

**Canadian Franchise Association
Legal Day - March 3, 2009**

2008 FRANCHISE LEGISLATIVE UPDATE

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I. LEGISLATIVE UPDATE

A. NEW BRUNSWICK

Since June, 2007, New Brunswick has had its own franchise legislation. The statute is essentially the same as Prince Edward Island's *Franchises Act*¹ ("PEI Act"), which, in turn, is very similar to Ontario's *Arthur Wishart Act*² ("Ontario Act") and Alberta's *Franchises Act*³ ("Alberta Act"). We contacted the New Brunswick Department of Justice and Office of the Attorney General and were advised that the *Franchises Act*⁴ ("New Brunswick Act") will be proclaimed when the regulations are completed, a process that is still ongoing because the government intends to issue a consultation paper on the regulations first. The Director of Consumer Affairs advised us that stakeholders will be able to comment on the issues raised by the process, and a consultation paper will be made available electronically by the fall of 2009. The regulatory development process will be concluded following this consultation period, but there are no other specifics available with respect to the target date for finalizing the regulations and proclaiming the New Brunswick Act in force.

B. BRITISH COLUMBIA

There has been no publicly announced intention to draft franchise specific legislation in British Columbia, but, over the years, we have been aware of unofficial rumours that the B.C. government will consider the issue at some time in the future.

¹ *Franchises Act*, R.S.P.E.I. 1988, c.F-14.1 [PEI Act].

² *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 [Ontario Act].

³ *Franchises Act*, R.S.A. 2000, c.F-23 [Alberta Act].

⁴ *Franchises Act*, S.N.B. 2007, c. F-23.5 [New Brunswick Act].

C. SASKATCHEWAN, NOVA SCOTIA AND THE TERRITORIES

There are no discernable intentions, as yet, to enact franchise specific legislation in Saskatchewan, Nova Scotia or the territories.

D. MANITOBA

In May, 2008, the Manitoba Law Reform Commission (the “Commission”) published its report on franchise law, addressing the issues concerned with the enactment of provincial franchise legislation. The report concluded that the need to rectify the disadvantage to franchisees in Manitoba operating without franchise regulation exceeded the fear of diminishing Manitoba’s prospects as an attractive business venue, and recommended that franchise legislation be implemented. In a 180-page report to the Minister of Justice and Attorney General, the Commission made many recommendations with respect to the provisions which would best protect the commercial interests of franchisees and franchisors. As a whole, the report echoes many of the principles presently governing franchises in Ontario, Alberta and P.E.I., however certain particulars warrant some commentary.

The following is a summary of some of the highlights of the Commission’s report:

- the Uniform Law Conference of Canada’s (ULCC) *Uniform Franchises Act* (the “Model Bill”) will be the model for franchise legislation and disclosure regulation upon which the proposed Manitoba franchise legislation (the “Manitoba Act”) will be based
- to ensure that full disclosure is not precluded by avoiding the use of a formal title, the requirement to disclose background information should be extended from directors, general partners and officers of the franchisor to all individuals who have management responsibility relating to the franchise

- in addition to the titles listed above, the disclosure requirement should be extended under the Manitoba Act to associates and affiliates of a franchisor who are significantly connected to the franchisor through relationships of control. The report adopts the Model Bill's definition of "franchisor's associate" and the *Canada Business Corporation Act's*⁵ definition of "affiliate"
- in order to avoid the situation which is possible under the existing franchise legislation where a franchisor could avoid disclosing unfavourable background information by assuming a new corporate identity, the Manitoba Act should include an extension of disclosure requirements to a franchisor's predecessors for the 10 year period immediately before the close of the franchisor's most recent fiscal year
- the level and extent of disclosure requirements in connection with financial performance representations should be broadened to include additional "reasonable" cautionary language with respect to the forward-looking nature of the information in the disclosure document
- where projections or forecasts of financial performance are not included, a statement should be required to be inserted in the disclosure document to the effect that no one is authorized to make projections or forecasts respecting the franchise
- similar to the Model Bill, franchisors should be required to disclose their policies and practices in relation to whether the franchisor or any of its affiliates received rebates or benefits in the previous year, whether the benefits formed a material part of the recipient's total revenue and whether and how rebates were shared with franchisees
- where a franchisee is granted an exclusive territory, the franchisor should be required to disclose the boundaries of the territory or a description of how the boundaries will be determined, and where there is no grant of exclusive territory to the franchisee, an express statement to that effect will be required to be included in the disclosure document

⁵ *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

- the franchisor should be required to disclose the number of lawsuits initiated by the franchisor against franchisees and the number of disputes that were resolved through mediation or arbitration
- in order to assist franchisees in evaluating the quality of information that may be obtained by contacting other franchisees in the system, prospective franchisees should receive information concerning the number of existing franchisees currently subject to confidentiality agreements
- disclosure should be required of the history of the franchise outlet in question and of repeated sales of other current franchises within Manitoba and of the 20 current franchises that are geographically closest to the franchise being offered, in order to provide for revealing information with respect to significant turnover at a specific location
- the report expressed a concern with the common use of cross-default provisions in franchise and lease agreements in those instances where an individual or corporation related to the franchisor acts as sub-lessor. Accordingly, where such a relationship exists, disclosure of the business background of the sub-lessor should be required
- wrap-around documents should be permitted under the Manitoba Act
- in accordance with the comments made by the Ontario Superior Court of Justice in *obiter dicta* in *Sovereignty Investment Holdings, Inc. v. 9127-6907 Quebec Inc.*⁶, which is discussed elsewhere in this paper, the Commission recommends that minor errors or irregularities in a disclosure document should not constitute grounds to be considered deficient or invalid. A disclosure document should be considered valid if it substantially complies with the Manitoba Act and its regulations
- of particular importance to franchisors is the recommendation by the Commission that electronic delivery of disclosure documents be permitted. Currently, P.E.I. is the only legislated jurisdiction that allows for such form of delivery, and the convenience and cost

⁶ *Sovereignty Investment Holdings, Inc. v. 9127-6907 Quebec Inc. et al.*, [2008] O.J. No. 4450, Court File No. 08-CL-7428 [*Sovereignty*].

savings of electronic communication is significantly attractive to franchisors. The recommendation does provide, however, that a franchisee has the right to receive delivery in paper form if requested

- the report provides for several notable circumstances in which an exemption should be made from the usual requirement that a franchisor shall provide a prospective franchisee with a disclosure document not less than 14 days before signing a franchise or related agreement and making any payment relating to the franchise, including the entering into of a confidentiality agreement. As experienced franchisors are well aware, an onerous interpretation of the Alberta, Ontario and P.E.I. statutes provides that a confidentiality agreement, to be enforceable, must be preceded by the delivery of a disclosure document. This exemption provides for strong protection of the franchisor's information *before* it is required to provide disclosure. Other exemptions from the rule include that a franchisor may enter into a site selection agreement to reserve a franchise site, and that a fully refundable deposit may be collected, within a maximum amount, if it is placed with an independent advisor, before a disclosure document is required to be provided
- unlike the Alberta, Ontario and P.E.I. statutes, the report recommended that the Manitoba Act not contain regulations which exempt "mature franchisors" from the requirement to include financial statements in a disclosure document
- the Manitoba Act should be consistent with the Model Bill with respect to statutory disclosure remedies and the preservation of common law rights and remedies, including the statutory remedy of damages for misrepresentation in connection with future projections and forecasts. It should be noted that the Manitoba Act is intended to provide that a person is not liable for misrepresentation in a future projection or forecast if the disclosure document contained the reasonable cautionary language and the person making disclosure had a reasonable basis for making the projection or forecast
- the duty of fair dealing and the protection of franchisees' right to associate should be maintained under the Manitoba Act

- the Manitoba Act should allow franchisees to waive a right or requirement granted by the legislation in order to enable franchisors and franchisees to better settle their disputes. This is in contrast with the other franchise statutes which do not provide for such a waiver
- the report recommends that several provisions be included in the Manitoba Act to address the imbalance of power between the franchisor and franchisee that exists during negotiations and is inherent in their relationship, for example:
 - restrictions on the termination of a franchise agreement without just cause, and a right of action for damages for contravention of this provision
 - a requirement for reasonable time to remedy a breach
 - a provision allowing a franchisee to purchase goods or services from suppliers other than those designated by the franchisor, where the goods or services are of comparable quality, subject to certain conditions
 - a provision for a cause of action for damages for where a franchisor allows encroachment on an exclusive territory
- the report does not recommend that the Manitoba Act provide for an alternative dispute resolution process, however notes that where a franchise agreement provides such ADR, thorough disclosure of all elements of the process is required
- the report recommends that the Manitoba Act provide that a mandatory arbitration clause in a franchise agreement is invalid insofar as it prevents a franchisee from participating in a class action proceeding

As of this writing, the Commission has recommended the enactment of franchise legislation in Manitoba.

II. CASE LAW RELATING TO FRANCHISE LEGISLATION

A. DISCLOSURE

In *Chu v. Chowdhury*⁷ the franchisor had provided a single document as disclosure, which was comprised only of a pamphlet that included a sales report, unaudited financial statements for 2 years and an overview of the franchise system. The franchisee brought an action in the Ontario Superior Court of Justice for rescission of the franchise agreement on the grounds that the document presented as a franchise disclosure document was so deficient that it could not constitute a disclosure document and thus, the franchisee had 2 years to rescind the franchise agreement. On a motion for summary judgment, the question before the Court was the extent of deficiency that would render a document invalid as a franchise disclosure document. However, both the Superior Court and Divisional Court (where the matter was heard on appeal) did not address that issue, instead concluding that such a determination with respect to the validity of a franchise disclosure document was a fact specific inquiry to be determined at trial and the motion for summary judgment by the franchisee was dismissed. It can be concluded then, at least for the purposes of a summary judgment motion, that almost any attempt to create something that purports to be a franchise disclosure document will suffice. This case makes no contribution to the question of when is a document a franchise disclosure document in any other context. The Divisional Court stated that “the content of disclosure documents will vary from

⁷ *Chu v. Chowdhury (c.o.b. Liberty Car and Truck Rental)*, [2008] O.J. No. 1975, 47 B.L.R. (4th) 7; appealed [2008] O.J. No. 2910, 47 B.L.R. (4th) 16 [*Chowdhury*].

case to case and is highly dependent on the facts of each case. A determination in any particular case will...have limited precedential value.”⁸

Of greater value in terms of specificity is the case of *Hi Hotel Limited Partnership v. Holiday Hospitality Franchising Inc.*⁹, decided by the Alberta Court of Appeal, which considered the prescribed certificate as crucial in determining the validity of a franchise disclosure document. At issue was a claim for rescission following the delivery of a disclosure document to a franchisee. The franchisee applied for a declaration of rescission, and the franchisor counterclaimed for damages for wrongful termination of the franchise agreement. The disclosure document did contain a certificate as required by the legislation, but it was neither signed nor dated. This case turned on whether certain information and requirements set out in the regulations and to be included in the franchise disclosure document could be more determinative of validity than others. In short, the Court concluded yes. If you are preparing a disclosure document for a prospective franchisee, it is not enough to simply provide the prescribed certificate. It is of paramount importance that you also sign *and* date it.

In *Hi Hotel* the Alberta Court of Appeal, in its analysis, examined the language of the Alberta Act in light of the provincial *Interpretation Act*¹⁰ and interpreted the words of the Alberta Act grammatically “in light of its context, scheme and the mischief aimed at.”¹¹ The Court’s logic was as follows: Subsection 4(1) of the Alberta *Franchises Act* provides that “a franchisor must give every prospective franchisee a copy of the franchisor’s disclosure

⁸ *Ibid.* at 5.

⁹ *Hi Hotel Limited Partnership v. Holiday Hospitality Franchising Inc.*, [2008] 4 W.W.R. 316, 165 A.C.W.S. (3d) 70; appealed 2008 ABCA 276, 296 D.L.R. (4th) 335 [*Hi Hotel*].

¹⁰ *Interpretation Act*, R.S.A. 2000, c.I-8.

¹¹ *Hi Hotel*, *ibid.* at 17.

document.” Subsection 4(3) provides that “a disclosure document must comply with the requirements of the regulations”, and section 13 sets out that the remedy of rescission is available to franchisees where a disclosure document is not received within the time set out in the legislation. Subsection (3) of the regulations provides that “a disclosure document, including any material changes made in respect of a disclosure document, must include a certificate set out in Schedule 2 that must be dated and must be signed....” And, finally, subsection (4) of the regulations provides that “a disclosure document is properly given for the purposes of section 13 of the Act if the document is substantially complete.”

The word of vital importance found in the aforementioned references is “must.” A disclosure document “must” comply with the regulations and a disclosure document “must” include a certificate.

The Court described, as in other cases set out in this paper, the vital importance of the certificate in that it provides prospective franchisees with a verification of the truth of the documents in front of them, which they are relying on for informed business decisions. In a relationship with an inherent imbalance in bargaining power, the certificate is mandatory in order for the franchisee to satisfy itself that there is no untrue information, nor omission of a material fact in the disclosure document.

The Court referenced the judicial principle of statutory interpretation that the word “must” in legislation reflects mandatory compliance, and a breach of a mandatory provision cannot go unrecognized or unacknowledged. In that respect it is interesting to note that the Court would not accept the franchisor’s argument that it had relied upon the franchisee’s admission that neither the signature nor the date on the certificate were determinative in its

decision to buy into the franchise system. On the contrary, since the franchisee was seeking a statutory remedy, rather than common law one of rescission, the common law need for reliance is irrelevant.¹²

Justice Côté of the Alberta Court of Appeal further compared the Alberta Act to securities legislation in emphasizing the importance of due diligence and care in the disclosure process with a view to holding corporate officers accountable for the representations made by the reporting or disclosing company.

Ultimately, the Court decided in favour of the franchisee and concluded that the absence of both a signature and date on the certificate rendered it inoperable and voided the disclosure document as a whole.

In *1518628 Ontario Inc. et al. v. Tutor Time Learning Centres et al.*¹³ the Divisional Court of the Ontario Superior Court of Justice dismissed an appeal concerning the application of section 11 of the Ontario Act with respect to a supposed settlement of a claim arising under the Act. The Court found there had been no error of law.

In *1648483 Ontario Inc. v. JTGT Holdings Inc.*¹⁴ the franchisee had rescinded the franchise agreement claiming that the franchisor had failed to meet its disclosure obligations and had been granted summary judgment for damages. The appeal was dismissed without reasons.

The three existing provincial franchise statutes set forth a sequence of events to entering into a franchise relationship. In order to comply with the legislation, the first step is for the

¹² *Ibid.* at 12, 28, 112.

¹³ *1518628 Ontario Inc. et al. v. Tutor Time Learning Centres et al.*, (unreported) [*Tutor Time*].

¹⁴ *1648483 Ontario Inc. v. JTGT Holdings Inc.*, [2008] O.J. No. 139, 2008 ONCA 30 [*JTGT Holdings*].

franchisor to provide the franchisee with a disclosure document at least 14 days before a franchise agreement (or related agreement) is entered into, or a fee is paid, whichever comes first. The franchisee has two options relating to its right of rescission; either it can rescind the franchise agreement within 60 days of its receipt of the disclosure document if it was not delivered within the prescribed time, or if its contents did not meet the requirements of the legislation; or the franchisee may rescind the franchise agreement no later than 2 years after entering into the franchise agreement, if the franchisor never provided disclosure at all.

The question at the heart of the Ontario decision in *4287975 Canada Inc. v. Imvescor Restaurants Inc.*¹⁵ was the triggering event with respect to the franchisee's right of rescission where the order of events was out of sequence. In this case, the prospective franchisee first paid a franchise fee to the franchisor. Then, just over two months later, the prospective franchisee was provided with a disclosure document. Finally, slightly over six months later, the parties executed a franchise agreement. The franchisee delivered a notice of rescission to the franchisor *more* than 60 days after its receipt of the disclosure document, but *less* than 2 years after the franchise agreement was entered into. At issue was whether the rescission remedy was still available given the timing of the delivery of the disclosure document to the franchisee and the signing of the franchise agreement.

The franchisee argued that the triggering event for the clock to run on its right to rescission was not the delivery of the disclosure document, but rather the signing of the franchise agreement. According to the franchisee, the wording of subsection 6(2) of the Ontario Act that a

¹⁵ *4287975 Canada Inc. v. Imvescor Restaurants Inc. et al.*, 91 O.R. (3d) 705; costs awarded in [2008] O.J. No. 3713, 48 B.L.R. (4th) 236 [*Imvescor*].

franchisee may rescind “if the franchisor never provided the disclosure document” should be interpreted as meaning that the franchisee may rescind if the disclosure document was not delivered within the sequence set out in the legislation, as discussed above.

The decision of the Ontario Superior Court of Justice was in favour of the franchisor in finding that the disclosure document had been delivered to the prospective franchisee before it entered into the franchise agreement, as per the first step of the sequence as set out in the Act. The franchisee, ostensibly, had 6 months to determine whether to sign the agreement based on its review of the disclosure document, and therefore had no right to rescind. A notice of appeal with respect to this matter has been filed.

Of vital importance to franchisors is the recent Ontario Superior Court of Justice decision in the *Sovereignty* case which addressed the degree of deficiency required in a document before it is rendered invalid as disclosure. The facts of the case are that prior to the signing of the franchise agreement with respect to a Houston Steak & Ribs restaurant, the franchisor provided the following to the franchisee:

- sales package and demographic study, including a demographic analysis, investment summary, lease summary, pro forma financial analysis and critical path statement;
- the disclosure document;
- pro forma financial projections; and
- a draft of the franchise agreement.

The franchisee later received further documents from the franchisor, including a pro forma opening balance sheet, a store development financial model, a sublease agreement, a copy of the head lease agreement and a trademark licensing agreement.

The Court listed several major deficiencies contained in the “disclosure document” which rendered it invalid as proper disclosure, including the absence of the following materials specifically enumerated by the regulations to the Ontario Act as being requirements for valid disclosure: financial statements (s.5(4)(b)); a basis for earnings projections (s.5(4)(a)); disclosure in the form of a single document delivered at the same time (s.5(3)); and no certificate verifying the disclosure (s.7). Each of these omissions constituted a fatal deficiency in the sense that their exclusion resulted in the franchisee being unable to make an informed decision or assessment of the financial position of the franchisor. Franchisors can, however, take some small comfort from the comments made in *obiter* (not part of the decision) in the *Sovereignty* case, which stated that a number of “minor deficiencies” in a disclosure document cannot, on a cumulative basis, disqualify documentation as a franchise disclosure document. Bearing these principles in mind, franchisors should continue to be diligent in ensuring that their disclosure documents reflect wholly and accurately the requirements of the respective provincial franchise regulations.

Further reinforcing the Alberta decision in the *Hi Hotel* case referenced above, the failure alone to provide the prescribed certificate was grounds to void the document as a franchise disclosure document.

In an added twist in the *Sovereignty* case, the original franchisor had assigned the franchise agreement to another company, 9187-0196 Quebec Inc. (the “assignee”) and the next question became, against whom was the rescission effective. The assignee argued that it should not be liable on the basis that it was a purchaser for value without notice of the original franchisor’s defective disclosure. The Court rejected this position on two grounds, namely:

- subsection 6(2) of the Ontario Act provides that a franchisee may rescind the franchise agreement no later than 2 years after “entering into the franchise agreement”. Therefore, the question turns on the franchise agreement, rather than the party which entered into it; and
- a common law defence does not apply to a statutory obligation.

Accordingly, rescission was granted against both the original franchisor and the assignee. In fact, the Court went further and declared that two other individuals and an additional corporate entity controlled by such individuals exercised significant operational control over the franchisee and were each found to be a “franchisor’s associate”, within the meaning of the Ontario Act.

The next question, then, was whether the provisions of the Act, which relate to what a franchisor or franchisor’s associate must pay to the franchisee subsequent to rescission, also apply to an assignee of the franchisor, in light of the definition of a franchisor including one or more persons who grant a franchise.

The Court found the assignee to be a franchisor for several reasons: first, the grant of a franchise includes continuing obligations of the franchisor and franchisee; second, the requirements of fair dealing and the right to associate would be rendered meaningless if the assignee was not a franchisor; third, given that the intent of rescission is to put the franchisee back in the place he/she would have been in prior to entering into the franchisee agreement, liability is necessarily extended to the assignee; and, finally, the franchisee had no control over an assignment of the franchise agreement while the assignee can protect itself from deficient disclosure provided by the original franchisor.

Earlier in the year, the Ontario Superior Court of Justice decided in *6792341 Canada Inc., et al v. Dollar It Limited et al.*¹⁶ (unreported) that rescission was not available to a franchisee because they received a disclosure document and did not deliver a notice of rescission within 60 days of its receipt, as per subsection 6(1) of the Ontario Act. An appeal from this decision is being heard at the end of January, 2009.

A similar set of facts were the subject of *6862829 Canada Limited et al. v. Dollar It Limited et al.*¹⁷ The Court considered the same disclosure document and franchise agreement as was considered in the *6792341- Dollar It* case and arrived at an opposite conclusion. The Court held that the disclosure document provided to the prospective franchisee was so deficient as to not even be a “disclosure document” as such term is defined in the Act. Accordingly, the franchisee had two years within which to rescind the franchise agreement.

The decision in the *6792341- Dollar It* focused on a literal reading of subsection 6(1), whereas, the *6862829 - Dollar It* decision considered the wording and intention of the entire Act. Subsections 6(1) and (2) of the Act read as follows:

6.(1) 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.

(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.

¹⁶ *6792341 Canada Inc., et al v. Dollar It Limited et al.* (unreported) [*6792341 - Dollar It*].

¹⁷ *6862829 Canada Ltd. v. Dollar It Ltd.*, [2008] O.J. No. 4687; Costs in [2009] O.J. No. 133 [*6862829 - Dollar It*].

The Court reasoned that the franchisor's failure to include financial statements and a signed and dated certificate were fatal to the franchisor's position and the franchisee had 2 years within which to rescind the franchise agreement. Of importance to franchisors and their advisors, however, was the finding that the franchisor's failure to include an offer to lease in the disclosure document was "non-disclosure" of material information. Section 5 of the Act defines "material facts" as "including":

"any information about the business, operations, capital or control of the franchisor or franchisor's associate, or about the franchise system, that would reasonably be expected to have a significant effect on the value or price of the franchise to be granted or the decision to acquire the franchise."

Ontario is a strict compliance jurisdiction and in order to avoid being subject to a notice of rescission, franchisors should ensure that they include in their disclosure documents all facts and documents material to the transaction, including those prescribed. As always, in compiling a disclosure package, franchisors should ask themselves what they would want to know if they were standing in the prospective franchisee's shoes.

*Personal Service Coffee Corp. v. Beer*¹⁸ was an appeal for costs from a 2005 action. However, since the area of law covered is quite unique it is worth revisiting the facts and trial judges decision in this case.

The franchisee, Stanley Beer, received incomplete disclosure before entering into a franchise agreement with the franchisor, Personal Service Coffee Corporation ("PSCC"). Mr. Beer sought rescission of the franchise agreement, as he was entitled to do under the Ontario Act. The difficulty is that he sought rescission mere days before the expiration of the 2 year limitation

¹⁸ *Personal Service Coffee Corp. v. Beer (c.o.b. Elite Coffee Newcastle)*, [2008] C.C.S. No. 4230; 2008 ONCA 353 [*Personal Service Coffee*].

period provided under the Act, and immediately set up a competing business that served the same customers as PSCC. The issue before this court was whether the franchisee's right to rescission in the face of inadequate disclosure under the Act is absolute and what, if any, remedy is available to the franchisor.

The Court concluded that the franchisee, Mr. Beer, had an absolute right to rescission. However, the franchisor, PSCC, has a separate right to pursue an action against him under s. 9 of the Act which states, “the rights conferred by this Act are in addition to and do not derogate from any other right or remedy a franchisee or franchisor may have at law.”¹⁹ In other words, if a party has a common law or equitable right of action against another party, he or she may assert such right under this section where the Act does not otherwise specifically deal with such right.

The trial court also conducted an analysis on the proper interpretation of the phrase "without penalty or obligation" as set out in section 6(2) of the Ontario Act. It concluded that the focus of the Act is on protecting the interests of franchisees and the mechanism for doing so is the imposition of rigorous disclosure requirements and strict penalties for non-compliance. For that reason, a franchisor cannot avoid the remedy available to a franchisee under s. 6(2) or its obligations in relation thereto by raising issues about the conduct of the franchisee. At the same time however, a franchisee cannot escape other causes of action against it, under section 9, by relying on this phrase. In short, the phrase “without penalty or obligation” is not to be read expansively.²⁰

¹⁹ Ontario Act, *ibid.* at s.9.

²⁰ *Personal Service Coffee Corp., ibid.* at 39-40.

In *Tupperware Canada Inc. v. 1196815 Ontario Ltd.*²¹, the distributor defendant operated pursuant to a distribution agreement, and signed a promissory note in favour of the plaintiff. When debts became disputed, the plaintiff terminated the distributorship agreement and commenced an action for payment of the promissory note. The defendants argued that the distribution agreement was in fact a franchise agreement, and served a notice of rescission on the grounds of non-disclosure, pursuant to the Ontario Act. In denying to grant summary judgment, the Court found that set off was not available because the debt was not an amount that could be determined with certainty, there was a triable issue with respect to whether there was a franchise agreement and if it was a franchise agreement, there were issues regarding compliance with disclosure obligations, valid rescission and the validity of the promissory note.

B. GOOD FAITH AND FAIR DEALING

In *1117304 Ontario Inc. (c.o.b. Harvey's Restaurant) v. Cara Operations*²² the plaintiff, carrying on business as Harvey's Restaurant, sued the defendant, Cara Operations Limited, for damages for breach of the implied duty of good faith and fair dealing under s. 3(2) of the Ontario Act.

Some of the issues raised by the plaintiff were whether the defendant breached its duty of good faith and fair dealing with respect to:²³

- (a) properly investigating the suitability of the store site prior to approving it;
- (b) properly projecting the sales and identifying the risks relative to the sales;
- (c) assisting the plaintiff to deal with the square footage issue in the lease;
- (d) properly provide adequate training;

²¹ *Tupperware Canada Inc. v. 1196815 Ontario Ltd.*, [2008] O.J. No. 532, 164 A.C.W.S. (3d) 614; Costs awarded in [2008] O.J. No. 3011, 168 A.C.W.S. (3d) 736 [*Tupperware*].

²² *1117304 Ontario Inc. (c.o.b. Harvey's Restaurant) v. Cara Operations Ltd.*, [2008] O.J. No. 4370 [*Cara Operations*].

²³ *Ibid.* at 63.

- (e) treating the plaintiff fairly in relation to operational issues of store inspections;
- (f) providing financial assistance; and
- (g) terminating the franchise prior to the end of the term.

The duty of franchisors and franchisees to act in good faith is a common law requirement that has been codified by s. 3 of the Act. Notably, s. 2(2) of the Act imposes the duty in all franchise agreements entered into before or after the coming into force of the Act for the parties to act in good faith and in a commercially reasonable manner.²⁴

The Court summarized the duty of good faith in franchise relationships as follows:²⁵

- A party may act self-interestedly, however in doing so that party must also have regard to the legitimate interests of the other party.
- If A owes a duty of good faith to B, so long as A deals honestly and reasonably with B, B's interests are not necessarily paramount.
- Good faith is a minimal standard, in the sense that the duty to act in good faith is only breached when a party acts in bad faith. Bad faith is conduct that is contrary to community standards of honesty, reasonableness or fairness.
- Good faith is a two way street. Whether a party under a duty of good faith has breached that duty will depend, in part, on whether the other party conducted itself fairly.

The Court awarded the plaintiff \$20,480 because it was successful only in relation to the unilateral termination of its franchise by the defendant. With respect to: (a), the Court found the defendant did not act in bad faith; (b), there was no representation, warranty and/or guarantee relating to the sales volume and potential profits; (c), the plaintiff did not deal with the issue of the square footage of the leased area in accordance with the terms of the lease; (d), the duty to

²⁴ *Ibid.* at 66.

²⁵ *Ibid.* at 68.

provide adequate training was met; (e), the defendant did not fail to treat the plaintiff fairly with respect to operational issues; (f), there was no contractual (or other) obligation for the defendant to provide financial assistance to the plaintiff; and (g), bad faith was found.

Fabutan Corp. v. Clement,²⁶ was an appeal by franchisees of a master's order dismissing their motion to open up a default judgment against them following the franchisor's claim for damages for unpaid royalties and advertising fees. The franchisees argued that the franchisor's failure to meet the requirement of fair dealing under the Alberta Act caused a loss of a sale of another franchise. The Court rejected the argument that the amount that the franchisees would have earned from the sale should be set off against the amount claimed by the franchisor. This was rejected, in part, because the franchisees had contracted out of their right to set off in their franchise agreement and that they did not actually dispute the claims or calculations of the franchisor, despite their defence.

C. ARBITRATION

In *MDG Kingston Inc. v. MDG Computers Canada Inc.*²⁷ the franchisor (MDG Computers) had a relationship with the franchisee (MDG Kingston) for seven years under two separate franchise agreements. The first was signed in 2000, prior to the Ontario Act coming into force, and the second was signed in 2005, well after the Ontario Act was in force. In both instances, the franchisor did not provide a disclosure document to the franchisee.

When the franchisee claimed rescission on the second agreement because the franchisor did not deliver a disclosure document, as required under s. 5 of the Ontario Act, the franchisor

²⁶ *Fabutan Corp. v. Clement*, [2008] A.W.L.D. 867 [*Fabutan*].

²⁷ *MDG Kingston Inc. v. MDG Computers Canada Inc.*, [2008] O.J. No. 3770, 2008 ONCA 656 [*MDG*].

moved for a stay of the action based on the arbitration clauses contained in both agreements. The motion judge concluded that the franchisor could not rely on the arbitration clause in the franchise agreement. On appeal, the Court held that the motion judge erred by failing to stay the action because of the arbitration clause.

The appellate court held that the franchisee's claims for rescission and damages fell within the terms of the arbitration clause and therefore was required by s. 7(1) of Ontario's *Arbitration Act*²⁸ to stay the action and refer the claims to arbitration. The franchise agreement was not invalid at law despite the fact it was subject to rescission. Consequently, the two issues of whether, on the merits, the franchisee was entitled to rescind the agreement, and the jurisdiction of the arbitrator, were for the arbitrator to determine.

*Bad Ass Coffee Co. of Hawaii Inc. v. Bad Ass Enterprises Inc.*²⁹ involved an appeal from a Master's decision to grant summary judgment and enforce a foreign judgment. The franchise and area development agreements contained provisions by which the parties agreed that the law of Utah applied and attorned to the jurisdiction of the Utah courts to resolve certain disputes and to arbitration in Utah to resolve others. The franchisor commenced arbitration proceedings in Utah and, when the franchisee would not submit to arbitration, sought a Utah court order to compel the arbitration to proceed. The franchisee responded to the Utah court proceedings, opposing the relief, and also wrote to the proposed arbitrator advising that it intended to bring its own action in Alberta. The Utah court issued the order compelling arbitration. Although the Alberta franchisee submitted a list of its proposed witnesses, in the end it did not participate in

²⁸ *Arbitration Act*, 1991, S.O. 1991, c. 17.

²⁹ *Bad Ass Coffee Co. of Hawaii Inc. v. Bad Ass Enterprises Inc* 2008 ABQB 404, 97 Alta L.R. (4th) 232 (ACQB)

the arbitration. An order was made against it and against the guarantor of the franchisee's obligations. The arbitration order was perfected by a judgment issued by the Utah court. The franchisor then brought an application in Alberta to have the Utah judgment recognized and enforced. The franchisee and guarantor opposed the application, on the basis that the Alberta Act and the Alberta *Guarantees Acknowledgment Act*³⁰ had been breached by the franchisor and therefore public policy required that the Alberta refuse enforcement. The appellate judge upheld the Master's finding that the franchisee had attorned to the jurisdiction of the Utah courts because its submissions addressed the merits of its case and the finding that there was a real and substantial connection between Utah and the matters in issue. With respect to the argument that the Utah judgment should not be enforced on the basis of the public policy exception, inasmuch as the franchise agreement breached the provisions of the Alberta Act by providing for the application of foreign law and venue, the judge upheld the Master's finding that the franchisor's claims did not depend on the Alberta Act. Moreover, the guarantor was an experienced businessman and did not require the protection that the *Guarantees Acknowledgment Act* afforded. In short, the public policy exception did not apply.

D. CLASS ACTIONS

In *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*³¹ the plaintiffs submitted that they and the other franchisees were overcharged for the products and merchandise used in their restaurants. They claimed that the overcharging was a result of a distribution agreement, the effect of which was to fix prices contrary to section 61 of the federal *Competition Act*³² and

³⁰ *Guarantees Acknowledgement Act*, R.S.A. 2000, c. G-11.

³¹ *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2008] O.J. No. 833, 89 O.R. (3d) 252 [*Quizno's Canada*].

³² *Competition Act*, R.S.C. 1985, c. C-34.

the duty of fair dealing under the Ontario Act and the Alberta Act. Unfortunately, because this class action was not certified the Court never ruled on the above issues.

In *Quizno's Canada Restaurant Corporation v. Kileel Developments*³³ the franchisor brought an action against one of its franchisees and area director for damages for breach of the Area Management Agreement, and the franchisees and area director served a statement of defence and counterclaim. The motions judge ordered several paragraphs from the statement of defence to be struck on the grounds that they were either of limited probative value, outweighed by prejudice to the plaintiff and duplicative of claims in a separate class action concerning the franchisor.

The motions judge stayed the impugned paragraphs in the counterclaim because they were duplicative of the pleadings in the class action, and it was not in the interest of justice to litigate more than one proceeding based on the same set of facts.

On appeal, the struck portions of the statement of defence were allowed since they were of more than probative value, since they were in direct response to the franchisor's claims. The Court of Appeal further disagreed with the motions judge with respect to the class action matter, as the parties in the proceedings were different, as well as because at the time of the motion judge's decision, there had not yet been a certification hearing and some of the defendants were not bound to participate in the class action as they were able to opt out.

³³ *Quizno's Canada Restaurant Corporation v. Kileel Developments et al.*, [2007] O.J. No. 3769, 160 A.C.W.S. (3d) 620; Appealed in 92 O.R. (3d) 347 [*Kileel*].

III. OTHER CASE LAW INVOLVING FRANCHISES

A. COMMON LAW GOOD FAITH

It appears that in Manitoba, at least, a franchise agreement does not impose obligations of utmost good faith on the parties. The contention that it does was advanced by the franchisees and related parties in *The TDL Group Ltd. v. Zabco Holdings Inc.*³⁴ The trial judge refused to follow the decision of the Ontario Superior Court of Justice in *Machias v. Mr. Submarine*³⁵, stating that the franchisor-franchisee relationship is an ordinary commercial one that gives rise to the simple duty to perform the contract in good faith, but not to a higher duty than that. Nor was the franchisor a fiduciary of the franchisee. Accordingly, the franchisor did not owe a pre-contractual duty to warn the franchisee about the vicissitudes of carrying on business in Winnipeg; nor did it owe the franchisee a higher duty than to act reasonably and honestly during the performance of the contract.

³⁴ *The TDL Group Ltd. v. Zabco Holdings Inc.*, 2008 MBQB 239 (CanLII)

³⁵ *Machias v. Mr. Submarine* (2002), 24 B.L.R. (3d) 228 (OSCJ)

B. VICARIOUS LIABILITY

In *Coffee Times Donuts Incorporated v Toshi Enterprises Ltd.*³⁶ the Divisional Court allowed an appeal from a decision of the Ontario Small Claims Court, which found that a franchisee was an employee of the franchisor and that the franchisor was vicariously liable for the franchisee's negligence. The Court agreed that the franchisor exercised a certain degree of control over the franchisee's activities, which in some circumstances might be indicative of an employer-employee relationship, but stated that the control provisions of a franchise agreement are a regular and expected aspect of the franchisor-franchisee relationship. Of greater importance in determining that the franchisee was not an employee were the facts that the franchisee hired and fired its own employees, handled its own finances, maintained its own accounting and business records, financial statements and tax returns, maintained its own insurance, owned the assets of the business and exercised its own business judgment in operating the business. Nor was the franchisee an agent of the franchisor, for whose conduct the franchisor might be vicariously liable. The franchise agreement clearly provided that such was not the case. The franchisee did not exercise the requisite element of control over the franchisee. Further, this was not a case where the injured party believed that it was dealing with the franchisor, or relied on a representation to this effect, which led to the loss or injury.

³⁶ *Coffee Times Donuts Incorporated v. Toshi Enterprises Ltd.*, [2008] CanLII 68167 (O.S.C.D.C.)

C. LANDLORD AND TENANT

In *Midas Realty Corp. of Canada Inc. v. Galvic Investments Ltd.*³⁷ the Ontario Court of Appeal upheld the lower court's decision to grant specific performance of an option to lease to the franchisor. Midas Realty, the realty arm of the franchisor, had been the tenant at the location in issue when the current owner acquired it and became the landlord. Thereafter, a numbered company related to the landlord became a franchisee and a subtenant to Midas Realty. When the lease expired, an arrangement was made involving three agreements: a new franchise agreement between the numbered company and the franchisor, a lease between the numbered company and the landlord and an option to lease between Midas Realty and the landlord. When the tenant-franchisee terminated the franchise agreement, but not the lease, Midas Realty tried to exercise the option to lease, but was refused by the landlord, notwithstanding the fact that the former franchisee was no longer carrying on business at the leased premises. The Court of Appeal agreed that on the record it was open to the judge to find that the landlord and franchisee had acted in concert in entering into the three related agreements and in attempting to frustrate Midas Realty's exercise of the option to lease. Since the purpose of the option to lease, as intended by the parties at the time of its execution, was to ensure Midas Realty's continuing presence at the leased location, there was no need to interpret that agreement *contra proferentum* Midas Realty. Further, the finding that the leased premises were unique was not assailable, as the record disclosed a fair, real and substantial basis for that conclusion. Finally, the equities in this case favoured the franchisor.

³⁷ *Midas Realty Corp. of Canada Inc. v. Galvic Restaurants Ltd.* [2009] ONCA 84 (CanLII)

D. INJUNCTIONS

In *W.A.B. Bakery Franchising Ltd. v. Canam Advertising Ltd.*³⁸ the franchisor sought an injunction to prevent its former franchisee, whose agreement respecting a What A Bagel franchise had expired, from operating a Bagel Nash restaurant from the same location, allegedly using the franchisor's baking system. The parties themselves had resolved the other issues between them, relating to the use of the franchisor's trademarks, trade names and other issues. The Court refused to grant the injunction. It held that while in some cases an applicant for an injunction to restrain the breach of a negative covenant need not demonstrate irreparable harm or that the balance of convenience favours the grant of an injunction, that principle applies only where the applicant has demonstrated a clear breach of the negative covenant. Here there were live issues as to (a) whether the non-competition covenant survived the expiry of the agreement, as opposed to its early termination; and (b) whether the particular covenant was enforceable at all. Accordingly, the applicant had not established a clear breach of an existing, enforceable non-competition covenant. The Court, therefore, went on to examine the other two limbs of the *RJR MacDonald* test: irreparable harm and balance of convenience. It found that the applicant had failed to make out a case of irreparable damage to the franchise system and to its goodwill. The first alleged harm was speculative, in that the franchisor had not led evidence to suggest that any other franchisee was considering following the defendant's lead or that any prospective franchisee had decided not to enter into an agreement because of the defendant's conduct. As for damage to goodwill, there was no evidence before the Court that the defendant's product did not meet

³⁸ *W.A.B. Bakery Franchising Ltd. v. Canam Advertising Ltd.*, [2007] WL 4948302

the What A Bagel standard, or that What A Bagel's reputation with its customers had been damaged.

In *1323257 Ontario Inc. v. Hyundai Auto Canada Corp.*³⁹ the Hyundai dealer in Thornhill ("Thornhill") was successful in obtaining an injunction prohibiting the franchisor from terminating its dealership. The two had been parties to a previous arbitration, relating to the Thornhill's refusal to relocate to a new location satisfactory to its franchisor, on relocation terms that they both accepted. Unbeknownst to Thornhill, while their dispute was proceeding its franchisor had engaged in its own negotiations with the owner of premises that were acceptable to Thornhill. The arbitration culminated in Minutes of Settlement which provided for a Temporary Dealer Agreement on the same terms as the original dealer agreement, subject to some carve-outs, and which included the right to terminate the Temporary Dealer Agreement on 90 days notice. Within a few months of the execution of the Minutes of Settlement, the franchisor began to solicit proposals for a new dealership in the same area, gave notice of termination in 90 days of the Temporary Dealer Agreement and entered into a conditional dealership agreement with a new franchisee. Thornhill contended that it had entered into the Minutes of Settlement relying on the franchisor's actual misrepresentations and misrepresentations by omission, the Minutes of Settlement and Temporary Dealer Agreement should be set aside and the original dealer agreement recognized as valid and subsisting. The result would be that the parties would resume their arbitration.

³⁹ *1323257 Ontario Inc. v. Hyundai Auto Canada Corp.*, 2009 WL 83020, 2009 CarswellONT 88 (O.S.C)

On the injunction motion the franchisor argued that the injunction being sought was not prohibitory in nature but was effectively a mandatory order, such that Thornhill had to establish a strong *prima facie* case in order to succeed. The Court disagreed, holding that the effect of the order would not be to create a right that had not previously existed but to require both parties to act in accordance with a right that existed under their original agreement, leaving the issue of termination for trial. Thornhill therefore had to establish only that there was a serious issue to be tried. Nonetheless, the Court held that Thornhill had established a very strong case. The dealership agreement created a franchisor-franchisee relationship, as did the Minutes of Settlement and the Temporary Dealer Agreement. Accordingly, the franchisor was subject to a statutory and common law duty of good faith and possibly a contractual one as well. The Court referred to a franchise agreement as being one of the “utmost good faith” and stated that there was a very arguable case that the parties had a duty to disclose material facts relating to issues involving such agreements. The question of whether the duty of good faith was tempered by considerations arising from the fact that the two parties were adversaries involved an arbitration was to be left to trial. The Court also found that there was sufficient evidence of active misrepresentation on the part of the franchisor, which could amount to a “civil fraud” that would result in an order setting aside the dismissal of the arbitration and which raised not only a serious issue to be tried, but a strong *prima facie* case. Thornhill also satisfied the Court that there was a serious question to be tried as to whether the termination of the Temporary Dealer Agreement was improper, although it had not established a strong *prima facie* case with respect to this issue. Finally the Court considered the other two *RJR MacDonald* tests, found that they had both been satisfied and granted the injunction. The Court discounted possible prejudice to the new

dealer, inasmuch as it had notice of the dispute between Thornhill and the franchisor and had exacted contractual protections for itself in its conditional agreement with the franchisor.

In Quebec a distinction is drawn between an injunction and a safeguard order, which also operates on an interlocutory basis to protect the moving party against a perceived harm. In *Eggspectations Inc. c. 9157-6561 Quebec Inc.*⁴⁰ the franchisor sought a safeguard order which would require the franchisee to pay into court arrears of royalties and advertising fees, future royalties and advertising fees, to pay its arrears of rent, taxes and the payables owed to its suppliers, to appoint an operator for the franchise unit and to abide by the terms of the franchise agreement. The franchisee maintained that it had not paid the royalties or the advertising fees, because it had a counterclaim to assert against the franchisor for failing to provide services pursuant to the franchise agreement. It admitted, however, that it had not paid the rent and other amounts because it was in financial difficulties. The central issue on the motion was whether the requisite degree of urgency existed and the temporal duration of the order being sought. The Quebec Superior Court found that the criteria of apparent right and irreparable harm had been met by the franchisor. The apparent rights flowed from the agreements between the parties. The requirement of irreparable harm was satisfied by the fact that allowing the franchisee's debt to grow pending trial could result in an insurmountable burden for it, if the franchisee were to be unsuccessful at the end of the day. With respect to the issue of urgency, the Court found that there was a distinction between the degree of urgency required to ground an injunction order and that required for a safeguard order. In the latter case, the issue was whether it made good sense for the Court to grant the

⁴⁰ *Eggspectations Inc. c. 9157-6561 Quebec Inc.*, 2008 QCCS 5087 (CanLII)

order at the time that it was sought. The applicant need not have moved immediately for the order, so long as it did not sit on its rights or act negligently in failing to move sooner. While the Court would not grant the order respecting payment into court of past arrears, since that would amount to execution before judgment, it would protect the future payments by requiring the franchisee to pay fifty percent of them into court. The request for the appointment of an operator and an order requiring the franchisee to comply with the operational standards was rejected, as there was no evidence of recent default in these regards. The order would expire within a few months, at which time the franchisor would have to apply for an extension.

E. CLASS ACTIONS

In *Dean v. Mister Transmission (International) Limited*⁴¹ the class action plaintiff sought to have a class action certified against the franchisor for alleged breaches of a repairer's obligations pursuant to the *Motor Vehicle Repair Act*⁴², prior to its repeal, and the *Consumer Protection Act*⁴³, for conspiracy between the franchisor and its franchisees to improperly charge consumers for work done prior to actual repairs being effected and unjust enrichment. The plaintiff did not name any of the franchisees as defendants. The franchisor's position with respect to the first cause of action was that it was unsustainable. No cause of action could be maintained against the franchisor, it argued, with respect to alleged breaches of a repairer's statutory obligations, because the franchisor did not perform any repairs; the franchisees did. The Court stated that the failure to add the franchisees as defendants would present a problem for the plaintiff and acknowledged that it was far from clear that the

⁴¹ *Dean v. Mister Transmission (International) Limited*, 2008 CarswellOnt 6445

⁴² *Motor Vehicle Repair Act*, R.S.O. 1990, c. M.43

⁴³ *Consumer Protection Act*, 2002, S.O. 2002, C. 30, Sched. A

plaintiff would succeed in engaging, in the franchise context, in an exercise akin to “piercing the corporate veil”. Based, however, on the degree of control and direction exercised by the franchisor on the franchisee and the possibility of a factual finding that that the franchisor and its franchisees operated a joint enterprise, the Court was not prepared to find that it was plain and obvious that the claim could not succeed. Accordingly, the class was certified.

*Fairview Donut Inc. v. TDL Group Corp.*⁴⁴ involved an application to be granted intervener status made by a group of franchisees who objected to the certification of a class action that was brought by a representative franchisee against the franchisor. The request was denied. The Court found that absent any reliable evidence that the certification of the class action would harm their business interests or would result in negative media coverage adversely affecting the brand or causing a decline in their sales, they could not veto the efforts of other members of the class to seek certification. It was open to the dissenting franchisees to opt out of the proceeding, if it were to be certified.

F. ARBITRATION

In *Arcadia Fitness Canada Inc. v. Dawn M. Hinze Consulting Ltd.*⁴⁵ the franchise agreement was purportedly amongst the franchisor, the franchisee, which was a corporation, and the principal of the franchisee as guarantor. However, the principal had signed the guarantee only in her capacity as authorized signing officer of the franchisee and now contended that she never intended to execute it in her personal capacity and did not do so. The franchise agreement required the parties to arbitrate their disputes, but she refused to

⁴⁴ *Fairview Donut Inc. v. TDL Group Corp.*, 2008 WL 5053476, 2008 CarswellOnt 6987 (OSCJ)

⁴⁵ *Arcadia Fitness Canada Inc. v. Dawn M. Hinze Consulting Ltd.*, 2008 BCSC 839, [2009] B.C.W.L.D. 105 (BCSC)

submit to arbitration in her personal capacity. The franchisor sought an order requiring her and the franchisee to submit to arbitration. The Court reviewed the British Columbia case law and concluded that the cases were not consistent as to the circumstances in which a non-party to an arbitration agreement could be required to submit to arbitration. However, the judge held that where it is unclear whether or not a person is subject to an arbitration provision, including by reference or by conduct, then the issue must be submitted to the arbitrator for determination.

G. JURY NOTICE

*Parmar v. Blenz the Canadian Coffee Company Ltd.*⁴⁶ involved an application for leave to appeal from a dismissal by the defendants, including the franchisor and the law firm that had provided pre-contractual advice to the franchisee, to strike out a jury notice served in the context of an action for damages for fraudulent and negligent misrepresentation, breach of the duty of good faith, breach of fiduciary duty and other claims. The original motion had been dismissed because the chambers judge rejected the submissions that the central issue for trial was interpretation of the franchise agreement and that the issues were too complex for a jury trial. She held that the central issue was misrepresentation and that this raised a question of application and not interpretation of the franchise agreement. Leave to appeal was granted on the grounds that guidance was required from the Court of Appeal with respect to the distinction made by the chambers judge between interpretation and application of an agreement and the impact on the procedural rule respecting striking out a jury notice. The appeal does not appear to have been heard as of the date of this paper.

⁴⁶ *Parmar v. Blenz the Canadian Coffee Company Ltd.*, 2008 BCCA 534 (CanLII)

H. DAMAGES

The Ontario Court of Appeal upheld the trial judge's decision in *Mega Wraps B.C. Inc. v. Mega Wraps Holdings Inc.*⁴⁷ respecting the damages awarded for the franchisor's wrongful termination of a master area franchise agreement. The judge awarded damages for lost profits expected from the thirteen franchisees who cancelled their agreements as a result of the termination, by reference to figures in the franchisor's promotional material respecting anticipated profits. She also awarded damages on the same basis in respect of the fourteen additional franchises which the master area franchisee was expected to place, according to the franchisor's requirements in the master franchise agreement. The Court of Appeal did correct some mathematical errors made by the trial judge.

⁴⁷ *Mega Wraps B.C. Inc. v. Mega Wraps Holdings Inc.*, 2008 CarswellOnt 8035 (O.C.A.)