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The Growing Prominence of Franchisee Associations in Canada

Overview

It is trite to state that franchised businesses are prominent players in the Canadian marketplace. Franchise systems have become increasingly sophisticated over the last 20 years, particularly in the retail food and apparel sectors. While franchisees remained relatively unorganized through this period, the enactment of franchise legislation in several Canadian provinces enshrining the right to associate has paved the way for the growth of truly independent and active franchisee associations.

The post-legislation era of franchisor-franchisee relations is, however, still in its infancy and the content of the right to associate has not yet been fully articulated. Nonetheless, the franchise statutes and associated regulations have leveled the playing field to a certain extent. Franchisees have to varying degrees seized the opportunity presented to them and have developed, or are in the process of developing, equally sophisticated associations capable of promoting their interests within their respective franchise systems and in the broader economic landscape. There is little doubt that franchisee associations will continue exploit their protected status to gain power and influence going forward.

The Right to Associate

To date, five common law provinces have enacted franchise-specific legislation: Ontario – the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (the "Wishart Act"); Alberta – the *Franchises Act*, RSA 2000, c. F-23 (the "Alberta Act"); Prince Edward Island – the *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1 (the "PEI Act"); New Brunswick – the *Franchises Act*, S.N.B. 2007, c. F-23.5 (the "New Brunswick Act"); and Manitoba – *The Franchises Act*,

C.C.S.M. c. F156 (the "Manitoba Bill"). Those laws are in force in four of the provinces. Manitoba has passed franchise legislation, but it will not come into force until a date to be fixed by proclamation. Regulations are expected to be passed in Cabinet by the end of February 2012, which would indicate a coming into force date of September 1, 2012. However, any delay in the regulation approval process could push that date some time further into the future.

Each of these statutes is of general application. That is, they apply to all franchisor-franchisee relationships regardless of industry or sector. The definition of franchise is inclusive rather than exclusive, encompassing relationships not traditionally considered as franchisor-franchisee. The statutes are remedial in nature and are given a liberal interpretation to redress the imbalance of power inherent in the franchise relationship and to protect and promote the interests of franchisees.

One of the most important aspects of franchise legislation is the protection of the right of franchisees to associate. Section 4 of the Wishart Act establishes the right of franchisees to associate with other franchisees or to form or join a franchisee association. Subsections 4(2) and 4(3) of the Wishart Act expressly prohibit franchisors or their associates from penalizing or attempting or threatening to penalize franchisees that form or join an association or otherwise exercise that right. Furthermore, a provision in a franchise agreement or other relevant agreement that purports to interfere with, prohibit or restrict the right to associate is void. Perhaps most significantly, subsection 4(5) of the Wishart Act grants franchisees a right of action for damages against franchisors and their associates that contravene any section 4 rights. These rights are mirrored in identical language in section 4 of the PEI Act, the New Brunswick Act and the Manitoba Bill. Subsection 8(1) of the Alberta Act prohibits franchisors and their associates from restricting or prohibiting franchisees from forming organizations of franchisees or from associating with other franchisees in organizations of franchisees, while subsection 8(2) provides that franchisors and their associates must not directly or indirectly penalize franchisees that engage in such activities. Section 11 of the Alberta Act establishes a right of action in favour of franchisees for any breach of their section 8 rights.

Since there have been very few court decisions involving franchisee rights to associate, the scope of this right has yet to be judicially determined. There has been some indication from the

courts that the interpretation of the right will involve the application of principles similar to those developed in relation to freedom of association under subsection 2(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, which protects, among other things, the basic right of union members to meet.

The Supreme Court of Canada has recently extended constitutional protection to collective bargaining, an important union activity (*Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27). The majority was careful to limit the ambit of protection to collective bargaining, which it described as a right to a process (¶ 135). It remains to be seen whether this type of analysis will be applied to construe franchisees' statutory right to associate. However, restricting it to a mere right to meet would not advance the interests of franchisees. Extending the protection to the affairs and activities of an association would appear be more in keeping with the intention of the legislature.

Damages for a Breach of the Right to Associate

The law relating to damages for a breach of the right to associate is similarly underdeveloped. The statutes are silent on the criteria for awarding damages and on their quantification. The scope of those damages will no doubt be defined over time. Guidance about where the law will go on this issue might be taken from the courts' interpretation of another aspect of Canadian franchise legislation.

Each of the provincial statutes referred to above states that a franchise agreement imposes on each party a duty of fair dealing in the performance and enforcement of those agreements (subsection 3(1) of the Wishart, PEI and New Brunswick Acts and the Manitoba Bill, and section 7 of the Alberta Act). In all but the Alberta statute, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards (subsection 3(3) of the Wishart, PEI and New Brunswick Acts and the Manitoba Bill).Each of the statutes, other than the Alberta Act, also provides a right of action in damages for breach of that duty (subsection 3(2) of the Wishart, PEI and New Brunswick Acts and the Manitoba Bill).As is the case with respect to the right to associate, the legislation does not establish parameters for an award of

damages for a breach of the duty of fair dealing. However, the Ontario Court of Appeal recently addressed this issue in *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673.

In *Timothy's*, the trial court held that the franchisor breached the duty of fair dealing by failing to provide key information to the franchisee despite repeated requests, keeping the franchisee in the dark regarding the status of negotiations between the franchisor and the landlord of the business premises that bore directly on the future of the franchise and inaccurately stating that it would take a payment of $350,000 to allow the franchisee to take up a new location at the shopping center in question ([2009] O.J. No. 4444, 65 B.L.R. (4th) 235 (S.C.J.)). Damages on a combined basis in the amount of $50,000 were awarded at trial for breach of the statutory duty of fair dealing, with a small component included for mental distress (¶ 156). The award was upheld by the Ontario Court of Appeal. Significantly, the Court of Appeal stated that damages for breach of the duty of fair dealing are not limited to compensatory damages for pecuniary loss and noted that to so limit them would be contrary to the policy initiative that franchise legislation represents (¶ 26). It may be that similar principles will inform the award of damages for breach of the right to associate, but that remains to be seen.

The remedies available for a breach of the right to associate do not appear to be limited to damages. The Ontario Court of Appeal, in another recent decision (*405341 Ontario Ltd. v. Midas Canada Inc.*, 2010 ONCA 478), considered a provision in a franchise agreement requiring a franchisee to execute a release as a condition of renewal. The release would have estopped signing franchisees from participating in a class proceeding against the franchisor. The court determined that the requirement to sign a release breached those franchisees' right to associate pursuant to section 4 of the Wishart Act (¶ 39) and declared the provision void under section 11 of that statute (¶ 31). That section, which renders void any contractual waiver or release of a right given under the legislation, represents a significant restriction on freedom of contract, one that clearly inures to the benefit of franchisees. Similar provisions are contained in the Alberta Act (s. 18), the PEI Act (s. 12), the New Brunswick Act (s. 12) and the Manitoba Bill (s. 11).

Extra-provincial Application

Many franchise systems have an inter-provincial or national presence. However, none of the other common law provinces (Newfoundland and Labrador, Nova Scotia, Saskatchewan, British

Columbia and Quebec) or territories has enacted franchise-specific legislation, raising the specter of unequal treatment of franchisees depending on location. The existing statutes attempt to ameliorate this concern by providing that the legislation applies to franchises that are operated wholly or partly within the province in question. In addition, in the *Midas* decision, the Ontario Court of Appeal also held that the Wishart Act applied to franchises operating outside of Ontario where the franchise agreement expressly stated that the law of Ontario was the governing law of the contract. Still, a franchise operated wholly within a non-franchise jurisdiction province whose agreement is expressly governed by its laws arguably may not yet benefit from the protections granted to franchisees in provinces that have enacted franchise legislation. Although I am not aware of any decisions in provinces that do not have franchise legislation that protect the rights of franchisees to associate, I believe that the right to associate would likely also be protected by the courts in those provinces as being consistent with a franchisor's common law duty of good faith.

Further, the Uniform Law Conference has recommended the implementation of a *Uniform Franchises Act*. However, that recommendation has not been acted upon. Until further action is taken, the risk of unequal protection will continue to exist. Although the *Uniform Franchises Act* is only a recommendation and does not carry the force of law, it is strong indication from an important national advisory body that the relationship between franchisors and franchisees should be regulated in a consistent manner and that the right to associate should be enshrined in the law across all of Canada.

Class Proceedings

The Canadian experience since the advent of franchise legislation has already shown that franchisee associations have a significant role to play in disputes between franchisors and franchisees. While an association generally lacks standing to participate directly in franchisor-franchisee litigation, well-funded franchisee associations can and do lend their often substantial financial resources in support of actions brought by or against franchisees. This is particularly evident in class proceedings in which matters of interest to a large percentage of franchisees are at issue or in resource intensive and complex litigation involving, for example, anti-competition claims under the federal *Competition Act*, R.S.C. 1985, c. C-34. Such support is crucial to

franchisees that might not otherwise be able to afford to pursue meritorious claims against franchisors.

Conclusion

The protection of the right to associate in existing Canadian franchise legislation provides a substantial incentive to form or join a franchisee association. Franchisors can no longer prevent franchisees, contractually or otherwise, from leveraging their resources to effect changes within the system. Franchisees, for their part, are now free to associate with each other without fear of retaliation. The stage has been set for a rise in the influence of franchisee associations, particularly in those provinces that have franchise statutes on their books. Manitoba will soon be added to the list and others may well follow. What that will mean for franchise systems in Canada is not yet clear. However, franchisors will have to come to terms with this new reality. Given such clear statutory protection, franchisors would be well served by reaching out to franchisee associations from the outset. The interests of both sides are more likely to be advanced through cooperative engagement than otherwise. While this might not always be possible, franchisors that fail to recognize the new paradigm could lose a vital opportunity to influence the direction taken by increasingly emboldened franchisees and the mandate of the associations they form.

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