Cassels

Distributorship or Franchise? The Significance of Control and Assistance in Determining The Application of Franchise Legislation

Stefanie Holland

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A recent lower court decision in Manitoba (found here) provides further guidance in determining whether a business arrangement is actually a franchise for the purposes of franchise disclosure legislation in that province. In *Diduck v. Simpson*,[1] the plaintiff signed a distribution agreement with a master distributor and paid an initial fee. The plaintiff received exclusive sales territory and was required to attend training sessions. The business relationship was not successful, and the plaintiff purported to rescind the distribution agreement on the grounds that he had not been provided with the necessary disclosure document as required under the Manitoba *Franchises Act* (Manitoba Act). The plaintiff subsequently brought a motion for summary judgment claiming that it was a "franchise agreement." The defendant also sought summary judgment, arguing that the plaintiff's claim for negligent misrepresentation must fail, as any representations made were merely "sales talk" and projections.

The Distributor Agreement Was Not A Franchise Agreement

In determining whether the distributor agreement was a franchise agreement, the Court considered the three elements of the definition of a "franchise" under the Manitoba Act.

The Court found that the first two elements of the definition, which are similar to those in Ontario's *Arthur Wishart Act (Franchise Disclosure), 2000*[2], were satisfied. The plaintiff was required to make an up-front payment and purchase $2,400 worth of inventory or make a payment of $2,400. The plaintiff was also granted the right to sell or distribute the defendant's goods, which were substantially associated with the defendant's trademark, trade name, logo or advertising.

It was the third element of the definition, however, on which the Court focused much of its discussion. Under this element, the franchisor must exercise significant control over, or offer significant assistance in, the franchisee's method of operation, including building design and furnishings, locations, business organization, marketing strategies or training. Unlike Ontario's *Wishart Act*, however, the Manitoba Act requires that the significant control or assistance take place "under a business plan." In this case, the Court found that the information and advice provided to the plaintiff did not amount to "significant assistance" as contemplated by the Manitoba Act. The information provided to the plaintiff included projections of profit based on anticipated sales and statements of opinion – not statements of fact. These were insufficient to

form a claim for negligent misrepresentation. In any event, the requirement of a business plan was absent.

Key Takeaway

Manitoba courts have demonstrated that they will closely scrutinize the relationship between the contractual parties in determining whether it constitutes a franchise relationship for the purposes of statutory disclosure obligations. Franchisors and distributors should understand the differences between provincial legislative schemes when deciding whether or not to provide franchise disclosure.

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[1] 2018 MBQB 76.
[2] S.O. 2000, c. 3 (the "*Wishart Act*").
