



## **THE RISE OF FRANCHISE LAW**

*Challenges and Opportunities in a Rapidly Evolving Practice Area*

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The roots of franchise law in Canada go back to at least the early '70's, when the growing franchise activity in the U.S. began to creep northward and a few aspiring Canadian entrepreneurs saw opportunities in this then unusual method of distribution. Back then, as today, a lot of the activity in franchising was in the fast food industry. Little noticed at the time was the nascent real estate franchise sector, which was one of the portents of today's multi-sector, multifaceted and robust franchise marketplace. Franchising in Canada today runs the gamut from retail businesses of every type, including service businesses, to many and varied business to business enterprises. Today, few lawyers would say that they never encounter franchise issues in their practices.

In the '70's, for reasons mostly political, the province of Alberta chose to pass complex and restrictive franchise specific legislation, mostly centered around pre-sale disclosure, but also requiring a franchise disclosure document to be approved by and registered with the Alberta Securities Commission. It would be two and a half decades later before Ontario would become only the second province to wade into the regulation of franchising. Less than a decade later, we now have such legislation in Prince Edward Island and New Brunswick as well, with Manitoba not far behind and, it is conjectured, more provinces to follow. While there is a significant amount of commonality among these statutes and their regulations, there are just enough differences to challenge and trap the average practitioner.

In the past, it was quite easy and relatively safe for a business owner to embark upon an expansion through a franchise distribution model. It was not uncommon for a new franchisor to employ the services of a trusted legal advisor, who had little or no knowledge about franchising. Those days are long gone. In this increasingly litigious area of law, the franchisors who do not acquire a sufficient amount of knowledge and expertise about franchising best practices are treading on very dangerous ground. And those who deign to offer such legal services without proper schooling are putting themselves at considerable risk; witness the rapidly increasing volume of negligence claims in franchise matters being handled by LawPro. Some of those claims are not just against lawyers acting for franchisors, but against those acting for franchisees as well, where a lack of knowledge about the workings of such legislation, availability of remedies and time limits formed the basis of a claim. Through the broad application of the definition of a “franchisor’s associate”, individuals can find themselves unprotected by the “corporate veil” and vulnerable to the claims of franchisees.

Historically, there really was no franchise common law. There was simply contract and other case law applied to franchise fact situations. The attitudes of the various judges towards franchise cases were very individual and provided little guidance to those who had to work with their decisions. While there is still arguably no common law franchise principles, the rapidly developing body of case law in franchise fact situations is amounting to the same thing, through a variety of means, including the interpretation and application of the various franchise statutes. There is now a sufficient body of such case law to conclude a number of things, including, that the courts will strictly apply the disclosure requirements of the statutes, that the statutes are remedial and should be given a broad interpretation to protect franchisees and franchisors had better treat their franchisees fairly.

The tentacles of franchise law developments are spreading beyond what one would consider traditional franchise situations. Distributors of products and services who never thought of themselves as franchisors and had no idea they were required to comply with franchise legislation are surprised to find out that the very broad definitions in the statutes could catch their

distribution model. These “inadvertent franchisors” are sometimes shocked to find themselves defending a claim from their “franchisees” for non-compliance with a very technical statute.

There has also been a meteoric rise in franchisee class action law suits recently. Canadian courts have spoken clearly and resoundingly that class action legislation provides an appropriate vehicle to address systemic claims by franchisees, even based on claims for breach of the implied covenant of fair dealing. This area of practice requires a high degree of expertise and experience to bring or defend such actions.

With the rapidly increasing impact of franchising on the Canadian economy, comes a rapidly increasing amount of legal work required for contract drafting, statutory compliance and litigation of all sorts. Franchising has and will affect many other areas of practice including labour, workplace health and safety, environmental, immigration and competition, to name a few.

Lest anyone feel complacent that these matters do not affect them, consider the modern reality that lenders, landlords and suppliers and those who advise them, more and more find they are dealing with a franchisor or a franchisee, who are affected by these legal developments. The times they are a changing and rapidly!

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