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Franchise Law
Dealing With and Litigating Disputes Involving Franchises

Strategies in Franchise Litigation

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STRATEGIES IN FRANCHISE LITIGATION

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I. INTRODUCTION

Franchisors and franchisees generally ask their counsel to resolve disputes quickly so the parties can focus on their business. This paper highlights the strategies that counsel can use to achieve this goal, specifically:

- Designing a clear alternative dispute resolution process to efficiently handle routine disputes while leaving the flexibility to tailor the approach to non-routine disputes. This alternative dispute resolution process can include mediation and arbitration. I recommend including mediation but being more selective about using arbitration (Part II);

- Using procedural tools available in litigation, including bringing an application rather than an action, seeking an injunction, or seeking summary judgment (Part III); and

- Starting a class action rather than an action by a single franchisee (Part IV).

Each of these strategies has risks and must be considered in the context of the particular facts of each case to ensure that they will lead to faster and cheaper resolution of the dispute.

II. STRATEGIC USE OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

A well-designed dispute resolution mechanism is critical to the health and success of any franchise network. The mechanism must be tailored to the character of the franchise network (i.e., its size, the nature of disputes that commonly arise, the relationship between the franchisees and the franchisor, etc.). In some systems, the character of the network makes a simple dispute resolution process more effective. For example, small systems with a high-degree of up-front franchisee participation in operational decisions will likely find a simple, more flexible process more effective. In more complex systems, the franchisor may choose to take a more nuanced approach.

Franchisors can design a dispute resolution mechanism that includes one or more of four dispute resolution techniques: (1) internal without prejudice meetings, (2) mediation, (3) arbitration, and (4) court proceedings. Each technique must be carefully considered and designed to ensure that disputes are effectively resolved in a manner that preserves the franchisee-franchisor relationship and the health of the franchise network. Generally, I recommend that franchisors include both an internal without prejudice meeting and mediation in their dispute resolution mechanism. Whether arbitration is appropriate and the types of disputes in which arbitration will be used depends on the character of the franchise network and the nature of its routine disputes.[2]

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[2] Note that section 5 of the Regulations to the *Arthur Wishart Act (Franchise Disclosure), 2000*, SO 2000, c.3 ["*Arthur Wishart Act*"] requires the franchisor to describe in its disclosure document any internal or external alternative dispute resolution mechanism it uses.

A. Mediation

I recommend including a properly designed and well-timed mediation as part of the dispute resolution mechanism. In parts of Ontario (including Toronto), parties are required to mediate before they can set an action down for trial. If the parties have to mediate anyway, it makes sense for parties to do so as soon as both sides have a clear understanding of the dispute and the key evidence that will be used at the hearing (be it by trial or arbitration). Parties that clearly understand the dispute and key evidence are in a good position to evaluate their case and speak reasonably about settlement, potentially avoiding the costs associated with litigation or arbitration. Mediation also has the benefit of an independent third party who can comment on the strengths and weaknesses of the case.

If the franchise system uses mediation to resolve disputes, it is best to establish the procedure for the mediation long before the dispute arises. Where the franchisee and franchisor are embroiled in a hotly contested dispute, it can be difficult to agree to a mediator and the deadlines for or the contents of the mediation briefs. These difficulties not only aggravate the dispute and increase the costs associated with it (affecting the parties' willingness to settle) but they also delay final resolution.

A well-designed mediation process will explain:

- How the mediator will be chosen (and may even provide a roster of a few mediators);
- Whether mediation briefs are required and the basic content of those briefs (for example, must the brief include an offer to settle?); and
- When and where the mediation will occur.

A well-designed and well-timed mediation mechanism has several benefits: it is confidential, can be designed to be quick, is often effective, can resolve disputes in creative ways, and is required before an action can go to trial in some jurisdictions. Given that mediation done well can be effective and may be mandatory, I recommend that franchisors consider including mediation in their dispute resolution mechanism.

B. Arbitration

The question of whether to include arbitration in the dispute resolution mechanism is more complicated. Arbitration is a more flexible process than litigation and it leads to a binding decision. It can be effectively used for routine disputes about required payments, termination and renewal of the franchise, and operational issues. However, a franchisor may not want to address other issues, such as the validity of its intellectual property, in an arbitration, especially if that arbitration has limited appeal rights.

Arbitration has the benefit of being confidential: franchisors are better able to protect sensitive commercial information in private arbitration than in open court, which benefits the franchise system as a whole. This confidentiality often has the practical effect of increasing the chance that the franchisor and franchisee can preserve their relationship and resolve the dispute. But confidentiality may not be absolute: the franchisor is required to disclose material facts including

whether it has been found liable in a civil action for various actions.[3] Although franchisors are not expressly required to disclose the results of arbitration, the general obligation to disclose material facts may require franchisors to disclose the results of arbitration as well. Even if it does, the parties maintain the confidentiality of the evidence (including sensitive commercial information) as well as any unproven allegations.

In the right conditions, arbitration can be cheaper, quicker and more flexible than litigation. In the wrong conditions, arbitration can be more expensive than litigation, have fewer rules to keep unreasonable parties or counsel in check, and add another dimension that can be disputed, namely whether the dispute is arbitrable at all.

Franchisors can help create the right conditions for arbitration by:

- Crafting an arbitration clause that clearly spells out what disputes can be arbitrated;
- Explicitly adopting a set of arbitration rules (such as the National Arbitration Rules of the ADR Institute of Canada, Inc., the Simplified Arbitration Rules of the ADR Institute of Canada, Inc., or the Arbitration Rules of the Canadian Foundation for Dispute Resolution, for example);
- Tailoring those rules to better serve the franchise system;
- Clearly stating the governing law;
- Clearly stating the remedies that the arbitrator can award;
- Providing a roster of a few arbitrators who have (or who develop) expertise in the franchise system;
- Expressly permitting the franchisee to remain in possession of the franchise until the dispute is resolved (if it relates to termination), subject to any interim relief that may be granted; and
- Expressly deciding whether to limit appeal rights.

Establishing these procedures before the dispute arises ensures that the franchisor and franchisee can spend their time and money resolving the dispute rather than being distracted by preliminary or procedural issues.

C. Can a Franchisor Make Arbitration Mandatory?

If the arbitration procedure is properly designed, it can effectively resolve routine disputes in the franchise context. The risk remains, however, that the franchisee will want his or her day in court and will start a court proceeding anyway.

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[3] *Arthur Wishart Act*, *ibid*, s 5(4); O Reg 581/00, s 2(5).

If the franchisee starts a court proceeding, the franchisor can move to stay the proceeding pursuant to section 7 of the *Arbitration Act*[4] and, if the matter is properly subject to the arbitration agreement and the exceptions listed in section 7(2) do not apply, then the court is obliged to stay the proceeding. The critical question is whether the arbitration clause in fact requires the parties to arbitrate the dispute.

Where the arbitration clause requires the parties to arbitrate the issue in dispute, Ontario courts have consistently stayed proceedings brought by franchisees in routine franchise disputes to permit arbitration. For example:

- In *MDG Kingston*, the Ontario Court of Appeal stayed an action by a franchisee for rescission based on failure to disclose and related damages. The Court noted that the dispute fell within the arbitration clause which remained effective even if the franchise agreement was ultimately declared rescinded.[5]

- In *Flexsmart*, the Superior Court stayed an action in which the franchisee alleged various breaches of the franchise agreement as well as deficient disclosure.[6]

- In *Nazarinia*, the Superior Court stayed an action in which the franchisee alleged that the franchise agreement was invalid for various reasons, including alleged fraudulent misrepresentations. The Court noted that the franchisee did not allege that the arbitration agreement in particular was invalid, held that there was not sufficient evidence of fraud to raise a serious question, and held that the arbitrator had the jurisdiction to decide whether the franchise agreement as a whole was invalid.[7]

- In *Lougheed*, the Superior Court stayed an action in which the franchisee sought damages arising out of an alleged breach of the franchise agreement. The Court refused to grant default judgment, holding that the mandatory arbitration clause was a complete answer to the relief sought.[8]

Despite the courts' favourable view of arbitration, they carefully construe arbitration clauses and will not stay proceedings where the subject matter does not fall within the arbitration clause. For example, in *Nafzaah International Ltd. v. RMCF Franchise Corp.*, a franchisee sought a declaration that the franchisor was not entitled to terminate and also sought an injunction preventing the termination. The court refused to stay the proceeding because the arbitration clause specifically precluded the arbitrator from granting the relief the franchisee requested.[9]

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4 SO 1991, c.17.

5 *MDG Kingston Inc. v. MDG Computers Canada Inc.*, 2008 ONCA 656.

6 *2162683 Ontario Inc. v. Flexsmart Inc*., 2010 ONSC 6493.

7 *Nazarinia Holdings Inc. v. 2049080 Ontario Inc.*, 2010 ONSC 1766, aff'd 2010 ONCA 739.

8 *Lougheed v. Garden City Entrepreneurs Inc.*, 2008 CarswellOnt 4536 (ONSC).

9 *Nafzaah International Ltd. v. RMCF Franchise Corp.* (2003), 40 BLR (3d) 304 (ONSC).

Similarly, in *Rosedale Motors Inc. v. Petro-Canada Inc*., a franchisee sued a franchisor for damages arising from alleged breaches of the franchise agreement and also from alleged misrepresentations. The arbitration clause did not cover allegations of negligent misrepresentations. The franchisor brought a motion to stay the breach of agreement claim in favour of arbitration and for summary judgment on the misrepresentations claim. The Court refused the stay because the two claims were so closely bound up with each other that it was more efficient to deal with them together thereby avoiding a multiplicity of proceedings.[10]

Finally, in *Stoneleigh Motors Limited v. General Motors of Canada Limited*, the Superior Court permitted the plaintiff dealers to pursue a group action against General Motors because the arbitration clause did not permit arbitration of group claims.[11]

The conclusion I draw from these cases is that the franchisor can require a franchisee to arbitrate a dispute if the arbitration clause is clearly drafted, covers the issue in dispute, and provides the arbitrator the power to award the relief sought. As I discuss below, it is less clear whether the franchisor can require a group of franchisees to participate in a group or class arbitration rather than in a class action before the court.

D. Can a Franchisor Make Class Arbitration Mandatory?

In two recent cases, the Supreme Court of Canada reinforced the value of arbitration and stayed purported class proceedings in favour of arbitration.[12] In *Telus*, the Supreme Court clarified that the principles supporting arbitration articulated in *Dell* (which was decided under Quebec law) also applied in common law provinces. The Court stayed most of the claims made by Seidel because her contract contained a mandatory arbitration clause. The Court affirmed that arbitration clauses would be enforced "absent legislative language to the contrary."[13]

However, the Court did not stay all of Seidel's claims. It permitted her claim under section 172 (but not section 171) of the *Business Practices and Consumer Protection Act*[14] to proceed because that section specifically permitted her to "bring an action in the [B.C.] Supreme Court" as a public interest litigant. As a result, section 172 relieved Seidel of her contractual commitment to arbitrate disputes.

In the franchise context, franchisees may be able to argue that section 4 of the *Arthur Wishart Act* operates in the same manner, i.e., that it confers a right to associate including a right to participate in a class action, and that an arbitration provision, even one that permits class or group arbitration, interferes with the right to participate in a class action and is void under section 4(4). This question has not been directly decided by the courts.

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[10] *Rosedale Motors Inc. v. Petro-Canada Inc.* (1998), 42 OR (3d) 776 (ONCJ), rev'd [2001] OJ No 5368 (Div Ct) ["*Rosedale Motors*"].

[11] *Stoneleigh Motors Limited v. General Motors of Canada Limited*, 2010 ONSC 1965 (Osler, Hoskin and Harcourt acted for General Motors).

[12] *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 ["*Dell"*]; *Seidel v. Telus Communications Inc*., 2011 SCC 15 ["*Telus*"].

[13] *Telus*, *ibid*, at para 42.

[14] *Business Practices and Consumer Protection Act*, SBC 2004, c.2 ["*BPCPA*"].

What has been decided is that a franchisor cannot require a franchisee to release claims in a class proceeding as a condition of renewing the franchise agreement.[15] The Ontario Court of Appeal held that such a release ran afoul of section 11 of the *Arthur Wishart Act*, which states that any release of a right under the Act is void. The Court then held (possibly in *obiter*) that the requirement of a release also violated rights of association because it prevented the franchisee from participating in the class action. The Court was not asked to consider an arbitration clause.

If section 4 of the *Arthur Wishart Act* gives a franchisee the right to participate in a class action, then the question under the *Telus* analysis is whether that statutory right manifests a legislative intent to interfere with arbitration agreements, which are also strongly supported by the legislature and the courts. As suggested above, franchisees will argue that section 4 is like section 172 of the BPCPA. On the other hand, franchisors will argue that section 4 of the *Arthur Wishart Act* is akin to section 171 of the BPCPA and that the court should stay a franchisee's purported class action seeking damages just like the Supreme Court stayed Seidel's private cause of action for damages under section 171 of the BPCPA. It is hard to predict which argument the courts will accept.

From the strategic perspective of resolving disputes quickly, franchisors should carefully consider what procedure they would like to use to resolve group claims. If franchisors are content with class or group actions, then the issue of arbitrability obviously does not matter. If, however, franchisors prefer to arbitrate class or group claims, then they must carefully review *Telus*, the jurisprudence interpreting section 4 of the *Arthur Wishart Act*, and the language of their arbitration clauses.

III. STRATEGIES FOR FAST(ER) LITIGATION

If the informal or alternative dispute resolution mechanisms fail and the dispute is placed before the court, the parties can use several strategies to resolve the dispute more quickly. First, counsel has to decide whether the dispute can be appropriately resolved in an application (which is usually faster than an action). Regardless of whether the dispute can be resolved by way of application or action, it may be possible to get an injunction.[16] If the dispute is not suited for an application such that an action is necessary, then the dispute could be resolved by a summary judgment motion. Whether any of these strategies are appropriate depends, of course, on the facts of each case.

A. Action v. Application

The general rule is that all proceedings should be started as actions unless an application is specifically permitted. Rule 14.05(3) permits applications where the relief claimed depends on the interpretation of contracts (including franchise agreements) or statutes (including the *Arthur Wishart Act*). Applications are usually resolved more quickly than actions, but there is a risk that the court will convert the application into an action under Rule 38.10, which, of course, increases the cost and time needed to resolve the dispute. Counsel should carefully consider whether the court can properly decide the dispute in an application to reduce the risk of conversion.

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15 *405341 Ontario Limited v. Midas Canada Inc.*, 2010 ONCA 478 ["*Midas*"].

16 My co-panellist, Jonathon Baker (a partner at Wardle Daley Bernstein LLP) prepared a thorough analysis of injunctions in the franchise context, so I will not consider the topic further in this paper.

1. *The General Rule*

According to Rule 14.02, every proceeding in Ontario is required to be by action except where a statute or the Rules provides otherwise. Actions have certain benefits: for example, parties have discovery rights and the ability to bring summary judgment motions under Rule 20 or motions to determine questions of law under Rule 21. These benefits must be weighed against the time it can take to have even the simplest action successfully mediated or tried as well as the numerous events that delay mediation and trial (for example, refusals motions and the court's docket).

In certain types of franchise cases, parties can start their proceeding by application under Rule 14.05(3). Applications also have benefits: they are (usually) completed more quickly than actions because the applicant's evidence is delivered with the notice of application and there is no discovery process, among other things.

Rule 14.05(3) provides a list of circumstances in which a proceeding may be started by application, three of which are common in the franchise context: a proceeding may be brought by application where the relief claimed is:

> (d) the determination of rights that depend on the interpretation of a...contract or other instrument, or on the interpretation of a statute...;
>
> (g) an injunction, mandatory order or declaration...or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by notice of application;...or
>
> (h) in respect of any matter where it is unlikely that there will be any material facts in dispute.

2. *Applications and Disputed Facts*

In a 1991 decision made outside the franchise context, the Court of Appeal confirmed that a court can decide an application even where there are material facts in dispute.[17] In *McKay Estate v. Love*, Steele J. held that he had the power to hear an application in which material facts were disputed (unless, of course, the application was brought solely under Rule 14.05(3)(h), which requires that it be "unlikely that there be material facts in dispute"). The Court of Appeal affirmed Steele J.'s decision without commenting on his reasoning about applications with material facts in dispute.

In the franchise context, the court has decided an application with material facts in dispute. In *Cash Converters Canada Inc. v. 1167430 Ontario Inc.*,[18] the franchisor brought an application for an order directing the franchisees to comply with their obligations under the franchise agreement (including paying royalties) until the disposition of an arbitration between them. Faced with a "plethora of affidavits" put forward by the responding franchisees, O'Driscoll J. evaluated the credibility of the franchisees' evidence, made some findings, and concluded that he was not persuaded. He granted the order sought.

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[17] *McKay Estate v. Love*, [1991] OJ No 1972; aff'd 6 OR (3d) 519 (ONCA).

[18] *Cash Converters Canada Inc. v. 1167430 Ontario Inc.*, [2001] OJ No 5860 ["*Cash Converters*"].

The *Cash Converters* decision is the exception to the general approach as most courts have been hesitant to find facts on applications in the franchise context. In fact, several applications brought under Rule 14.05(3)(d) for the determination of rights based on the interpretation of franchise agreements or the *Arthur Wishart Act* have been converted into actions because there were material facts in dispute. The courts seem to have particular concerns about deciding applications where issues of credibility are involved or where *viva voce* evidence is required.

For example, in *W.A.B. Bakery Franchising Ltd.*,[19] the franchisor sought a declaration that the franchisees had breached the franchise agreement and that the franchise agreement was terminated. McMahon J. refused to grant the application, stating that he would have to make significant factual determinations to interpret the contractual documents and determine the parties' intentions. He converted the application into an action.

Similarly, Daley J. converted an application into an action in *Premier Cleaners*,[20] stating that he could not resolve the conflicting evidence regarding the leases and did not have enough evidence to decide whether the applicant as franchisor had any rights with respect to the leased business premises occupied by the franchisees. Daley J. was also concerned about the third-party landlords who had not received notice of the application and whose rights might be impacted by the application.

Finally, in *Lechuga 1 Ltd.*,[21] Penny J. found that there were disputed facts that were material to the resolution of the parties' claims and defences. The franchisee served a notice of rescission alleging the franchisor delivered a deficient disclosure document. Penny J. ordered a "hybrid proceeding" with limited *viva voce* evidence to supplement the affidavit evidence. I note that Penny J. may have taken a different approach to the "hybrid proceeding" if he had had the benefit of the Ontario Court of Appeal's decision about the new summary judgment rule (*Combined Air Mechanical Services Inc.*[22]), which is discussed in detail below.

Based on the comments in these cases, it seems that even though the court can hear applications where material facts are in dispute, it will nonetheless choose to convert the application into an action. To avoid unnecessary expense, counsel must carefully assess whether the dispute can be appropriately resolved on an application. Similarly, counsel responding to an application ought not manufacture factual disputes simply to delay resolution of the dispute.

3. *Applications Without Disputed Facts*

Where there are no disputed material facts, Ontario courts have heard and decided applications on various issues, including:

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19 *W.A.B. Bakery Franchising Ltd. v. 1359820 Ontario Ltd.*, [2005] OJ No 5393.

20 *2138689 Ontario Inc. (c.o.b. Premier Cleaners) v. Owasia Logistics Inc.*, 2011 ONSC 2754.

21 *Lechuga 1 Ltd. v. Lettuce Eatery Development Inc.*, 2011 ONSC 4851.

22 2011 ONCA 764.

- A franchisee's application for rescission of the franchise agreement for lack of disclosure where the franchisor admitted that the agreements were franchise agreements and that disclosure had not been made.[23]

- A franchisee's application for an order requiring the franchisor to renew the franchise agreement for 10-year term based on an interpretation of the franchise agreement.[24]

- A franchisee's application for a declaration that an individual was a franchisor's associate (which required the application judge to find some facts).[25]

- Several franchisees' application for an order that the dispute be submitted to arbitration.[26]

- A franchisor's application for the appointment of a receiver over the franchisee's business when the franchise was not making the required franchise payments to the franchisor nor the required PST payments to the provincial government. (Proceeding by way of application was authorized by the *Bankruptcy and Insolvency Act*[27].)[28]

In summary, although applications can be resolved more quickly than actions, there is a real risk that the application will be converted into an action if there are facts in dispute.

B. Summary Judgment: the New "Full Appreciation" Test

If counsel brings the claim as an action instead of as an application, then counsel can use the strategy of bringing a summary judgment motion. In January 2010, the summary judgment rule was amended to:

- replace the test of "no genuine issue for trial" with the more focused "no genuine issue requiring a trial" (Rule 20.04(2)(a));

- empower a judge to weigh evidence, evaluate credibility and draw inferences from evidence (Rule 20.04(2.1)); and

- allow a judge to order that oral evidence be presented for the purpose of weighing evidence, evaluating credibility and drawing inferences (Rule 20.04(2.2)).

In the months following the amendments, the court began to develop its approach to summary judgment under the new Rule 20. Although a consensus emerged that the new rule broadened the

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[23] *Personal Service Coffee Corp. v. Beer (c.o.b. Elite Coffee Newcastle),* [2005] OJ No 3043; *6792341 Canada Inc. et al. v. Dollar It Limited et al.* 2009 ONCA 385.

[24] *1259286 Ontario Ltd. v. Kardish Food Franchising Corp.,* [2007] OJ No 5429.

[25] *6862829 Canada Ltd. v. Dollar It Ltd.,* 2010 ONCA 34.

[26] *Adlakha v. Meehan,* 2011 ONSC 444.

[27] RSC 1985, c B-3.

[28] *1470568 Ontario Ltd. (c.o.b. East Side Mario's) v. Prime Restaurants of Canada Inc.,* [2011] OJ No 83; aff'd 2011 ONCA 9.

court's jurisdiction, the cases diverged on the question of whether it was appropriate for a motion judge to use the new powers to decide an action on the basis of the evidence presented on a motion for summary judgment, rather than simply using the new powers to decide whether a trial was ultimately needed.[29]

On December 5, 2011, the Ontario Court of Appeal released its long-awaited decision concerning Ontario's new summary judgment rule. In *Combined Air Mechanical Services Inc.*, the Court of Appeal expressly adopted a "fresh approach" to summary judgment that makes previous cases essentially irrelevant.[30]

The Court's new approach – described as the "full appreciation test" – requires the motion judge to conclude that he or she can fully appreciate the evidence and issues *in the case* (not just the motion) based on the motion record, as supplemented by limited oral evidence. In other words, the motion judge must determine whether this full appreciation can be obtained from the motion record or whether the advantages of the trial process are necessary to effect a full and fair resolution of the dispute. The Court suggested that summary judgment would not be appropriate (because a full appreciation could not be achieved) in cases where:

- the motion record is voluminous;
- there are many affiants;
- the moving party has different theories of liability for defendants;
- the court is asked to make numerous findings of fact;
- credibility is at the heart of the dispute;
- the evidence of key witnesses is disputed on critical issues; or
- assessing credibility is difficult because few reliable documentary yardsticks exist.

If the motion judge concludes that he or she can fully appreciate the evidence and issues in the case, he or she is permitted to weigh evidence, evaluate credibility or draw reasonable inferences to find facts on the balance of probabilities and dispose of the action.

This new approach to summary judgment gives both franchisors and franchisees an effective tool to draw the other party into settlement discussions because the risk posed by a summary judgment motion is so much higher. The risk is higher because if the court concludes that it can fully appreciate the issues and evidence in the case, then the court can make findings of fact on a balance of probabilities to finally resolve the case. The risk is higher for the moving party as well

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[29] See the discussion in *Mauldin v. Cassels Brock & Blackwell LLP*, 2011 ONCA 67 (CanLII), (http://canlii.ca/t/2fd7v), at paras 13-24.

[30] 2011 ONCA 764. We note that counsel for one of the parties is seeking leave to appeal to the Supreme Court.

because even if the responding party does not bring a cross-motion seeking summary judgment, the court can nonetheless grant summary judgment to the responding party.[31]

Because the risk is higher, counsel should consider seeking evidence in advance of the summary judgment motion using Rule 39.03. Rule 39.03 states:

> (1) Subject to subrule 39.02 (2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.
>
> (2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination.
>
> (3) The right to examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of an examination where the party seeking the adjournment has failed to act with reasonable diligence.
>
> (4) With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial.
>
> (5) The attendance of a person to be examined under subrule (4) may be compelled in the same manner as provided in Rule 53 for a witness at a trial.

This rule is particularly powerful in the summary judgment context because the summary judgment motion judge can refuse counsel's request that oral testimony be permitted. Rule 39.03 does not depend on leave of the court but rather on counsel serving a timely summons.

IV. STRATEGIC USE OF CLASS ACTIONS

Bringing a claim with the intention of certifying it as a class action under the *Class Proceedings Act, 1992*[32] is another strategy that significantly impacts the cost and efficiency of dispute resolution. According to the Court of Appeal, a franchise claim "involving a dispute between a franchisor and several hundred franchisees is exactly the kind of case for a class proceeding."[33] In the past few years, the courts have certified several franchise class actions. Successfully certifying a class action or starting a case that is likely to be certified has several benefits, including:

- Levelling the playing field between a large, commercially sophisticated franchisor and individual franchisees;
- Allowing franchisees to litigate (and usually settle) issues that are too small for one franchisee to litigate but that impact the franchise system as a whole;

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[31] See *Manulife Bank of Canada v. Conlin*, [1996] 3 SCR 415, at p 448, per Iacobucci J. dissenting. The majority agreed with Iacobucci J. on this issue at p 421.

[32] SO 1992, c.6.

[33] *Quiznos Canada Restaurant Corporation v. 2038734 Ontario Ltd.*, 2010 ONCA 466 at para 62.

- Allowing parties to finally determine an issue in a manner that binds the franchise network (or the portion of it in the class);

- Allowing non-representative franchisees to participate in the legal proceeding without being seen to take steps against the franchisor, which helps franchisees protect their relationship with the franchisor;

- Increasing the representative franchisee's chances of retaining a law firm on a contingency basis; and

- Increasing the chance of settlement (as common issues trials seem to be even rarer than non-class action trials).

Despite their benefits, class actions are not appropriate in every case with common claims because they are more expensive, entail more risk for the representative plaintiff,[34] and take much longer to reach a final resolution than a claim brought by one franchisee or a small group of franchisees. Representative franchisees must be confident that their claims will be certified, at least in part, before taking the first step towards a class action.

A. What Claims Have Been Certified?

Representative plaintiffs' counsel have several precedent cases in which franchise claims were certified. In the past decade, the courts have certified franchise class actions addressing the following subjects:

1. Failure to disclose, misleading disclosure, or other negligent misrepresentations:

    - In *Trillium Motor World Ltd.*, the representative dealer alleged that a wind-down agreement, under which certain dealers agreed to wind down their dealerships, was a franchise document such that disclosure was required. As disclosure had not been provided, the representative dealer sought a declaration that he could rescind or cancel the wind-down agreement and seek damages. The Court also certified the question of whether General Motors is a franchisor.[35]

    - In *578115 Ontario Inc. v. Sears Canada Inc.*, the representative franchisee alleged that Sears improperly failed to disclose that Sears was only passing on to franchisees part of the rebate it received from suppliers.[36]

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[34] As Winkler J., as he then was, said in *A&P*, *infra*, at para 56: "Nonetheless, the plaintiffs will be the only class members exposed to costs in the litigation, up to the conclusion of that trial. For that matter, they are the only members of the proposed class exposed to costs on this application for certification. Under virtually any other procedure, they would be exposed to less costs individually."

[35] *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2011 ONSC 1300 ["*Trillium*"] (Osler, Hoskin & Harcourt LLP acted for General Motors of Canada Limited). GMCL obtained leave to appeal Justice Strathy's certification decisions with respect to certain issues, including whether two issues ought to have been certified as common issues (namely, whether GMCL had a duty to disclose material facts concerning its restructuring to franchisees and whether GMCL interfered with the class members' right to associate under): 2011 ONSC 3939.

[36] 2010 ONSC 4571, 325 D.L.R. (4th) 343 ["*Sears*"].

- In *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, the representative franchisee alleged that the franchisor failed to disclose receiving volume-based rebates, its policy in respect of allocating those rebates to class members, the amount it received and the amount it retained.[37]

- In *Rosedale Motors*, (a pre-*Arthur Wishart Act* case), the representative franchisee alleged that the franchisor had misrepresented the profitability of the proposed franchise. The Divisional Court held that there were enough common issues to certify the class, including whether the representations were false and misleading.[38] If the case were brought under the *Arthur Wishart Act*, the representative franchisee might also have been able to rely on section 7, which allows franchisees to claim damages for misrepresentations in the disclosure document.

2. Breach of the duty of good faith and fair dealing or the common law duty of good faith:

- In *Trillium*, the representative dealer alleged that General Motors had breached the duty of fair dealing by offering a wind-down agreement without providing a disclosure document, giving dealers fewer than seven days to respond, and keeping them in the dark concerning GMCL's actual financial position.[39]

- In *Pet Valu*, the representative franchisee alleged that the franchisor breached the duty of good faith and fair dealing by failing to pass on to the franchisees volume-based rebates, allowances and discounts given by suppliers and manufacturers to Pet Valu or its affiliates.[40]

- In *Sears*, the representative franchisee alleged that Sears breached the duty of good faith and fair dealing by failing to disclose that Sears was only passing on to franchisees part of the rebate it received from suppliers, among other things.[41]

- In *405341 Ontario Limited v. Midas Canada Inc.*, the representative franchisee alleged that Midas had breached the duty of good faith and fair dealing by changing its system in a manner that eliminated both a centralized purchasing network for and the related discount on car parts without implementing a corresponding decrease in royalties.[42]

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37 2011 ONSC 287 ["*Pet Valu*"].

38 *Supra* note 10.

39 *Supra*, note 35.

40 *Supra*, note 37.

41 *Supra*, note 36.

42 *Landsbridge Auto Corp. v. Midas Canada Inc.* (2009), 73 C.P.C. (6th) 10 (Ont. S.C.J.) ["*Midas*"].

3. Breach of the right of association:

   - In *Trillium*, the representative dealer alleged that General Motors had breached the right of association by adopting a strategy that was designed to divide the franchisees and give them no time to make a unified response to GMCL's offer.[43]

4. Breach of the franchise agreement:

   - In *Pet Valu*, the representative franchisee alleged that the franchisor breached the franchise agreement by failing to pass on to the franchisees volume rebates given by suppliers and manufacturers to Pet Valu or its affiliates before Pet Valu resold the products to franchisees.[44]

   - In *Sears*, the representative franchisee alleged that Sears breached implied terms of the franchise agreement by failing to disclose that Sears was only passing on to franchisees part of the rebate it received from suppliers.[45]

   - In *2038724 Ontario Ltd. v. Quiznos Canada Restaurant Corp*, the representative franchisee alleged that Quiznos breached the franchise agreement by failing to assist franchisees in obtaining reasonable prices for supplies and for using contractual powers to maximize remittances. The representative franchisee also alleged breach of the then-operative price maintenance sections of the *Competition Act*[46] and conspiracy.[47]

   - In *Mont-Bleu Ford Inc. et al. v. Ford Motor Company of Canada, Limited*, the representative franchisees alleged that Ford had breached the dealer agreement by allowing Mercury/Lincoln dealers to sell Ford vehicles as well.[48]

   - In *1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd.*, the representative franchisee alleged that A&P breached the franchise agreement by changing the invoicing system to show "net billing" rather than separately identifying the rebates franchisees were entitled to receive.[49]

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[43] *Supra*, note 35.

[44] *Supra*, note 37.

[45] *Supra*, note 36.

[46] RSC, 1985, c C-34.

[47] *2038724 Ontario Ltd. v. Quiznos Canada Restaurant Corp.* (2009), 96 OR (3d) 252, aff'd 2010 ONCA 466 ["*Quiznos*"].

[48] [2000] 95 ACWS (3d) 230 (SCJ), rev'd [2000] 48 OR (3d) 753 (Div. Ct.).

[49] *1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd.* (2002), 62 OR (3d) 535 (SCJ) at para 5, aff'd (2004) 70 OR (3d) 182 (Div. Ct.), leave to appeal denied (CA). (Osler, Hoskin & Harcourt LLP acted for A&P.)

5. Unjust enrichment

- In *Pet Valu*, the representative franchisee alleged that the franchisor was unjustly enriched by retaining volume rebates that ought to have been paid to the franchisees.[50]

- In *Sears*, the representative franchisee alleged that Sears was unjustly enriched because it kept part of the rebate from supplies that it ought to have passed on to suppliers.[51]

- In *Midas*, the representative franchisee alleged that Midas was unjustly enriched by retaining an enhanced royalty while removing the related discount on car parts.[52]

The franchise bar is also waiting for certification decisions in two proposed class actions: (1) *Shoppers Drug Mart*,[53] in which the plaintiffs allege that Shoppers Drug Mart breached its duty of good faith and fair dealing, breached the franchise agreement, interfered with the franchisees' right to associate, failed to provide adequate disclosure and was unjustly enriched; and (2) *Fairview Donut Inc. et al. v. The TDL Group Inc. et al.*,[54] in which the plaintiffs seek to certify a class action against Tim Hortons alleging breach of the franchise agreement, breach of the duty of good faith, unjust enrichment, misrepresentations and breach of the *Competition Act*. Tim Hortons brought a motion for summary judgment that was heard at the same time as the certification motion. Both motions are under reserve.

B. What Franchise Class Actions Have Failed?

As the list of certified franchise class actions makes clear, representative plaintiffs' counsel have plenty of guidance on how to frame a claim that is likely to be certified. Although many franchise claims have been certified, some have not been certified or have failed for some other reason. As Strathy J. explained in *Pet Valu*, "it is wrong to simply say that because this is a franchise claim it is appropriate for class actions".[55] Two franchise cases have not been certified:

- *909787 Ontario Ltd. v. Bulk Barn Foods Ltd*., in which the representative franchisee alleged that the franchisor breached the franchise agreement by overcharging for supplies. Although certified at first instance, the Divisional Court de-certified the case because the franchise agreements tied the price of supplies to the prevailing prices in the franchisee's region. As a result, the allegedly overcharged prices were not

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50 *Supra*, note 37.

51 *Supra*, note 36.

52 *Supra*, note 42.

53 Osler, Hoskin & Harcourt LLP is acting for Shoppers Drug Mart in *Spina et al. v. Shoppers Drug Mart et al.* Note that the certification hearing is not scheduled until April 2012.

54 *Fairview Donut Inc. and Brule Foods Ltd. v. The TDL Group Corp. and Tim Hortons Inc*. The certification hearing and defendant's summary judgment motion were heard in August.

55 *Supra*, note 37, at para 104.

common and the individual calculation of damages would have overwhelmed the remaining common issues.[56]

- *TA&K Enterprises Inc. v. Suncor Energy Products Inc.*, in which a franchisor recently defeated a purported class action by filing a defence and bringing a successful summary judgment motion.[57] I note that with the Ontario Court of Appeal's recent decision on the new summary judgment rule, discussed above, franchisors may be able to rely more frequently on summary judgment to finally determine an action, including a class action.

On the whole, as Ontario courts have frequently commented, franchise claims that are properly framed are well-suited to the class action procedure. The question for the representative plaintiff is whether the increased risk, litigation time and cost exposure is worth the benefits associated with bringing a class action.

V. CONCLUSION

As you can see, counsel for franchisors and franchisees have many options and strategies that they can use to resolve disputes quickly so their clients can focus on their business. Each option has risks and the success of each strategy depends on the particular facts of each case and on how the courts apply the law. Some areas of legal uncertainty remain, particularly in the summary judgment and class action contexts. Fortunately, 2012 will give us decisions on the new summary judgment test and how it applies in the franchise context as well as on certification of franchise class actions and franchise class action common issues trials.

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[56] *909787 Ontario Limited v. Bulk Barn Foods Ltd.* (2000), 2 CPC (5th) 61 (ON Div Ct) (Osler, Hoskin & Harcourt LLP acted for Bulk Barn Food Ltd.). We note that since *Bulk Barn* was decided, the Supreme Court of Canada has emphasized the "low bar" for certification: see *Hollick v. Toronto (City)*, [2001] 3 SCR 158.

[57] 2010 ONSC 7022, aff'd 2011 ONCA 613 (Osler, Hoskin & Harcourt LLP acted for Suncor).