] *Trademarks Act*, RSC 1985, c T-13.

franchisors hold publicly recognized evidence of their claim to ownership of a trademark that expands their protection on a Canada-wide basis. When a trademark is properly protected under the TMA, it becomes increasingly difficult for non-registrants to challenge its ownership and develops a sufficient defence against an infringement or conflicting trademarks.[11]

Under the TMA, there are four different types of "trademarks" recognized by Canadian federal law. Used and Proposed Trademarks, which we will group together, consist of any trademark, sign, logo, symbol, design, acronym, sounds, single word or sentence, or any combination of these elements that is either already used or proposed for the purposes of distinguishing the wares, services or business of a person or entity from those of others.[12] Certification Trademarks are a specialized type of trademark used in a particular trade to distinguish wares or services that are of a defined standard. Further, Distinguishing Guises are non-traditional trademarks used to protect trade dress (or get-up). More specifically, they protect the shaping of wares or their containers or a mode of wrapping or packaging wares, the appearance of which is used to distinguish the wares or services manufactured, sold, leased, hired or performed from those of others.[13]

To avoid jeopardizing ownership rights, a franchisor should ensure there is proper use and distinctiveness of the trademarks within the meaning of the TMA. Distinctiveness is described under Canadian trademark law as the ability for a trademark to operate as a connection between wares or services and their source or origin.[14] This connection is assessed through the perspective of consumers to ensure that the wares sold or services performed under a given trademark are only associated with a single source. Moreover, to register a trademark its use must also be for the purpose of distinguishing the source of wares or services from others. In relation to wares, the trademark must, in the normal course of trade within Canada, be used visually on the wares themselves, its packaging, or in any other way be noticeably associated with the wares at the time it is transferred or distributed.[15] Similarly, use with respect to services requires the trademark to be visually used or displayed in the actual performance or advertising of those services in Canada.

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[11] Peter Snell & Larry Weinberg, eds, *Fundamentals of Franchising, Canada* (Chicago: American Bar Association, 2005) at 117.
[12] *Ibid* at 120.
[13] *Ibid* at 121.
[14] *Ibid* at 122.
[15] *Ibid* at 123.

Although the TMA outlines some limits as to what is considered registerable as a trademark, a franchisor may generally secure registration in the following situations: if the trademark is in actual use in Canada; if, through reputation, it has become known in Canada; if a franchisor intends to use the trademark within three years; or it is used and registered in another country. Prior to filing an application for the registration of a trademark, a comprehensive search is recommended to determine the availability of the trademark and to identify potential claims of infringement by third parties with similar trademarks. Once an application is filed and approved, the franchisor then holds the exclusive right to use the trademark throughout Canada, subject to renewal within 15 years from the date of issuance. The franchisor also holds several tools to limit the prohibited use of their trademark, such as initiating infringement actions.

Franchisors capitalize on the value of their trademarks by licensing them to their franchisees. In accordance to section 50 TMA, a franchisor is able to license a trademark to a franchisee if it is done under their authority and the franchisor maintains actual control of the character or quality of the wares or services associated with the trademark.[16] Franchisors should establish standards and limits on the use of trademarks for franchisees and enforce their compliance. Although the TMA does not require that the licence be in writing, prudent practice dictates that it should – whether it is a component of the franchise agreement or in conjunction as a separate trademark license agreement.[17]

PART 2: ADVISING A FIRST TIME FRANCHISOR

The Importance of Understanding the Business

As a legal advisor to the franchisor, counsel serves as a bridge between the franchisor, on the one hand, and perspective franchisees on the other hand. Through the use of a franchise disclosure document, franchisors cross the informational divide and provide franchisees with information that they require to make an informed investment decision with respect to the subject franchise system.

[16] *Ibid* at 133.
[17] *Ibid* at 134.

Franchisor counsel has a key role to play in ensuring that this metaphorical bridge is well built, well-maintained, and it achieves its intended purposes while minimizing risk for the franchisor.

As is explored elsewhere throughout this paper, a lawyer servicing a franchisor or a franchisee must understand the unique circumstances of their client. Failing to understand these unique circumstances will impact the quality of the advice provided to a potential client. Although franchisor lawyers will lean heavily on their clients to allow them to "get smart" on the nature of the business and systems, lawyers should nonetheless take proactive steps to understand the fundamentals of the business and the industry in question. This is a key element of a lawyer's duty of competency.

The Importance of Understanding the law: Duty of Competence

Understanding the area of law in which you practice is an integral responsibility that a lawyer holds as a member of the legal profession. Under section 3.1 of the Law Society of Ontario's Rules of Professional Conduct, a lawyer owes a duty of competence; they are held out as knowledgeable, skilled and capable in the practice of law. As such, clients are entitled to assume that their lawyer has the ability and capacity to deal adequately with all legal matters undertaken on their behalf.[18] This obligation involves more than just an understanding of legal principles, as a lawyer should keep a keen eye towards understanding ongoing developments within all related areas of law.

There are several factors included when assessing whether a lawyer has employed the requisite degree of knowledge and skill in a matter: the complexity and specialized nature of the matter; the lawyer's general experience; their training and experience in the field; the preparation and study the lawyer is able to give the matter; and whether it is appropriate or feasible to refer the matter to, associate or consult with, a licensee of established competence in a certain area of law.[19] Before taking on a matter, it is important for a lawyer to assess their own knowledge and skills, especially as it pertains to franchise law. A lawyer should decline to undertake any matter he or she is not competent to handle or to become competent without undue delay, risk, or expense to the client. If a lawyer is consulted about a task for which they lack competence and are not able to reasonably

[18] Law Society of Ontario, *Rules of Professional Conduct*, (22 June 2000, amendments current to 28 June 2022), online: <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct> [*Rules of Professional Conduct*].
[19] *Ibid*.

become competent, they should either decline to act or obtain instructions from their client to contact a lawyer that holds the required competency for the task.

The Use of Engagement Letters, Onboarding Memoranda and Reporting Letters for the Preparation of Disclosure Documents

NOTE: The following section has been taken in part from a paper titled "Lessons Learned: The Most Common Mistakes Made by Franchise Counsel in the Disclosure Process and How to Avoid Them" by Andraya Frith, Darrell Jarvis and Rosanne Manson.[20]

A detailed and customized engagement letter can serve to outline in writing the scope and parameters of the franchise lawyer's mandate, and which areas of the disclosure document and disclosure process fall outside the scope of the retainer. In practice, however, the usefulness of the engagement letter is somewhat limited as they tend to be relatively standard firm letters and, in many cases, the letter is issued so early in the process that the full scope and limitations of the retainer may not be known. Engagement letters are also less helpful tools for reducing the risk of a negligence claim where the disclosure advice is being provided to a long-standing franchise client.

Where there are obvious and clear limitations to the scope of the outside lawyer's retainer, such as where the lawyer is asked to update the franchisor's existing disclosure documents and the franchisor has indicated that it does not want the lawyer to satisfy itself that the existing disclosure documents contain all prescribed information, it is very important to have a written record of these limitations. This record can form part of the estimate or fee quote (if one has been requested) or as part of an early communication (perhaps when the first draft of the disclosure document is provided to the client for comment and input).

A more practical and client-friendly tool is the use of a detailed letter or memorandum that can be sent to the client either at the beginning of the mandate or at the end of the project. If necessary, the letter or memorandum can be customized to address a particular issue or set of issues that arose on a particular file.

[20] Andraya Frith, Darrell Jarvis & Rosanne Manson, "Lessons Learned: The Most Common Mistakes Made by Franchise Counsel in the Disclosure Process and How to Avoid Them" (12th Annual Franchise Law Conference, Ontario Bar Association, 2012) at 16-18.

There are several advantages to providing a detailed "onboarding memorandum" to a new or ongoing franchise client at the beginning of each disclosure document project (regardless of whether the disclosure document is being prepared for the very first time or as part of an annual update). Much of the information about a franchisor's general disclosure obligations and the consequences of deficient disclosure that would typically be provided at the end of a mandate can just as easily be provided to the client at the beginning of the retainer.

There are several benefits to providing a detailed "onboarding memorandum" early in the disclosure document project. The client is more likely to read the onboarding memorandum at this stage of the process. Communicating the franchisor's disclosure obligations earlier in the project is also likely to result in the franchisor having additional questions and being more engaged in the document preparation process. This has the additional benefit of giving the franchise lawyer more opportunities to communicate and clarify any areas of uncertainty or misunderstanding on the part of the franchisor client.

An early "onboarding memorandum" is also good protection in the event of a "runaway client" (i.e., where the client stops using the lawyer's services before the disclosure document is finalized). In these cases, it is also a best practice for the lawyer to send a written communication to the client indicating that the lawyer cannot provide any assurances that the draft disclosure document is in full compliance with the franchise disclosure legislation.

Examples of elements relating to the scope of the mandate and general limitations include the following:

- Which provincial disclosure laws have been taken into consideration when preparing the disclosure document?;

- What information has been relied on when preparing the disclosure document (i.e., the franchise agreement, specific ancillary agreements, supplemental information provided by the franchisor, the US franchise disclosure document (if applicable) and the lawyer's interpretation of specified legislation and regulations;

- Confirmation that the lawyer is not providing financial advice (i.e., in connection with financial statements, earnings projections or costs estimates); and

- Special considerations if providing the disclosure document to candidates in the "voluntary provinces".

The Importance of a Written Record

Where unique, novel, or particularly sensitive issues arise during the course of preparing the disclosure document, the lawyer should have a written record of the related advice that was provided. In some cases, this "written record" may well be limited to notes taken during a call with the client. As a best practice, particularly on sensitive issues which give rise to potential statutory claims, the lawyer is well-advised to prepare an email to himself or herself which is then date and time stamped to coincide with the date the advice was given. On highly sensitive issues, it is always most prudent to send a detailed email or memorandum to the client summarizing the issues and the potential risks associated with the various options available to the franchisor or decision the franchisor has made. Sending such an email or memorandum (particularly where it has not been requested by the client) can be potentially damaging from a client relationship standpoint, but depending on the circumstances and the possible negligence claim exposure to the lawyer and the law firm, the lawyer may feel he or she has no choice but to have a written confirmation of the advice that was given to the client.

PART 3: DISCLOSURE BASICS

Statutory Requirement to Disclose

The common law does not create a duty of disclosure in pre-contractual relationships. Absent fraud or misrepresentation, there is no requirement on parties to share information prior to entering into a contract unless it is stipulated.[21] Although the franchise relationship attracts a duty of good faith, this duty only imposes an obligation on the *performance* of the contract, not in the pre-contractual stage.[22] Therefore substantive statutory disclosure requirements have been mandated by franchise

[21] *Bhasin v Hrynew*, 2014 SCC 71 at para 73.
[22] Stephanie Sugar, *Franchise Law in Canada* (Toronto: LexisNexis Canada, 2019) at 73.

legislation to supplement the information gap and to redress the inherent power imbalance between franchisors and franchisees.[23]

The purpose of the Wishart Act is to obligate franchisors to make full and accurate disclosure for the benefit of potential franchisees so that they can make an informed decision about whether to invest in a franchise system.[24] The language of the Wishart Act and its accompanying Wishart Act Regulation is unambiguous, mandatory, and articulates requirements in precise terms.[25] The franchisor's disclosure obligations do not change based on the actions or reactions of a particular franchisee.

In *Mendoza*[26] the Ontario Court of Appeal confirmed that the proper test for disclosure is strictly objective;[27] franchisees can rely on the remedies for a franchisor's failure to disclose properly even if the franchisee never actually read or relied on the disclosure document.[28]

The content and delivery of disclosure documents are key aspects which the Acts (and corresponding Regulations) seek to regulate and are central to most discussions regarding rights and remedies for prospective franchisees.[29] It is important for franchisors and their counsel to adopt useful strategies for gathering all the information needed for appropriate disclosure to be given by employing the use of questionnaires, checklists, and reviewing publicly available information.[30]

Contents

The Wishart Act stipulates that a disclosure document must contain the following: (a) all material facts, including material facts as prescribed; (b) financial statements as prescribed; (c) copies of

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[23] *1518628 Ontario Inc v Tutor Time Learning Centres LLC*, 2006 CanLII 25276 at paras 55-56, [2006] OJ No 3011 (QL) (Ont Sup Ct); *2147191 Ontario Inc v Springdale Pizza Depot Ltd*, 2014 ONSC 3442 at para 1, aff'd 2015 ONCA 116 [*Springdale*]

[24] *1490664 Ontario Ltd v Dig This Garden Retailers Ltd* (2005), 256 DLR (4th) 451, 201 OAC 95 at para 55 (Ont CA) [*Dig This*].

[25] Sugar, *supra* note 22 at 73-75.

[26] *Mendoza v Active Tire & Auto Inc*, 2017 ONCA 471, leave to appeal refused, 37814 [*Mendoza*].

[27] Jennifer Doleman & Sarah McLeod, "Mendoza v. Active Tire & Auto Centre Inc. – Ontario Court of Appeal rejects role of an "informed decision" in rescission" (8 June 2017), online (blog): *Osler* <https://www.osler.com/en/resources/regulations/2017/mendoza-v-active-tire-auto-centre-inc-ontari>.

[28] *Mendoza*, *supra* note 26.

[29] Stephanie Sugar & Andrew MacIver, "Introduction to Franchise Law: The Aims and Emerging Changes of Franchise Legislation in Canada" at 7.

[30] Christine Jackson, Frank Robinson & Vincent Dore, "Franchise Law: Fundamentals of Franchising" (Your First Franchise Client, Ontario Bar Association, 2016) at 14.

all proposed franchise agreements and other agreements relating to the franchise to be signed by the prospective franchisee; (d) statements as prescribed for the purposes of assisting the prospective franchisee in making informed investment decisions; and (e) other information and copies of documents as prescribed.[31] Certain of these key items are discussed in further detail below.

Further, the Wishart Act Regulation prescribes an enumerated list of items to be included in disclosure documents, which can be summarized as follows:[32]

- the business background of the franchisor, its directors, general partners and officers; [33]
- information on judgments, litigation and bankruptcy as against the franchisor, franchisor's associate, or a director, officer or general partner of the franchisor; [34]
- financial statements prepared in accordance with the prescribed standards; [35]
- a series of prescribed statements to appear at the beginning of the document relating to commercial credit reports, a statement to the effect that independent legal and financial advice should be sought by franchisees prior to entering into the franchise agreement, that a prospective franchisee is strongly encouraged to contact current or previous franchisees prior to entering into the franchise agreement, and that 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; [36]
- a prescribed statement that mediation is a voluntary process, that any party may propose mediation or another dispute resolution process in regard to a dispute under the franchise agreement, and that the process may be used to resolve the dispute if agreed to by all parties. If mediation or another alternative dispute resolution process is used by a franchisor in disputes with the franchisee, then a description of the process and the circumstances in which it may be invoked must be provided;

[31] *Wishart Act*, *supra* note 3, s 5(4).
[32] Jackson, Robinson & Dore, *supra* note 30 at 15-17.
[33] O Reg 581/00, ss 2.1, 2.2 [Wishart Act Regulation].
[34] *Ibid*, ss 2.3, 2.4, 2.6.
[35] *Ibid*, s 3(1).
[36] *Ibid*, s 4.

- if a mediation or other alternative dispute resolution process is used by a franchisor in disputes with the franchisee, then a prescribed statement detailing that mediation is a voluntary process, a description of the process and the circumstances in which it may be invoked; [37]

- a list of all costs and payments, direct or indirect, associated with the establishment of the franchise, including details of deposits and franchise fees, inventory, leasehold improvements, equipment, leases, and all other tangible and intangible property necessary to establish the franchise and an explanation of any assumptions underlying the estimate;[38]

- if an estimate of annual operating costs or an earnings projection are provided, a statement specifying the reasonable basis for the projection, the assumptions underlying the projection and a location where information is available for inspection that substantiates the projection; [39]

- the terms and conditions of any financing arrangement offered directly or indirectly to franchisees by the franchisor or franchisor's associate; [40]

- a description of any training or other assistance offered to franchisees by the franchisor or franchisor's associate and who bears the cost of that training; [41]

- if the franchisee is required to contribute to an advertising fund, statements describing the breakdown of how the fund has been utilized in the past and projections going forward; [42]

- a description of any restrictions or requirements imposed on the franchisee with respect to obligations to purchase or lease from the franchisor, franchisor's associate or suppliers approved by the franchisor, the goods and services the franchisee may sell and to whom;[43]

[37] *Ibid*, s 5.
[38] *Ibid*, s 6.1.
[39] *Ibid*, ss 6.2, 6.3.
[40] *Ibid*, s 6.4.
[41] *Ibid*, s 6.5.
[42] *Ibid*, s 6.6.
[43] *Ibid*, s 6.7.

- a description of the franchisor's policy regarding volume rebates and whether the franchisee is entitled to share in any rebates, commissions, payments or other benefits, directly or indirectly; [44]

- a description of the rights the franchisor or franchisor's associate has to the trade-mark, trade name, logo or advertising or other commercial symbol associated with the franchise;[45]

- a description of every license, registration, authorization or other permission the franchisee is required to obtain to operate the franchise; [46]

- a statement indicating whether the franchisee is, or, if the franchisee is a corporation, whether its principals are required to participate personally and directly in the operation of the franchise; [47]

- a description of any exclusive territory granted to the franchisee, and if so, a description of the franchisor's policy, if any, as to the conditions that must be fulfilled for the continuation of the franchisee's rights to the exclusive territory, and under what circumstances these rights may be altered; [48]

- a description of the franchisor's policy, if any, on the proximity between franchises, a franchise and any other distributor using the franchisor's trade-mark or other commercial symbol, a franchise owned or operated by the franchisor or granted by the franchisor that distributes similar products or services under a different trade-mark or other commercial symbol; [49]

- a list of and contact information for all franchisees who operated a franchise of the type being offered that has been terminated, cancelled, not renewed or reacquired by the franchisor or otherwise left the system within the last fiscal year;[50]

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[44] *Ibid*, s 6.8.
[45] *Ibid*, s 6.9.
[46] *Ibid*, s 6.10.
[47] *Ibid*, s 6.11.
[48] *Ibid*, ss 6.12, 6.13.
[49] *Ibid*, s 6.14.
[50] *Ibid*, s 6.15.

- for each closure of a franchise of the type being offered within the last three fiscal years, the reasons for the closure;[51]

- a list of the locations of all franchises in Ontario of the type being offered, including the business address, telephone number and name of the franchisee who operates the franchise and, if there are less than 20 franchises in Ontario, the list must include those franchises which are geographically closest to Ontario, until information on 20 franchises is provided; and [52]

- a description of all restrictions or conditions in the franchise agreement related to the termination or renewal of the agreement, and the transfer of the franchise.[53]

In addition to the prescribed items in the Wishart Act and Wishart Act Regulation, every disclosure document must also be accompanied by a franchisor's certificate, certifying that the contents (a) contain no untrue information, representations or statements; and (b) include every material fact, financial statement, statement or other information required by the Wishart Act and Regulation.[54] Where the franchisor is an incorporated entity then this certificate must be signed by at least two individuals that are directors or officers unless there is only one director or officer in the corporation, then one is sufficient. The signing directors and officers to the certificate are subject to personal liability in some instances, placing higher diligence and stakes on ensuring that the franchisor's disclosure is complying with the Wishart Act. Case law in this area confirms that a signature page included at the end of a disclosure document attesting to the truth of the information contained in the disclosure document would not meet the requirement under the Wishart Act. The franchisor's signature must be preceded by the mandatory statements contained in subsection 7(1) of the Regulation. In *Hi Hotel*,[55] the Alberta Court of Appeal held where this requirement is not met, no disclosure can be said to have been made and the franchisee will have the right to rescind. Similarly, in *Dollar It*[56] while the disclosure document contained what purported to be a "Franchisor Certificate", it was neither dated nor signed and this was considered fatal to the disclosure document.

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[51] *Ibid*, s 6.16.
[52] *Ibid*, s 6.17.
[53] *Ibid*, s 6.18.
[54] *Ibid*, ss 7(1), 7(2).
[55] *Hi Hotel Limited Partnership v Holiday Hospitality Franchising Inc*, 2008 ABCA 276 [*Hi Hotel*].
[56] *6792341 Canada Inc v Dollar It Limited*, 2009 ONCA 385 at para 4 [*Dollar It*].

The franchisor is also required, as per subsection 5(5) of the Wishart Act, to provide a statement of any "material change" that occurs after the disclosure document has been delivered to the prospective franchisee, but before any agreement pertaining to the franchise has been signed or any consideration been offered by the franchisee. The concept of "material change", and statements of material change, are further discussed below.

The information in a disclosure document should be current at the time that it is issued. It is important to note that certain information provided can be "current" as of different dates under the Wishart Act: For example, some information (such as a list of officers and directors[57]or convictions[58]) must be current per the date of issuance of the disclosure documents. Other information, such as closure of franchises or use of the advertising fund, are sufficiently current as of the most recently completed fiscal year.[59] Franchisors should be aware of which information needs to be updated and when for the disclosure to be deemed "current".

Material Fact

A "material fact" is defined in the Wishart Act to include any information about the business, capital, operations, or control of the franchisor or franchisor's associate, or about the franchise system that could reasonably be expected to have a [emphasis added] *significant* effect on the price or value of the franchise or a potential franchisee's decision to acquire the franchise.[60] Franchisors are required to disclose all material facts, not just those enumerated items prescribed by the Wishart Act Regulation. The failure to disclose all material facts denies prospective franchisees the ability to make an informed investment decision and can give rise to a recission claim. A distinguishing feature of the Wishart Act as compared to the other Acts is that Wishart Act uses the term "includes", rather than "means" when defining this term, suggesting the description of material facts is non-exhaustive.

Failing to properly disclose to a prospective franchisee can be a costly mistake for franchisors. Competent counsel for franchisors should approach this process as more than a mere a box-ticking

[57] Wishart Act Regulation, *supra* note 33, s 2(i).
[58] *Ibid*, s 6.
[59] Although the list of closed locations is not required to be current as of the date of the disclosure document an argument can be made that this amounts to a material fact, and as such, best practice would be to provide the most current information as of the date of the disclosure document.
[60] *Wishart Act*, *supra* note 3, s 1(1).

exercise to ensure that the document captures all material facts. Counsel should ask their clients if there is any information, which if known by a prospective franchisee, 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. If so, those facts should be included in the disclosure document.

The best defence to a recission claim is to ensure disclosure documents are accurate, up-to-date and include complete information. A formal process is recommended for larger franchisors in order to ensure that all appropriate staff and relevant executives have had a say in assessing whether all material facts have been disclosed.

It is especially important for counsel to confirm that their client has adhered to these requirements when the disclosure document has been drafted based on an earlier precedent or if the document is one currently being used in a different jurisdiction. Note: the concept of disclosing all 'material facts' may be somewhat 'foreign' to U.S. clients.[61]

Site Specific Disclosure

Disclosure documents must be tailored to the particular franchise being granted. It is important to consider the ways a franchisor's standard form of disclosure document should be modified, adapted or customized to accord with the specific location being offered.[62] Further, the disclosure document should include cautions on any risks associated with anything that is unique to the franchise being granted. This may also include potential risks associated with a new business model or different type of location where the franchise system may be seen as "untested."

Site specific disclosure is not explicitly mentioned in the Wishart Act nor its Regulation, but has evolved from jurisprudence regarding the scope of what can be considered a "material fact", as described above. The jurisprudence has served to shift franchisors away from using standardized disclosure documents, whereby particularized disclosure documents are the industry standard. Site specific disclosure was also addressed in *Freshly Squeezed* where the Superior Court considered the materiality of missing lease-related information. In that cases the Superior Court took issue with the concept of negative disclosure: the franchisor was faulted for not being forthcoming about

[61] Karen Granofsky, David Altshuller & Darrell Jarvis "Lawyer Conduct Disclosed: Potential Liability of Franchise Counsel for Failure to Comply with Franchise Disclosure Requirements" (Your First Franchise Client, Ontario Bar Association, 2016) at 4.
[62] Jackson, Robinson & Dore, *supra* note 30 at 17.

the fact that they had never granted a franchise outside of a mall.[63] This decision is understood to have expanded the open-ended "material fact" analysis, to include location-specific negative disclosure where appropriate.[64] This concept is further explored, below.

Disclosure Exemptions and Excluded Relationships

In limited circumstances franchisors are exempt from having to provide prospective franchisees with disclosure. These instances are set out in section 5(7) of the Wishart Act:

(1) *Resale by franchisee*:[65] an exemption exists for resales by franchisees if the grant of the franchise is not effected by or through the franchisor.

(2) *sale to an officer or a director*:[66] an exemption from disclosure is available when the franchise is sold to a person or a corporation controlled by that person if he or she has been an officer or director of the franchisor or the franchisor's associate for at least six months and is currently in such position, or if that person was an officer or director for at least six months and not more than four months have passed since they held that position.[67]

(3) *sale of an additional franchise to an existing franchisee*:[68] a franchisor does not need to provide disclosure to an existing franchisee who is granted an additional franchise that is substantially the same as the existing franchise the franchisee is operating. This exemption is only available if there has been no material change since the existing franchise agreement or latest renewal or extension was entered into.[69]

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[63] *2611707 Ontario Inc et al v Freshly Squeezed Franchise Juice Corporation et al*, 2021 ONSC 2323 at paras 89-92 [*Freshly Squeezed*].
[64] Christine Jackson & Dominic Mochrie, "Now and Then: An Overview of the Development of Location-Specific Disclosure Requirements, Where We Are and Where We Are Going Following Freshly Squeezed and Yogurtworld" (Ontario Bar Association, 2021) at 5-6.
[65] Wishart Act Regulation, *supra* note 33, s 5(7)(a).
[66] *Ibid*, s 5(7)(b).
[67] Darrell Jarvis & George J Eydt, "Disclosure Exemptions: Risky Business" (Ontario Region Legal Day, Canada Franchise Association, 2012) at 7.
[68] Wishart Act Regulation, *supra* note 33, s 57(c).
[69] Jarvis & Eydt, *supra* note 67 at 8.

(4) *sale by a third party*:[70] this exemption is limited to the 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.[71]

(5) *fractional franchise*:[72] A franchisor is exempt from the disclosure obligations if the grant is for a fractional franchise. The term "fractional franchise" refers to the grant of a franchise to a person to sell goods or services within an existing business in which that person has an interest and if the sales arising from those goods or services during the first year of operation of the franchise, as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into, do not exceed, in relation to the total sales of the business in that year, 20 percent.[73]

(6) *franchise agreement renewal or extension:*[74] A franchisor does not have a provide a disclosure document relating to the renewal or extension of a franchise agreement, where there has been (i) no interruption in the operation of the business operated by the franchisee under the franchise agreement and (ii) there has been no material change since the franchise agreement or latest renewal or extension of the franchise agreement was entered into.[75]

(7) *minimal investment*:[76] a franchisor is not required to provide a disclosure document if the prospective franchisee is required to make a total investment of an amount that does not exceed $15,000.

(8) *short-term franchise*:[77] A franchisor does not have to provide a disclosure document relating to the grant of a franchise if the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable franchise fee.[78]

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[70] Wishart Act Regulation, *supra* note 33, s 5(7)(d).
[71] Jarvis & Eydt, *supra* note 67 at 8.
[72] *Wishart Act*, *supra* note 3, s 5(7)(e); Wishart Act Regulation, *supra* note 33, s 8.
[73] Jackson, Robinson & Dore, *supra* note 30 at 17.
[74] Wishart Act Regulation, *supra* note 33, s 5(7)(f).
[75] Jackson, Robinson & Dore, *supra* note 30 at 18.
[76] Wishart Act, *supra* note 3, s 5(7)(g)(i); Wishart Act Regulation, *supra* note 33, s 9(2).
[77] Wishart Act Regulation, *supra* note 33, s 5(7)(f).
[78] Jackson, Robinson & Dore, *supra* note 30 at 18.

(9) *multi-level marketing plans*:[79] there is a disclosure exemption under the *Wishart Act* for franchisors governed by section 55 of the *Competition Act.*[80] However, franchisors owning multi-level marketing franchises are still required to make disclosure under the *Competition Act* and the failure to do so carries significant penalties.[81]

(10) *substantial investment*:[82] a franchisor is not required to provide a disclosure document to a prospective franchisee if the prospective franchisee is required to make a total investment of an amount that is greater than $3,000,000.[83]

In addition to disclosure *exemptions*, it is important to remember not all business arrangements require within the jurisdiction of the Wishart Act and consequently are not required to provide disclosure. The following relationships are expressly *excluded* from the application of the Wishart Act:

1. *Employer-employee relationships***:** the legislation provides no guidance on this exclusion. Courts look at a number of indicia to determine whether an employment relationship exists, including the control test. The determination centers on how much control one party exercises over the other, the greater the degree of control the more likely that the relationship will resemble one of employment.[84] This was the case in *Head v. InterTan Canada Ltd* where the degree of control a putative franchisor held over the putative franchisee was determined by a judge to be indicative of employment.

2. *Co-operatives*: the Wishart Act defines the four types of co-operatives that are excluded from the application of the Act: (i) organizations incorporated under Ontario's *Co-operative Corporations Act*; (ii) organizations incorporated under the *Canada Cooperatives Act*; (iii) "co-operative corporations" as defined under the *Income Tax Act*;

[79] Wishart Act Regulation, *supra* note 33, s 8.5(7)(g)(iii).
[80] *Competition Act*, RSC 1985 c C-34, s 55(1).
[81] Jarvis & Eydt, *supra* note 67 at 10.
[82] Wishart Act, *supra* note 3, s 5(7)(h); Wishart Act Regulation, *supra* note 33, s 9(3).
[83] Jackson, Robinson & Dore, *supra* note 30.
[84] Jarvis & Eydt, *supra* note 67 at 3.

and (iv) buying cooperatives[85]. This exception appears to be clear and unambiguous and where appropriate can be applied with little risk.[86]

3. *Single Licenses*: a single license is defined under the Wishart Act as "arrangement arising from an agreement between a licensor and a single licensee to license a specific trade-mark … 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 or … commercial symbol".[87] The application of this exclusion beyond a licence (such as with respect to a franchise agreement) is not clear and there is no clear applicable case law.[88]

4. *Leasing Arrangements*: this exclusion is applicable where a tenant retailer leases a space within the property of another larger retailer.[89] This exclusion only applies where the tenant was/is not advised nor required to purchase the services or goods from the larger retailer or its affiliate.[90]

5. *Oral Agreements*: oral franchise agreements are excluded from the application of the Wishart Act. This applies when there is no written evidence of any material term of a franchise agreement.

6. *Crown Arrangements*: no franchise-like arrangements to the Crown or an agent of the Crown would not need to comply with the legislation.[91] This carve-out for the Crown suggests that neither party would be subject to the legislation.[92]

Given the significant adverse consequences that can potentially arise if a franchisor relies on a disclosure exemption or exclusion that is not clear or for which there is not jurisprudence, counsel for franchisors generally do not rely on these, nor recommend that practitioners do, unless there is a strong business case for doing so and there is a clear application of the exemption or exclusion. The courts generally construe exemptions and exclusions extremely narrowly to further the legislative purpose of the Wishart Act to address the power imbalance between the franchisor and

[85] Wishart Act Regulation, *supra* note 33, s 1(a)(b)(c)(d).
[86] Jarvis & Eydt, *supra* note 67 at 4.
[87] Wishart Act, *supra* note 3, s 2(3)(5).
[88] Jarvis & Eydt, *supra* note 67 at 5.
[89] Wishart Act, *supra* note 3, s 2(3)(6).
[90] Jarvis & Eydt, *supra* note 67 at 5.
[91] Wishart Act, *supra* note 3, s 2(3)(8).
[92] Jarvis & Eydt, *supra* note 67 at 5.

franchisee. So when assessing whether one should use an exemption or exclusion, your confidence that the exemption or exclusion applies needs to be weighed squarely against the potential significant adverse impact of disclosure non-compliance, and whether that risk is justified.[93]

Timing Requirements

Section 5(1) Wishart Act's requires a franchisor to provide a prospective franchisee with a disclosure document at least 14 days before the earlier of (a) signing the franchise agreement or any other agreement relating to the franchise; or (b) the payment of any consideration relating to the franchise. In Ontario, this 14-day period for disclosure does not include the day on which the prospective franchisee receives the franchise disclosure document. Effectively, this makes the disclosure period 15 days.[94] This requirement is further explored below.

Delivery Requirements

The Wishart Act sets out formal delivery requirements which must be met. section 5(2) outlines appropriate methods of delivery for the disclosure document as: (1) delivered personally, (2) by registered mail, (3) electronically as long as it complies with section 12(1) of the Regulation,[95] (4) or by courier (at franchisor's cost).[96]

Section 5(3) stipulates the disclosure document must be one document. Piecemeal delivery of documents has been held to not meet the requirement for appropriate disclosure. In *Dig This Garden*,[97] a significant Ontario Court of Appeal case, franchisors that provided their future franchisees with information in "bits and pieces" over a period of time, not in one document delivered at one time as prescribed by section 5(3) of the Wishart Act. [98] This amounted to a finding

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[93] *Ibid* at 3-11.
[94] Jackson, Robinson & Dore, *supra* note 30 at 14.
[95] Wishart Act Regulation, *supra* note 33, s 12(1): For the purposes of subsection 5 (2) of the [Wishart] Act, a franchisor may deliver a disclosure document to a prospective franchisee by electronic transmission if,
(a) the document is delivered in a form that enables the recipient to view, store, and retrieve and print it;
(b) the document contains no links to external documents or content;
(c) the document contains an index for each separate electronic file, if any, of which the document consists, where each index sets out, (i) the file name, and (ii) if the file name is not sufficiently descriptive of the subject matter deal with in the file, a statement of that subject matter; and
(d) the franchisor receives a written acknowledgement of receipt from the prospective franchisee .
[96] Rebecca Valo & Faye Lucas, "The Franchise Model and the Accidental Franchisor" (18th Annual Franchise Law Conference, Ontario Bar Association, 2018) at 7.
[97] *Dig This*, *supra* note 24.
[98] *Ibid.*

of "no disclosure" because the section 5(3) requirement was not satisfied.[99] Further, section 5(6) provides that the information in a disclosure document must be accurately, clearly and concisely set out.

With respect to recipients, the franchisor must provide the disclosure document to each prospective franchisee that ultimately enters into a franchise agreement, which is broadly defined under the Wishart Act to mean: any person who has indicated, directly or indirectly, to a franchisor or a franchisor's associate, agent or broker an interest in entering into a franchise agreement, and a person whom a franchisor or a franchisor's associate, agent or broker, directly or indirectly, invites to enter into a franchise agreement.[100]

In the case of a corporate entity, best practice would be for the franchisor to address and deliver the disclosure document to the potential corporate franchisee and any shareholder or other person that will guarantee the obligations of the prospective corporate franchisee, directly or indirectly. Prudent counsel to the franchisor should ensure a signed receipt upon delivery is obtained from each of the parties, entities, or individuals that the disclosure document was delivered to.[101] Frequently, disclosure is given to individuals, both in their personal capacity and on behalf of a company to be incorporated, where those individuals will be the shareholders of the corporate franchisee that has not yet been incorporated.

Rescission

The Wishart Act creates the powerful statutory right to rescind a franchise agreement where there has been either defective or no disclosure. The franchisee is entitled to damages calculated pursuant to section 6(6) of the Wishart Act, which may be viewed loosely as restoring the franchisee to its pre-contractual position. The remedy fuels the presumption that the failure to provide adequate disclosure is equivalent to unfairly inducing a franchisee into a contract.[102]

[99] *Ibid* at paras 18-22.
[100] *Wishart Act*, *supra* note 3, s 1(1).
[101] Jackson, Robinson & Dore, *supra* note 30 at p. 14.
[102] Sugar & MacIver, *supra* note 29 at 9.

Franchisees are not are not required to even provide evidence that they read and relied on the deficient disclosure document.[103]

The Wishart Act outlines the right of rescission in section 6. Section 6(1) relates to late or defective disclosure:

> A franchisee may rescind the franchise agreement, without penalty or obligation, no later than 60 days *after receiving the disclosure document*, if the franchisor failed to provide the disclosure document or a statement of material change within the time required by section 5 or if the contents of the disclosure document did not meet the requirements of section 5.[104]

The section 6(1) right is triggered if the timing or other content related requirements are not met by a franchisor. Specifically, if the disclosure document is not delivered at least 14 days before the agreement is signed or considered paid, or if there have been minor and non-substantive technical deficiencies in formatting or delivery.[105] The right to rescind for a franchisee in this circumstance is available within 60 days of receiving the disclosure document. This right is directed to the situation where the franchisee is unable to make a fully informed decision because they were not provided an adequate amount of time to consider such a decision, or were provided inadequate disclosure of material facts.[106]

The section 6(2) right of rescission is presented in the Act as being triggered if no disclosure document is provided at all by the franchisor:

> 6(2) A franchisee may rescind the franchise agreement, without penalty or obligation, no later than two years after entering into the franchise agreement if the franchisor never provided the disclosure document.

Franchisees are able to exercise the right of rescission under section 6(2) up to two years following the execution of the franchise agreement. Courts have interpreted the right to mean that a delivered disclosure document that is fatally deficient, or has "fatal flaws," is tantamount to no disclosure at

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[103] *Mendoza*, *supra* note 26.
[104] *Wishart Act*, *supra* note 3.
[105] *Vijh et al v Mediterranean Franchise Inc et al*, 2012 ONSC 3845, aff'd 2013 ONCA 698.
[106] *Sovereignty Investment Holdings Inc v 9127-6907 Québec Inc* (2008), 303 DLR (4th) 515, 2008 CanLII 57450 at para 25 (Ont Sup Ct).

all. The right of rescission under section 6(2) extends to the situation where the franchisee is incapable of making an informed decision due to fundamental deficiencies in the disclosure documents they are provided.[107] no disclosure document at all. .

Determining whether disclosure documents meet the level of deficiency that allows a franchisee to invoke their section 6(2) right to rescind has been well discussed by courts in Ontario. The Superior Court of Ontario in *Sovereignty Investment Holdings Inc v. 91276907 Québec Inc.* identified four such "fatal flaws" that would meet this level of deficiency:

- No financial statements;
- No statement specifying the basis for the earnings projections and the assumptions underlying these projections;
- The disclosure document was not a single document delivered at one time; and
- No signed and dated certificate of the franchisor.[108]

The Court stated that each deficiency on its own would be enough to amount a deficiency fatal enough to assert that there was no disclosure at all. The Ontario Court of Appeal in *6792341 Canada Inc. v. Dollar It Ltd* took a similar stance and identified additional fatal flaws, including: the absence of disclosure of a pending lawsuit against the franchisor and a copy of an existing offer to lease.[109]

If a franchisee is entitled to statutory rescission under section 6(1) or section 6(2), damages as calculated under section 6(6) pursuant to four categories:

> The franchisor, or franchisor's associate, as the case may be, shall, within 60 days of the effective date of the rescission,
>
> a) refund to the franchisee any money received from or on behalf of the franchisee, other than money for inventory, supplies or equipment;

[107] *Ibid*.
[108] *Ibid*.
[109] *Dollar It*, *supra* note 56.

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).[110]

Courts are most often challenged with respect to calculating damages under paragraph (6)(d), which requires franchisors to compensate franchisees for any losses that they have incurred in acquiring, setting up, and operating the franchise. In making this calculation, rescinding franchisees cannot include any of the amounts owing to them pursuant to paragraphs (6)(a) to (c). Courts have concluded that all four steps should be read in conjunction to avoid any double-counting in the calculation of amounts owed to rescinding franchisees.[111] Generally, rescinding franchisees should focus on reasonable expenses that they incurred to operate the business, including rent, operating expenses, advertising, insurance, utilities, and legal frees.[112] Further, courts have been cautious in awarding unsubstantiated expenses as part of rescinding franchisees' claims for losses under paragraph (6)(d). Where there is no corroborating evidence to support the rescinding franchisee's calculation of expenses, the court will not speculate or make assumptions in order to calculate their damages.[113]

Section 7(1) of the Wishart Act provides a statutory right action in misrepresentation against franchisors, its associates, agents and every person who signed the misrepresented disclosure

[110] *Wishart Act*, *supra* note 3, s 6.
[111] *Payne Environmental Inc v Lord & Partners Ltd* (2006), 14 DLR (4th) 117, [2006] OJ No 273 (Ont SCJ).
[112] For more information on how courts have provided guidance on compensation for losses under step four see: "My franchisee rescinded its franchise agreement: What to look for in reviewing the franchisee's calculation of damages" (15 November 2015), online (blog): *Sotos LLP* <https://sotosllp.com/my-franchisee-rescinded-its-franchise-agreement-what-to-look-for-in-reviewing-the-franchisees-calculation-of-damages/>.
[113] *2189205 Ontario Inc v Springdale Pizza Depot Ltd*, 2011 ONCA 467.

document.[114] The right can be invoked if a franchisee suffers a loss as a result of a misrepresentation in a disclosure document or due to the franchisor's failure to comply with the disclosure obligations set out in section 5 of the Wishart Act. However, unlike the common law tort of misrepresentation, the franchisee does not have to prove that it "detrimentally relied" on the alleged misrepresentation. Section 7(2) of the Wishart Act provides that a franchisee is deemed to have relied upon any misrepresentation contained in a disclosure documents, making it easier to establish the statutory right of action under section 7(1).[115]

PART 4: KEY ISSUES IN PREPARING THE FRANCHISOR'S FIRST FRANCHISE DISCLOSURE DOCUMENT

The preparation of a franchise disclosure document is a time-intensive undertaking. The amount of information that must be collected, synthesized, analyzed, and incorporated is extensive, and ensuring that a disclosure document is fulsome, clear, and concise requires the use of significant judgement. Building on the fundamental topics detailed above, below are certain flashpoints and key tasks that franchise practitioners should keep in mind when preparing a franchisor's first disclosure document.

Conducting Due Diligence as Counsel to the Franchisor

As described above, franchisor lawyers have a crucial role to play in bridging the franchisor's founders and operations team, on the one hand, with the requirements of the Acts and Regulations (and ultimately the franchisee prospects) on the other hand. Although the founders will understand their business inside and out, their expertise will likely be in sales, operations, real estate, marketing, accounting, and other areas, but not in franchise law compliance. As such, legal counsel serves as a crucial member of the franchisor's franchising team, ensuring that all material facts concerning the business are being included in the disclosure document, and that the disclosure document otherwise conforms to the requirements of the Acts and Regulations.

The scope and breadth of information that a franchisor is required to include in its disclosure document is significant. In order to ensure that the disclosure document discloses all "material facts" (as such concept is explored above), in addition to including all items prescribed by the Acts

[114] *Wishart Act*, *supra* note 3, s 7.
[115] *Ibid*.

and Regulations, a franchisor (and their legal counsel) must diligently review the nature and specifics of the franchise system, including its organization, operation, management, intellectual property, and characteristics. Moreover, the terms of the franchise agreement and other related agreements will need to be concisely described therein, and the forms of these agreements will need to be annexed to the disclosure document.

Failure to prepare a disclosure document with the requisite care and attention can result in costly consequences for franchisors, as has been described above, and potential claims against their legal counsel. Moreover, as is discussed below with respect to templates, franchise systems (and their corresponding legal documents) are not one-size-fits-all. One should not assume that the system in question is substantially similar to any other franchise system solely because it is operating in the same industry space. One potential starting point in the diligence process is actually frequenting the business, if possible, to get a better sense of its on-the-ground workings.

Counsel must educate their clients as to the type, scope, and depth of information that must be included in the disclosure document, and must also conduct (and assist their clients in conducting) significant diligence to ensure that all necessary information is being identified for inclusion. As such, counsel must ensure that they are asking the right types of questions, and soliciting the right information, to ensure that the disclosure document is fulsome and complete. Counsel should consider the use of various aides, such as questionnaires, checklists, and other information-collection tools to help prime their client for the types of information that should be sourced and solicited, and ensuring that clients can easily understand and consider what is expected of them in this process. A client who does not understand the reason why they are required to source this information, or what ultimately ends up in the disclosure document, may be less effective at identifying responsive material information. Undertaking these tasks is also an important part of a lawyer's professional obligation in helping ensure that a disclosure document is prepared properly, in a clear, concise, and complete manner.

A critical review of materials provided to counsel by the client should be taken at each stage, while considering if there are obvious misrepresentations, omissions, or inaccuracies. As their legal advisor, you may not be the primary expert with respect to the business, but you nonetheless should

employ critical thinking and common sense to consider whether there are obvious issues with the information provided.

The Dangers of Templates

When preparing a system's first disclosure document, franchisor counsel should be cautious not to be overly reliant on a template disclosure documents or template franchise agreement previously used in connection with another system. While franchise systems may have certain high-level attributes in common, and a template may serve as a useful starting point in the drafting process, every franchise system is drastically different. Each has different characteristics, including with respect to management, background, systems, procedures, processes, and organization, among other areas. A template last used to build out a food and beverage concept disclosure document, for instance, will not be substantially appropriate for use as the base of a hair salon concept's disclosure document absent significant revisions.

An overreliance on templates can result in the disclosure of incorrect information, or the failure to disclose a system's novel elements or characterises. As a rule of thumb, much of what makes a system unique (and will ultimately constitute a material fact) is the exact type of information that will not likely appear in a template. As such a template should serve as a starting point for counsel, but not a roadmap.

Rethinking Everything but the Kitchen Sink

Pursuant to section 5(6) of the Wishart Act, and as was described above, all information provided in a disclosure document must be presented accurately, clearly, and concisely. The Wishart Act Regulations also stipulate that certain prescribed information must be set out in the same section of the disclosure document, to ensure conciseness. These requirements reflect the intention of franchise legislation, to "address the perceived imbalance of power in the franchisor/franchisee relationship"[116]. A prospective franchisee should be able to easily navigate the disclosure document and understand the information laid out therein. Only an accurate and concise disclosure

[116] *Springdale*, *supra* note 23.

document will facilitate the sharing of information, allowing a franchisee to make an informed investment decision with respect to the franchise.

Worth noting is that, with the passing of time, disclosure documents are becoming lengthier and more complex. This is due in part to an increasing number of decisions emerging from Canadian courts with respect to franchise litigation. Ensuing court decisions, including recent decisions such as *Freshly Squeezed* (as described above) and *2364562 Ontario Ltd. v Yogurtworld Enterprises Inc.*[117], have led to franchisors (and their lawyers) including new and more substantial disclosure within disclosure documents in an attempt to manage new and potential risks stemming from such decisions. As new franchise law decisions emerge, franchisor counsel is closely reviewing decisions (including the obiter therein) in an attempt to future proof their documents.

Although franchisor counsel is right to take proactive action in response to emerging franchise law decisions, and to otherwise remain current with best practices in the franchise law bar generally, counsel must strike a careful balance between preparing a disclosure document that is comprehensive while not being so complex, unconcise, or otherwise overflowing with content that it would confuse a prospective franchisee or prevent them from understanding the information laid out therein.[118] To merely "throw the kitchen sink" at a franchisee in hope of meeting all of the content and form requirements of the Wishart Act and Wishart Act Regulation may increase, rather than decrease, your client's risk in connection with the disclosure document in question. Although the authors are not aware of a case in which it was found that a disclosure document did not meet this requirement that it be clear and concise, it is likely that it is a matter not of "if", but "when" such a finding will be made.

Financial Statements

Under the Wishart Act, Franchisors must include in their disclosure documents the financial statements for their most recently completed fiscal year, in the form prescribed by the Wishart Act

[117] *Freshly Squeezed*, *supra* note 63; *2364562 Ontario Ltd v Yogurtworld Enterprises Inc*, 2021 ONSC 5112.
[118] Derek Ronde & Jonathan Mesiano-Crookston, *The 16th Annual Franchise Law Conference: Beyond the Basics: in-Depth and Cross-Disciplinary Topics in Franchise Law* (Toronto: Ontario Bar Association Continuing Professional Development, 2016).

Regulation. This requirement is more or less consistent across all Acts and Regulations, subject to certain variations.

Put simply, financial statements must be in the form of (1) audited financial statements prepared in accordance with generally accepted auditing standards that are at least equivalent to those set out (i) in the CPA Canada Handbook – Assurance, (ii) by the Auditing Standards Board of the American Institute of Certified Public Accountants or the Public Company Accounting Oversight Board of the United States, as applicable, or (iii) by the International Auditing and Assurance Standards Board; or (2) a financial statement for the most recently completed fiscal year of the franchisor's operations, prepared in accordance with generally accepted accounting principles that meet the review and reporting standards applicable to review engagements as set out, (i) in the CPA Canada Handbook — Accounting, (ii) by the Financial Accounting Standards Board of the United States, or (iii) by the International Accounting Standards Board. Certain Acts (including the Wishart Act) permit non-Canadian financial statements in certain circumstances.[119]

If 180 days have not yet passed since the end of the franchisor's most recently completed fiscal year and financial statements have not yet been prepared for that previous fiscal year, the franchisor is permitted to include the financial statements for the prior fiscal year (i.e. not the most recently-ended fiscal year, but the fiscal year preceding that year) assuming that such statements were prepared in accordance with the requirements specified above.[120] Franchisor counsel should ensure that clients understand at which point new financial statements must be included in the disclosure document, and whether specific financial statements are recent enough to be eligible for inclusion. If the franchisor corporation is newly incorporated and the franchisor has not yet completed its first fiscal year, or if 180 days have not yet passed since the end of the first fiscal year of operations of the franchisor (and financial statements for that year have not yet been prepared), the franchisor is permitted to include an opening balance sheet for the franchisor corporation during this period.[121] As a matter of best practice, practitioners should ensure (or engage the appropriate advisors to help ensure) that the balance sheet is prepared in accordance with acceptable accounting practices and otherwise does not contain any obvious errors, omissions, or discrepancies.

[119] Wishart Act Regulation, *supra* note 33, s 3(1).
[120] *Ibid*, s 3(2).
[121] *Ibid*, *supra* note 33, s 3(3).

The courts have confirmed that failure to include financial statements in the specified form is considered a "fatal deficiency" to the disclosure document – in other words, a disclosure document provided without the requisite financial statements will be considered so deficient that it is as if the franchisee did not receive a disclosure document at all, providing the franchisee with certain remedies under the Acts.[122] Moreover, if financial statements are provided but do not include the notes thereto, these statements (and the disclosure document generally) will also be considered to be fatally deficient.[123]

Although it is beyond the scope of this paper, in certain instances, a franchisor may be exempt from providing financial statements. The Acts and Regulations provide exemptions in situations where, among other instances, the franchisor possesses a certain number of operating outlets, or the franchisor (or in certain instances, its parent) exceed certain revenue thresholds.[124] Worth noting, however, is that new franchise systems will rarely be able to avail themselves of these exemptions absent being part of a larger franchise brand or group. Counsel to new franchisors should be extremely cautious when attempting to rely on any of these financial statement exemptions, as there is a low likelihood that they will apply to new franchisors. Moreover, under certain Acts, necessary statements and disclosures must be included in the disclosure document if no financial statements are being provided.[125]

Site-Specific Disclosure – One Size Does Not Fit All

As has been described above, in addition to including all of the statutorily prescribed items called for in the Acts and Regulations, franchisors are also required to disclose information that is considered specific or unique to the particular grant, resale, or renewal of a franchise, if that information constitutes a "material fact" (as described above) and is known by the franchisor at the time of disclosure.[126] As such, the disclosure requirements contained in the Acts and Regulations are not a closed list of inclusions, but rather, a list of prescribed list of all items *in*

[122] *Raibex Canada Ltd v ASWR Franchising Corp*, 2018 ONCA 62.
[123] *Freshly Squeezed*, *supra* note 63.
[124] Wishart Act Regulation, *supra* note 33, s 8-11.
[125] *Alphataho Inc et al v Maaco Canada Partnership LP et al*, 2022 NBQB 25.
[126] *Wishart Act*, *supra* note 3, s 4.

addition to all other material facts. In this paper, we refer to this concept as "site-specific disclosure".

When it comes to providing site-specific disclosure, there is no one-size fits all answer to what needs to be included in the disclosure document. The exact nature and detail of site-specific disclosure will depend on a myriad of considerations unique to each specific site or franchise. Relevant material facts may include, for example:

- leasing information and/or a summary of key lease terms;
- a description of the nature of the commercial setting (e.g., mall, hospital, office tower) and whether the franchisor has experience in such setting;
- a description of the ingress, egress, and parking at the site in question;
- details concerning the build-out and construction of the premises, including unique considerations and increased costs;
- details regarding the condition of the space being considered, and the suitability and costs related to a potential repurposing of existing space and equipment;
- protected territory details;
- in the event of a resale, the previous franchisee's revenue figures during the three-year period prior to their sale of the franchised business;
- in the event of a resale, any conduct or action by the previous franchisee that may adversely affect the purchaser's reputation or operation of the business;
- key performance requirements or sales targets;
- information regarding competition the franchise may face, including from other franchisees of the system in question; and
- any negotiated terms or amendments to the franchise agreement or the franchise grant.

The above is not meant to be an exhaustive list, but rather, to highlight the myriad of considerations that franchisors and their counsel should turn their minds to on a case-by-case basis when preparing a disclosure document.

Franchisors and their counsel should consider establishing diligence and information collecting processes when preparing and customizing disclosure documents to ensure that all material facts and site-specific disclosure known to the franchisor is included and provided to the franchisee. By the same token, however, standardized procedures should not merely constitute a box ticking exercise. Franchisor counsel should review the grant and related documentation on each grant to consider whether there are particular considerations that need to be disclosed, or whether further diligence is required.

As an example, in *Freshly Squeezed*, the Ontario Superior Court considered the scope of location-specific disclosure requirements in the context of a franchisee rescission claim. In this case, the franchisor took the position that it had provided an adequate disclosure document to the principal of the franchisee prior to the franchisee entering into any franchise agreement. The franchisee's business was to be located in the food court of a hospital in Toronto, Ontario, and this was going to be the first instance that a "Freshly Squeezed" franchise would be located outside of a shopping mall context. This fact was not included in the disclosure document, which the courts found (in connection with other items considered during the case) amounted to the franchisor's failure to disclose certain material facts to the franchisee.[127]

In explaining its reasoning, the application judge found that the key question on rescission is whether the subject deficiency was so serious that it deprived the franchisee of an opportunity to make an informed investment decision [emphasis added] *in the particular circumstances of the case.* The court found that the fact that this was to be the first non-mall location was a material fact that ought to have been explicitly disclosed pursuant to section 5(4)(a) of the Wishart Act, which it was not. The Court noted that there was "no track record for the success of this franchise business in non-mall settings and that could pose a risk to the financial viability of this particular venture".[128]

[127] *Freshly Squeezed*, *supra* note 63
[128] *Freshly Squeezed*, *supra* note 63.

The *Freshly Squeezed* case illustrates that disclosure should not be approached as a mechanical exercise. There is no standard or rigid disclosure document "template" that can be used repeatedly, and the unique qualities of each specific unit need to be considered in determining what information must be disclosed. What facts are "material", and therefore required to be disclosed, may vary with each grant of a franchise. A disclosure document that is adequate for one franchise opportunity may be materially deficient in respect to another.

PART 5: MANAGING THE SALES PROCESS

Your franchisor client's franchise agreement and franchise disclosure document are complete, the operations manual has been finalized, the necessary structuring and preparations have taken place, and the franchisor is ready to begin selling franchises. There may be no more exciting time for a franchisor than signing up its first franchisee, and officially embarking on its journey as the operator of a franchise system.

In this exuberance, however, it should be kept in mind that the sale of franchises is a potential legal minefield for franchisors, and failure to carefully manage the sales process can result in violations of the Acts' disclosure rules, and provide significant remedies provided to the franchisee.

To avoid potential pitfalls, franchisors (and their counsel) should ensure that they have a handle on how the sales of franchises interact with the Acts' rules regarding disclosure. As the franchisor's legal counsel, you must ensure that you are properly informing your client (and your client's sales team) of their disclosure obligations. Equally important, however, is explaining to your client what they must and must not do after disclosing a franchisee prospect.

Covering Your Bases

Pursuant to the Wishart Act, a franchisor must provide its disclosure document, and the Franchisee must receive the disclosure document, "not less than 14 days before the earlier of, (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…"[129] This requirement is mirrored, subject to certain differences, across all of the Acts.

Put simply, and subject to certain limited exemptions described in the Wishart Act, fourteen clear days must pass from the date the franchisee receives the disclosure document until the franchisee signs any agreements relating to the franchise, or the franchisee pays any consideration to the franchisor (or its associate) relating to the franchise.

The above language found in the Wishart Act may raise more questions than it answers. For instance, what constitutes a "franchise agreement or any other agreement relating to the franchise"? Franchisor counsel should think critically about what agreements may relate to the franchise and otherwise be implicated by this language. Obviously, a franchise agreement would apply, as would other agreements that govern key terms of the franchise relationship, such as a personal guarantee agreement, general security agreement, or a tripartite agreement in respect of brick and mortar locations. Where this analysis becomes more complicated is in instances where the franchisor is not the drafter of an agreement in question, or where an agreement governs relationships and situations that, while relevant to the franchise business to be operated, are not necessarily central to the franchise relationship between the franchisor and the franchisee.

Moreover, it needs to be considered what constitutes the "payment of any consideration" in the context of section 5 of the Wishart Act. Although we can imagine that an initial franchise fee would constitute "consideration" for purposes of section 5 of the Wishart Act, what about a requirement that the franchisee immediately purchase initial inventory from the franchisor? Moreover, it is not clear if consideration payable to a third party, rather than directly to the franchisor, would violate this requirement.[130] These are issues that a franchisor's counsel should be live to, and in the face of ambiguity under the Acts, advise their client of potential risks associated with such ambiguity. When in doubt, the safest path forward is to ensure that no money is paid to the franchisor until the disclosure period has ended.

[129] *Wishart Act*, *supra* note 3, s 5.
[130] Ian Roher & Frank Zaid, "Hot Spots in Franchising" (Dealing With and Litigating Disputes Involving Franchises, Ontario Bar Association, 2012) a 15.

Counting the Days

It may seem innocuous, but special attention should also be paid to the fourteen-day period the Wishart Act provides between when a disclosure document is provided to a prospective franchisee, and when any franchise or related agreements can be signed or any consideration can be paid.

It is a requirement of the Acts that a franchisor receive written receipt of its disclosure document by the prospective franchisee(s). For instance, the Wishart Act notes that the franchisor must receive "a written acknowledgment of receipt from the prospective franchisee"[131]. As a matter of best practice, a disclosure document should contain a form of receipt for each franchisee prospect to sign, date, and return. While it is not strictly prohibited that the receipt be in the form of an e-mail returned to the franchisor, best practice dictates that the receipt should be included in the disclosure document itself in a form that clearly evidences what the franchisee has received where locations to sign and date the page.

As such, when determining when the fourteen-day disclosure period begins and ends, the franchisor should not "start the clock" until the day *following* the latest date included on the receipt returned by the franchisee prospects. When measuring this fourteen-day period, fourteen days *does not* include the day the receipt was returned to the franchisor (i.e., the last date indicated on the signed and dated receipt). Instead, "day one" should be the next calendar day following the date on the receipt returned to the franchisor. As a best practice, and to reduce potential ambiguity when considering whether the full disclosure period has been expended, a franchisor should consider self-imposing a mandatory fifteen-day disclosure period.

As described above, only once this fourteen-day disclosure period has run its course, is a franchisor entitled to seek that the franchisee (a) sign any franchise agreement (or other agreement related to the franchise), or (b) pay any consideration in respect of the franchise. It should be noted that, following the expiry of this fourteen-day period, and on the earlier of the first date that the franchisor accepts (a) or (b) above, the franchisor's disclosure obligations is considered complete, and no further disclosure (in the form of a Statement of Material Change, as described below) is due to the franchisee.[132]

[131] Wishart Act Regulation, *supra* note 33, s 12(1)(d).
[132] *Wishart Act*, *supra* note 3, s 5(1).

A key point of note that many franchisors (and their sales staff) may fail to grasp is that the disclosure period does not automatically end at the end of the fourteen-day period described above. A disclosure period must be at least fourteen days in length pursuant to the Acts, but that is not to say that it cannot be longer than fourteen days. Even if the initial fourteen-day disclosure period has elapsed, the disclosure period continues until either event (a) or (b) (as described in the preceding paragraph) occurs, or until either the franchisor or the franchisee formally withdraws or declines the franchise grant in question. As such, the franchisor's obligation to disclose "material changes" or new "material facts" that emerge between the date of delivery of the disclosure document, and the end of the disclosure period, does not automatically end. The next paragraph section of this paper provides further information on the topic of "material changes".

What's Changed from Disclosure to Signing?

A lot can happen in (approximately) two weeks (or more). For instance, the 1962 Cuban Missile Crisis lasted only thirteen days. While it is hoped that far less significant changes will have taken place in your client's franchise system between the date of the provision of the disclosure document, and the end of the disclosure period, changes (including significant changes) and the emergence of new material facts can happen quickly.

Under the Wishart Act, franchisors have an obligation to provide "the prospective franchisee with a written statement of any material change, and the franchisee must receive such statement, as soon as practicable… and before the earlier of, (a) the signing by the prospective franchisee of the 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."[133] In other words, it is expected that a franchisor will keep the franchisee apprised of any material changes that may take place during the disclosure period.[134]

In turn, the Wishart Act defines a "material change" 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

[133] *Wishart Act*, *supra* note 3.

[134] Worth noting, and as described in the preceding section, a franchisor's disclosure obligation does not automatically end upon the expiry of the fourteen-day disclosure period. Instead, it continues on until the franchisee (a) signs any franchise agreement (or other agreement related to the franchise), or (b) pays any consideration in respect of the franchise. As such, the period during which a franchisor is required to disclose material changes could be significantly longer than the statutory fourteen-day disclosure period.

prescribed change, that would reasonably be expected to have a [emphasis added] *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".

A "material change" is distinguished from a "material fact" where the former *only* includes information that is adverse to the business while the latter is broader. Nonetheless, pursuant to the "*DeliMark*" case, a franchisor is also expected to keep a franchisee apprised of the emergence of new "material facts" and site-specific information during the disclosure period, including as part of a statement of material change.[135]

A simple way to think about whether a new material fact has emerged is to consider whether the information in question would affect (i) the franchisee's decision to purchase the franchise, or (ii) the price it would pay for the franchise. Although this simplified approach should not replace a careful review of the words and requirements of the Wishart Act (or any of the other Acts and Regulations), it is a helpful first step at conducting the analysis as to whether new information or changes have emerged that must be disclosed. This test should be conducted together with the test used to consider "material changes", outlined above. In the event that a material change has occurred, or a new material fact has emerged, the franchisor is then required to deliver a statement of material change to the franchisee informing them of such information.[136] You should note that the Acts and Regulations may specify certain prescribed form or other content requirements.[137]

Perhaps the more challenging issue is to determine what actually constitutes a "significant adverse effect", or a new "material fact", for the purpose of determining whether a Statement of Material Change must be issued. Franchisor practitioners are well-advised to ensure that they are discussing any potential changes or new facts with their franchisor clients prior to the franchisor having the franchisee sign any documents, or pay any consideration, to consider in detail what has happened since the disclosure document was issued. Where possible, franchisors should try to establish a standard practice of conducing "pre-signing calls" where the franchisor and their counsel canvass

[135] *2337310 Ontario Inc. v 2264145 Ontario Inc.*, 2014 ONSC 4370, 37-39.
[136] Snell & Weinberg, *supra* note 11 at 228-29.
[137] *Wishart Act*, *supra* note 3.

whether any material changes have occurred, or any new material facts have emerged, prior to ending the disclosure period.

The challenge may rest in determining whether seemingly neutral changes or items may be construed, whether in the present or in the future, as constituting or representing a material change or new material fact. For instance, if a franchisor's reviewed or audited financial statements are prepared and completed during the franchise disclosure period, is it possible that the metrics therein could be construed as being material?

Ambiguities such as these emphasize the importance of frank and ongoing discussions between counsel and their client. Although the list of possible material changes or new material facts is endless, a careful item-by-item examination should be taken of the happenings during the disclosure period, to consider whether any of these events are, or could be considered, material with respect to the franchisee's interests, the franchise system, the franchise grant in question, and other specified items. When in doubt, a franchisor (and their counsel) should consider whether the safest path forward is to disclose, rather than not disclose, a potential material change or new material fact.

Disclosure Period (and Pre-Disclosure Period) Correspondence

It is understandable that a franchisor and a franchisee will have discussions leading up to a franchisee's investment in a franchise system. The purchase of a franchise will be one of the most significant purchases a franchisee will make, so it is only natural that an engaged franchisee will want to learn everything they can about the opportunity, the business, and the grant. They will also be especially eager to know how much money they may earn, a topic which is described under the subheading "Financial Performance Representations", below.

Franchisors obviously need to be engaged with the franchisee and these questions, or will otherwise have a difficult time "selling" the concept and the business to a franchisee. But by the same token, a franchisor must be extremely careful to ensure that their discussions, correspondence, and other communications with the potential franchisee, whether taking place before or after a disclosure document has been delivered, do not run afoul of the Acts.

A franchisor would be well advised to ensure that their sales teams fully understand what they can and cannot say during the selling process. In particular, a franchisor should ensure that anything

being stated during the sales process is also included in the disclosure document that has been, or will be, issued to the franchisee prospects in question. Although the concept of "discovery days" is not as prevalent in Canada as it is in the United States, for American franchisors operating in Canada, or selling to Canadian franchisees, content to be delivered or shared on such days should be vetted by both American and Canadian legal counsel.

This is especially true with large franchisor companies, where the sales, operations, and legal teams will likely consist of different members. Constant ongoing communication should be taking place between all team members interacting with potential franchisees or involved in the franchise grant, as well as legal, to ensure that messaging provided to a prospect is consistent across the board, and that such messaging has been vetted. It is crucial that all team members who will be interacting with potential franchisees have been briefed on what they can and cannot say, and should understand what is already in the disclosure document and has been (presumably) vetted to share.

Financial Performance Representations

As previewed above, the first thing a prospective franchisee will want to determine is how much they can expect to earn by purchasing the franchise. This makes the inclusion of financial performance representations and other metrics (collectively, "**FPRs**") a powerful tool to entice franchisee investment. However, it is important that franchisors consider carefully what they can, should, and should not provide in their disclosure document.

While the Wishart Act does not define "earnings projections", the Acts in the other five provinces define this term to include "…information given by or on behalf of the franchisor, directly or indirectly, from which a specific level or range of actual or potential sales, costs, income, revenue or profits from franchises, or businesses of the franchisor or of the franchisor's affiliate of the same type as the franchise being offered can easily be ascertained"[138]. The broad nature of this definition provides that wide swaths of financial information or data are, or can be interpreted as, FPRs.

It is worth noting that none of the Acts nor the Regulations contain a specific requirement to include annual operating costs, earnings projections, or other FPRs in a franchisor's disclosure document. As such, the inclusion of FPRs is optional. If FPRs are provided, however, certain Acts

[138] BC Reg 238/2016, s 1(1).

provide additional requirements with respect to the underlying assumptions, basis, and availability of supporting documentation with respect to such FPRs.[139]

Considering the breadth of the definition above, and the associated requirements accompanying FPRs, the provision of FPRs in the Canadian marketplace remain uncommon. This is also due to the fact that, for a franchisee searching for deficiencies in a disclosure document, FPRs are likely the first information they will look to dissect for potential errors, omissions, or misrepresentations, especially considering the complexity of the information and the multitude of ways that such data may be organized, calculated, and presented. As such, declining to include FPRs allows a franchisor to avoid the inclusion of potentially incorrect or misleading data, or misunderstandings or misrepresentations that may result from differing or non-standard accounting practices. It may also, however, hinder their ability to sell franchises.

Franchisors must remain diligent to avoid accidentally providing FPRs outside of the disclosure document – for example, by way of pro forma data, profit and loss charts, cost calculators and franchisee worksheets, the provision of the metrics of other corporate and franchised units absent the necessary accompany information, or scribbled notes at a sales meeting. A frank discussion should be had with the franchisor explaining the types of information that should and should not be shared by its sales team. In the event that they do wish to share figures that may constitute FPRs, such figures should be vetted by accounting and legal, the necessary accompany information and backup should be prepared and compiled, and such information should be identically disclosed in the disclosure document.

PART 6: ADVISING THE FIRST-TIME FRANCHISEE[140]

Thus far, this paper has focused on a new franchise law practitioner's obligations to its franchisor clients. As we know, however, a franchisor represents only one half of the franchise relationship. Although the authors of this paper generally represent franchisor clients, it is their strong belief that franchising works best, and certain potential future disputes can be avoided altogether, when

[139] *Franchises Act*, RSA 1980, c F-17.

[140] For further information regarding this topic, the authors would highly recommend that readers also consult Allan DJ Dick & Daniel F So, "The Unique Aspects of Advising Franchisee Clients" (Institute of Continuing Professional Development, Ontario Bar Association, 2011); Jackson, Robinson & Dore, *supra* note 30.

all parties are well informed and well-prepared prior to signing, regardless of their size and sophistication.

Prospective franchisees, especially franchisees who are new to the franchise business model and who likely have little familiarity with Canada's franchise law regimes, may be in a vulnerable position prior to, and following, their signing of a franchise agreement. Often, they have little to no bargaining power in the face of a franchisor who has greater resources, is often (but not always) well advised of their legal rights and obligations, and who generally will make few to no changes or concessions to their franchise agreement or other terms of the franchise grant. As such, it is imperative that franchisee lawyers are equipping their franchisees clients with the tools and knowledge they need to assess the grant in question.

The purchase of a franchise is a considerable investment, often one of the most significant investments an individual will make in their lifetime. Moreover, the franchise agreement will impose significant obligations on that individual (and their operating company, if any) for years to come. Yet a striking number of new franchisees are not informed of their obligations under a franchise agreement until a dispute has arisen. Instead, it is every franchise law practitioner's aspiration that a new franchisee will seek legal advice prior to entering into such a significant commitment. As a franchise law practitioner, where do you begin when you have been retained by a first time-franchisee?

The Retainer

Rules and best practices surrounding retainers have been explored and discussed at length (including earlier in this paper), and a review of the applicable rules and professional obligations[141] and commentary[142] are well worth the time. In the franchise law context, the retainer entered into with a franchisee should clearly describe what services you, as their franchise counsel, will provide in respect to the review of their prospective franchise grant. For instance, you may review the disclosure document and franchise agreement, but will you also be responsible for negotiating potential changes directly with the franchisor? Moreover, are they soliciting you for corporate

[141] *Rules of Professional Conduct*, *supra* note 18.
[142] *Ibid.*

structuring and other ancillary services? Among other things, the retainer should clearly set out what services will be provided to the franchisee, and at what cost.

Understanding the Backstory and Conducting your Diligence

Once the client has fully retained you, it is crucial that franchise lawyers are not undertaking their mandate in a vacuum. Understanding the franchisee's background, unique circumstances, needs, financial resources, objectives, and potential concerns is crucial element of providing well-reasoned advice when reviewing the prospective franchise grant. Although experienced franchise law practitioners can assess a franchise grant on its merits through a review of the documents presented, no analysis is fully informed unless such practitioners have done background diligence on their client, and understand the unique circumstances that may affect the grant, beyond simply the terms that have been put to paper. While the concerns will vary from individual to individual, concerns that may arise include:

- If the franchise agreement stipulates the full-time involvement of the franchisee principal in the business, does that align with the realities and objectives of the prospective franchisee?

- Is there an in-term or post-term non-competition and/or non-solicitation provision? Would this interfere with other business ventures that the franchisee may current operate, or may wish to operate in the future?

- Does the franchisee understand the advantages of having a corporation serve as the franchisee, rather than herself or himself personally? Do they need assistance incorporating a corporation?

The above list is non-exclusive, but provides examples of the types of considerations that may only become evident following a frank discussion with the prospective franchisee. A review of the franchise documents should not be conducted in a void, and the terms of the proposed agreements need to be reviewed considering the client's existing realities and future objectives.

To assess the grant in question, and to understand whether the franchisor has acted in accordance with its requirements under the Act to date, it is also crucial to drill down on what conversations

and communication the franchisee has had with its potential franchisor to date. Has a disclosure document been provided? Have additional materials, outside the disclosure document, been provided? Has the franchisee been provided any representations, assurances, guarantees, information, or financial information, and has that information been included in the disclosure document? The potential items of note are endless, but the key takeaway is that a franchisee's lawyer must understand the relationship, correspondence, and interactions that have occurred to date between a prospective franchisee and a franchisor.

Equally important is conducing due diligence on the franchisor in question. In particular, franchisee lawyers should consider what the franchisor is agreeing to provide pursuant to the terms of the franchise agreement, and whether it seems realistic that a franchisor could deliver on such commitments.[143] Franchisee lawyers should consider the nature and specifics of the franchisor, including reviewing its financial health pursuant to its financial statements, considering whether the franchisor has taken adequate steps to apply and/or register for its intellectual property and trademarks, and calling (or advising the prospective franchisee to call) existing franchisees (if any), whose information would be provided in the disclosure document.

Special attention should be paid when the franchisor is a non-Canadian brand or entity, and is bringing the franchise concept to Canada. In such an instance, consideration should be paid to whether the franchisor is in a position to establish, operate, and grow the brand and system in Canada from abroad, including whether it has conformed its operations for the Canadian marketplace and regulatory regime.[144].

Providing the Lay of the Land

It is crucial that counsel take the time to provide their client with the lay of the franchise law landscape. Although it is your duty to review the franchise grant in question from a legal perspective, it is nonetheless imperative that you are explaining to the franchisee prospect the considerations that are informing your analysis, and ultimately the relationship between them and the franchisor, before and after signing the franchise agreement or paying any consideration. In

[143] Peter Viitre & Joseph Adler, "Fundamentals of Canadian Franchising" (Ontario Bar Association: Institute of Continuing Professional Development; Franchise Law, 2011).
[144] See *e.g.* Tony Wilson, "Want to buy a franchise? Read this First", *The Globe and Mail* (2 March 2010), online. <https://www.theglobeandmail.com/report-on-business/small-business/sb-growth/want-to-buy-a-franchise-read-this-first/article626836/>.

particular, you should ensure that they have a baselevel understanding of the following franchise-related topics:

- What is franchising, and what does it entail?
- What additional steps can the franchisee undertake to perform further diligence on the franchise system, the grant in question, and the franchisor?
- What are the typical obligations that exist under a franchise agreement?
- What are the Acts and Regulations, and what obligations do they impose on the franchisor with respect to disclosure?
- What happens if they do not receive adequate disclosure?
- What types of obligations and responsibilities do the Acts impose on a franchise relationship?

Reviewing the disclosure document

Having been properly retained by the franchisee, and having now taken the time to understand their unique circumstances, it is now time to drill down on the disclosure document provided. This section assumes that a compliant disclosure document has been, or will be, provided to the franchisee. Should a disclosure document not be provided, or should that disclosure document be deficient, the practitioner should consider whether the franchisor is availing itself of an applicable disclosure document exemption under the Acts, or whether the franchisor has failed to meet its disclosure obligations to the franchisee, in which case it is imperative to advise the franchisee of this fact and his or her resulting rights (including all applicable dates and timelines).

When beginning to review the disclosure document, a practitioner should keep in mind that they are a legal, and not a business, advisor. Ultimately, it is the franchisee's obligation to assess the merits of the business case the disclosure document is presenting, and whether it would be viable in the franchisee's circumstances. Instead, the practitioner should review the disclosure document with a focus on whether it is complying with the Acts and Regulations, and more generally, assess the narrative being conveyed. When reviewing, counsel should confirm that the disclosure

document is complying with the requirements of the applicable Act and Regulations, including that it contains all necessary prescribed information, all other material facts, financial statements (unless an exemption exists), all required or applicable agreements, a certificate of disclosure, and all other items called for under the applicable Act or otherwise.[145] In the event that material changes or new material facts have emerged, it should be considered whether the franchisor has complied with its ongoing disclosure obligations.

When reviewing the disclosure document, you should be sure to highlight all deficiencies, ambiguities, and errors you may observe to your client. Such deficiencies and other issues matter for two reasons: firstly, such deficiencies may impact the business calculations that your client will make when deciding whether to purchase the grant. It is crucial that your client has a complete understanding of the potential franchised business they are purchasing, and deficiencies or missing/incorrect information may affect such a calculation. By pointing out these deficiencies, your client has an opportunity to seek further information from the franchisor to consider if this opportunity is right for them.

Secondly, the presence of such deficiencies and other issues may provide your client with significant remedies under the applicable Act and Regulations, including (potentially) the right of rescission (which is described above).

Although legal advisors play a crucial role in the review of a potential grant, simultaneously with the review of the grant from a legal perspective, you should be encouraging your client to engage accounting, tax, and business advisors to ensure that the franchisee is fully informed of all crucial aspects of the potential grant, not solely the legal considerations.

Review the Franchise Agreement

While the findings from reviewing the disclosure document may provide valuable high-level information regarding the franchise grant, and may also inform whether the franchisee has any rights under the Acts and Regulations, the franchise agreement is the beating heart of the franchise

[145] Jackson, Robinson & Dore, *supra* note 30 at 11.

grant. This document will guide the parties' relationship for years, and maybe even decades, to come. As such, a careful, line-by-line review of the franchise agreement is crucial.

As with any of the activities described herein, the review of the franchise agreement, and your findings, will vary wildly from one instance to the next. There are no specific criteria or set of guidelines you can avail yourself to when reviewing the franchise agreement. In our experience, however, there are a series of questions you should be asking yourself while reviewing. In particular, consider questions such as:

- Is the scope and demands of the agreement reasonable in light of the nature of the franchise grant, the size of the franchise system, the franchisee's investment, and nature of the business?

- What is the term of the agreement, and are there any rights of renewal? Is it of a sufficient length to allow your client to recoup their investment?

- Who is responsible for selecting a territory and/or constructing the location, if applicable?

- Is there an exclusive territory provided? If so, are there any carve outs from such territorial protection? If not, are there any limits on what the franchisor can or cannot do in close proximity to your future business?

- Are there provisions therein that are off market for a franchise grant or franchise system of this nature?

- Are there provisions that, although on-market, could have a significant impact on your client professional and personally, such as a personal guarantee of the franchisee corporation's obligations?

- What degree of assistance is the franchisor offering to the franchisee, both prior to, and following, the franchisee opening for business?

- Is there a training program, and does it look sufficiently fulsome for the franchisee to learn and grasp the franchise system's operations?

- Are the fees and expenses being charged reasonable in light of the franchise grant?
- In the event of a foreign franchisor, how are withholding and other taxes to be paid? Moreover, in what currency are payments to take place?
- Has the franchisor established an advertising fund, and if so, will the franchisee have to contribute to it? Does the franchisee have any information rights with respect to such fund?
- Are there mandatory or specified vendors and suppliers, and if so, do they charge a markup?
- Are there mechanics allowing your client to eventually walk away, transfer, or otherwise monetize its business?
- How are any rebates the franchisor may receive from vendors and suppliers treated, and will they be shared or passed on to the franchisee?
- Is there an in-term and/or post-term non-competition and/or non-solicitation provision? Is it reasonable, and is it enforceable?
- How are disagreements resolved? Are there mandatory dispute resolution provisions, such as mandatory and binding arbitration? What law governs the agreement? Do such provisions comply with restrictions contained in the Acts and Regulations?
- In what situations can the franchisor unilaterally terminate the franchise relationship? Are there instances where your client can do the same?
- Does the agreement impose penalty fees on the franchisee in set instances?

In reality, the list of questions above is a small sample of what practitioners above should consider and ask when reviewing a franchise agreement. Franchise agreements are incredibly complicated documents, and as is evident, dozens of different mechanics come together to govern the franchise relationship in question. It is imperative that a franchise law practitioner understand the workings of a franchise agreement, including the types and specifics of common provisions, so that they can advise clients as to whether the agreement is reasonable and sufficient. Part of becoming familiar

with franchise agreements, and effectively being able to advise on these questions, comes with closely reviewing a significant number of different agreements.

Negotiating the Franchise Agreement

Franchisors will often make it clear that their franchise grant is not up for negotiation, and that the grant is presented on a "take it or leave it" basis. In reality, this is not always true.

Larger, more profitable franchise systems have significantly more bargaining power and significant interest from potential franchisees, so understandably they will (presumably) be less willing to make concessions. When your client is interested in investing in a new or emerging franchise system that is looking to build their initial franchisee base, however, a franchisor may be more willing to make concessions to secure another franchisee.

It is worth keeping in mind that a franchisor too willing to make concessions to sell a franchise can raise red flags. Although seeking better terms for your client is a desirable outcome, if a small franchisor is willing to compromise on key system terms, such as royalty fees, it should raise the question as to what other concessions it may have already given, or will give, to other franchisees. A franchise system thrives on consistency, and systems that provide overly generous concessions to every franchisee may struggle to maintain brand standards, or otherwise fail to secure the revenues necessary to continue to grow, build brand presence, or otherwise ensure that it is reinvesting revenues into the system to generate innovation and maintain relevance.

That being said, even with particularly uncompromising franchisors, there remain particular items that may be negotiated without harming the franchisor's system. As an example, certain franchise systems require franchisees to either expend a certain dollar amount on conducting grand opening advertising for their business, or to otherwise pay such an amount to the franchisor so that it may conduct grand opening advertising on the franchisee's behalf. Consider inquiring whether, to sweeten the deal for the franchisee, the franchisor will match the franchisee's contributions to the grand opening advertising spend, or otherwise split it with the franchisee. Moreover, it should be considered whether the franchisor would be willing to compromise with respect to providing enhanced training and/or additional on-site assistance prior to and following launch.[146]

[146] Dick & So, *supra* note 139 at 9.

Although the above are but a few potential items that may be negotiated, there are a variety of items in a franchise agreement that can be negotiated in the franchisee's favour without harming the consistency or strength of the franchise system.

Reviewing and Negotiating Other Agreements

In certain instances, your client may be acquiring more than the right to operate a single franchised business.

For instance, your client may be acquiring the right to act as an area developer in a territory, where it will be responsible for establishing and operating multiple individual franchise units. Moreover, under such an agreement, your client may have additional obligations not typically seen in a standard unit franchise agreement, including providing additional support to franchised locations. Likewise, if your client is entering into a lease for the premises, a careful review of the terms of that lease should be conducted to ensure that they are on market, reasonable, and align with your client's goals.

Although a discussion of these more complicated franchise structures is beyond the scope of this paper[147], all agreements being provided for the eventual execution by your client should be carefully reviewed as a whole, and the nature and specifics of these agreements must be explained to your client. In particular, you should consider whether the agreements are cohesive, and the obligations being woven together by all of the agreements as a whole are workable and fair.

Managing the Signing

If you are tasked with assisting your clients to sign the execution documents, once provided, you should ensure that the documents provided to you match those included in the disclosure document, including any negotiated changes. Franchise agreements and related documents can be

[147] *Ibid.*

both long and dense, so assisting your client to understand what documents need to be signed, and what other items may need to be completed, will significantly reduce their stress levels.

Post-Signing

Following the completion of your mandate, it is recommended that you report to the client on your scope of review, findings, warnings, and concerns. As Allan D.J. Dick and Daniel So succinctly state, "[b]ecause franchise documentation is typically extensive, so too will necessarily be the review report."[148] In particular, the reporting letter should consider topics such as the importance of the franchisee conducting additional and follow-up due diligence, a detailed summary of your findings with respect to the disclosure document and franchise agreement, a list of any deficiencies in the documents, franchise agreement, and related documents, key dates and deadlines, and a summary of key or particular material/burdensome terms, and other related material items.[149]

A franchised business, and a franchise system more generally, excel when the franchisor, the franchisee, and their suppliers are profitable and working towards a common goal. Should any one of these parties not be profitable, complications, disputes, and other issues may arise. The extent and scope of the services you may provide to franchisee clients post-signing cannot be known at the time the franchisee signs the franchise agreement, and could range from administering the transfer of the business (should your client wish to sell), to overseeing the renewal of your client's franchise agreement at the expiration of its term. In any event, ensure that you keep records of the franchise relationship entered into by your client (assuming they were provided to you) for further reference.

In the event that there are important notice deadlines or other key dates, ensure that you are informing your client upfront to keep an eye on those dates, and clearly indicating to your client that it is their responsibly to monitor such dates (unless you agree otherwise). This is especially important in the event that your client may have a potential rescission right.

[148] *Ibid* at 10.
[149] *Ibid.*

CONCLUSION

The above is intended to illustrate key concepts, and certain best practices, that new counsel should be aware of when advising new franchisors and new franchisees. It goes without saying that no single paper will sufficiently endow readers with the entirety of the knowledge that they require to effectively practice in this area. Nonetheless, practitioners will hopefully take away from this paper an understanding of certain key aspects of franchise law, together with certain best practices and tips, that may be useful in their own practice. The authors strongly recommend also reviewing the various papers and articles referenced throughout this paper for further information, and otherwise keeping in mind the importance of due diligence in one's practice. No practitioner should operate in a vacuum, and a solid understanding of your client and their needs, aspirations, and circumstances is necessary to provide the best possible advice.

Counsel should not hesitate to contact the authors of this paper should they wish to discuss these topics further.