ETHICS AND NEGOTIATION IN A FRANCHISE DISPUTE

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INTRODUCTION

The *Arthur Wishart Act (Franchise Disclosure) 2000*, (the Act) is the Ontario act which is supposed to alleviate the imbalance of power between a franchisor and franchisee. The Act is also supposed to provide remedies for abuses which sometimes result from the imbalance.[1]

Section 3 of the Act imposes a duty of fair dealing on parties to the franchise agreement. In particular, parties are subject to a duty to act in good faith in accordance with reasonable commercial standards.[2] There is a statutory cause of action for damages if a party breaches that duty.[3]

Furthermore, the franchisee can rescind the franchise agreement within two years after entering into the agreement if the franchisor does not provide a disclosure document[4]. Section 7 sets out a statutory cause of action for damages for breach of this obligation.

An important question that arises after a franchise relationship has been created is the extent to which the Act imposes an obligation on franchisors to disclose material information in their possession to franchisees when negotiating issues in dispute. This question has not yet been fully answered by the courts but some relevant considerations are discussed below.

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[1] *Salah v. Timothy's Coffees of the World Inc.* (2010), ONCA 673, per Winkler, C.J.O., at para. 26.

[2] s. 3(3) of the Act.

[3] s. 3(2) of the Act.

[4] s. 6 of the Act.

Although the courts have not yet considered the following distinctions, parties to a franchise dispute in the course of settlement discussions would do well to carefully consider the distinctions, if any, between situations where:

(a) a party makes threats or acts coercively;

(b) a party lies;

(c) a party exaggerates;

(d) a party choses not to disclose material facts;

(e) a party makes careless misstatements of fact or law;

(f) a party makes excessive initial demands;

(g) a party engages in distraction, e.g., by producing excessive documentation, evading questions or pretending certain issues are more important than they are;

(h) a party maintains an unreasonable position and engages in protracted litigation without merit to take advantage of an economic disparity;

(i) a party expressly advises the other that it will not provide specific information and directs the other to obtain independent legal advice;

(j) a party knowingly fails to correct another party's mistaken assumption; or

(k) a party makes persuasive but accurate presentations to third parties or the media.

Only some of these situations have been addressed by the courts and apart from the *Hyundai* case (reviewed below), most of the relevant discussions have arisen in the context of franchise class actions.

CASE LAW APPLICABLE TO THE ETHICS OF NEGOTIATING A FRANCHISE DISPUTE

Duty of Good Faith and Fair Dealing

The Hyundai Case

In *1323257 Ontario Ltd. (Hyundai of Thornhill) v. Hyundai Auto Canada Corp.*, 2009 CanLII 494 (D.M. Brown, J.) the court granted an injunction restraining Hyundai Canada from terminating its dealer agreement with the plaintiff when there was a very strong case on the preliminary motion that the parties were in a franchise relationship.[5]

Justice Brown discussed the franchisor's obligations during settlement negotiations in the following terms:

> The law clearly indicates that a duty of good faith attaches to the performance and enforcement of such contracts, and Ontario courts have treated them as contracts of the utmost good faith. A very arguable case exists that the parties to such franchise agreements operate subject to obligations to disclose material facts relating to issues involving such agreements. The extent to which obligations of good faith arising under the franchise relationship between (Hyundai Canada) and Thornhill (the plaintiff) are tempered, if at all, by policy considerations pertaining to the disclosure of information by parties involved in litigation and its settlement will be a matter for full argument at trial.[6]

While Justice Brown did not try to define the scope or boundaries of the duty of good faith he did distinguish between a situation in which one party provides the other with inaccurate information, and a situation in which the other party knows the facts are different but decides not to inquire about the details.[7] The former was more likely to give rise to a breach of the duty of fair dealing, but the dividing line between these categories was not discussed further.

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[5] *Hyundai of Thornhill* at *para*. 86.

[6] *Hyundai of Thornhill* at para. 86.

[7] *Hyundai of Thornhill* at para. 86, citing his own earlier decision in *Quinn v. Keiper* (2007), 87 O.R. (3d) 184, aff'd (2008), 92 O.R. (3d) 1 (Ont. C.A.) at para. 56.

Although we do not yet have the benefit of a trial judgment on this point, it is obvious that a franchisor will have to carefully consider to what extent it can withhold information in the course of settlement discussions with a franchisee, no matter what may be the nature of the dispute.

Franchise Class Actions

Motions to certify class actions do not resolve the merits of a claim and only consider the procedural issues specified in the *Class Proceedings Act*[8]. Franchise disputes have been held by courts to be particularly well-suited to class actions because there are often common issues concerning the interpretation of the franchise agreement and the duties of the franchisor under contract, statute and common law. As Armstrong, J.A., has said:

> I am also of the view that a class proceeding in this case will satisfy at least two of the objectives of the *Class Proceedings Act* of judicial economy and access to justice. It seems to me that this case involving a dispute between a franchisor and several hundred franchisees is exactly the kind of case for a class proceeding.[9]

Thus, while subsequent cases have established that not every franchise case will be suitable for certification as a class action, nonetheless franchise claims will often be consistent with the goals of both the Act and the *Class Proceedings Act*.

One of the legal and ethical issues that may arise following the commencement of a class action is that after a class action is commenced a franchisor may be tempted try to settle the action or scupper it by circumventing class counsel (i.e., the law firms acting for the representative plaintiff (before certification) or the class (after certification) and approaching its franchisees directly. While it may seem a natural approach given the ongoing nature of the franchise relationship between the franchisor and its plaintiff franchisees, this is dangerous territory for the franchisor, especially where its actions may be interpreted as threatening or coercive.

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[8] *Class Proceedings Act, 1992*, S.O. 1992, C.6. The test for certification is set out in s. 5.

[9] *Quizno's Canada Restaurant Corporation v. 2039724 Ontario Ltd.*, 2010 ONCA 466, 100 O.R. (3d) 721 at para. 62.

A&P Case

In *1176560 Ontario Limited v. Great Atlantic and Pacific Company of Canada Ltd.* [10](A&P) the plaintiffs were franchisees of Food Basics, the discount grocery chain operated by A&P. The plaintiff claimed that A&P had improperly withheld the benefits of certain rebates and allowances from the franchisees. The primary issue for present purposes was the concurrent motion to stop the defendant from circulating new franchise agreements and releases to the class members during the "opt-out" period.[11]

The plaintiff alleged that A&P was intimidating the class members and attempting to coerce them into signing improvident releases. Indeed the motions judge found that A&P had:

(a) monitored the franchisees' payments to their lawyers;

(b) improperly subjected franchisees to rent increases when they refused to execute releases;

(c) sent out a copy of the statement of defence and counterclaim without including the plaintiff's reply and defence to counterclaim; and

(d) delivered or promised to deliver a new franchise agreement to the franchisees and have them sign it no matter what happened on the certification motion.

The action was certified as a class action and the court directed A&P not to communicate with the franchisees during the opt-out period, other than in the ordinary course of business. The court acknowledged that the *Class Proceedings Act* did not prohibit communications with the putative class prior to certification nor did it require court approval for every communication. The court stated, however, that:

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[10] 2002 CarswellOnt 4272.

[11] The opt-out period is the period (often 60 days) after the common issues have been certified as appropriate to be dealt with in a class action. Class members must decide in that period whether to remain in the class and be bound by the outcome of the class action or to "opt-out", usually in order to pursue an individual claim.

> Where however a communication constitutes misinformation, a threat, intimidation, coercion or is made for some other improper purpose aimed at undermining the process, the court must intervene.[12]

The court also found that:

> The evidence shows that A&P has engaged in a course of conduct that is intimidating, threatening and coercive and in consideration of the information vacuum sufficiently misleading to vitiate any notion that the franchisees executing releases are doing so on an informed basis.[13]

In addition to the *Class Proceedings Act*, the court relied on the Act and the franchisor's duty of utmost good faith. The court found that the franchisor must act in good faith and in accordance with reasonable commercial standards when defending the class action.[14]

Justice Winkler concluded:

> Apart from any other considerations that may be brought to bear under the *CPA*, A&P had and has an obligation as a franchisor to ensure that its franchisees were properly informed in respect to the decisions they were being asked to make about this proceeding.[15]

Justice Winkler also stated:

> Certification motions are not decided by polls among the class. The battle cannot be taken to individual class members. Conduct aimed at pitting one member of the class against another cannot be condoned.[16]

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[12] *A&P*, *supra*, at para. 77, per Winkler, J.

[13] *A&P*, *supra*, at para. 80.

[14] *A&P*, *supra*, at paras. 86-87.

[15] *A&P*, *supra*, para. 90.

[16] *A&P*, *supra*, para. 93. The Divisional Court granted a limited right of appeal in respect of unrelated issues. that appeal was dismissed, Divisional Court decision March 8, 2004.

Pet Valu Case

The Court of Appeal recently revisited these issues in *1250264 Ontario Inc. v. Pet Valu Canada Inc.*[17] In that action the franchisees' primary claim was that the franchisor, Pet Valu, had breached the franchise agreement by failing to share the benefit of certain volume discounts and rebates with them.

The case was certified as a class action. The court, as usual, approved a plan for communicating the notice of certification and the opt-out details to the class. In the meantime, Pet Valu continued to communicate with its franchisees about their day-to-day commercial relationship. The certification notice was distributed to class members on July 15, 2011. The opt-out period was 60 days, expiring September 15, 2011.[18]

Certain class members, i.e., franchisees, however, opposed the class action and effectively supported the franchisor, Pet Valu. The dissident group (calling themselves the CPVF) started encouraging other Pet Valu franchisees to opt-out of the class action. The CPVF campaign appeared to significantly increase the number of opt-outs with the result that about 65% of current franchisees and 10% of former franchisees opted out.[19]

Two months after the end of the opt-out the plaintiff class served notice of a motion seeking to set aside all the opt-out notices.

The motions judge drew an inference that there had been intimidation and coercion by the franchisor even though it did not control CPVF. He also held the CPVF to a standard of objectivity, i.e., the dissidents had to disclose all aspects of the pros and cons of opting out, rather than just their position. The judge at first instance therefore granted an order invalidating any opt-out notices received after the date of initiation of CPVF opt-out campaign.

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[17] 2013 ONCA 279, 115 O.R. (3d) 653.

[18] *Pet Valu*, *supra*, at para. 16.

[19] *Pet Valu*, *supra*, at para. 23.

The Court of Appeal reversed this decision. The court distinguished between the dissident group, CPVF, and the franchisor, Pet Valu. The Court of Appeal put considerable emphasis on the fact that, although the parties had been aware of CPVF's opt-out campaign soon after it began (during the opt-out period), neither party had sought any order from the motions judge in that time frame. The court held that if CPVF's telephone campaign and website had been misleading or its tactics threatening or intimidating[20] an order might have been sought during the opt-out period. (This had been the pre-emptive approach of the moving party in A&P.[21])

Ultimately, the court concluded that because Pet Valu was not linked to any of the impugned conduct of CPVF it was inappropriate to invalidate the opt-out notices. The court noted that in this case, unlike A&P, the CEO of Pet Valu had, among other things, "consistently told franchisees that whatever their decision on the class action it would not effect their relationship with him or Pet Valu."[22]

The Court of Appeal also held that CPVF did not have to communicate on an objective basis.:

> These former class members had an unassailable right to speak out in opposition to the class proceeding in an attempt to convince other class members to opt-out, subject only to the overriding principles set out in *A&P*.[23]

Duty To Disclose Information

The scope of the duty to disclose arising from the duty of fair dealing was discussed in two recent class actions, albeit again only in the preliminary stages and not at trial on a full record. In *Trillium Motor World v. General Motors of Canada Limited*[24] General Motors of Canada Limited ("GMCL") reduced its dealer network in the immediate wake of the 2008 financial

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[20] This had been the pre-emptive approach of the moving party in *A&P*.[20]

[21] *Pet Valu*, *supra*, paras. 60-62.

[22] *Pet Valu*, *supra*, para. 68.

[23] *Pet Valu*, *supra*, para. 73.

[24] 2011 ONSC 1300, certification by Strathy J., March 1, 2011 (Trillium certification decision); leave to appeal granted in limited respects by the Divisional Court, June 22, 2011, 2011 ONSC 3939; aff'd by 2012 ONSC 463 and 2012 ONSC 1443 (Divisional Court).

crisis, advising 240 of approximately 700 dealers that their dealer agreements would not be renewed upon expiry. GMCL offered each of the 240 dealers a "wind-down agreement". The dealers were given six days in which to accept or reject the terms of the wind-down agreement, and were further advised by GMCL that the offer was conditional upon a 100% acceptance rate by the offerees.

The proposed class action dealt with various issues, including the extent to which the duty of fair dealing required GMCL to make full disclosure of its overall restructuring strategy at the time of its offering of the wind-down agreements and whether it acted improperly by requiring all dealers to accept the wind-down proposal within such a short time frame.

Although the court did not address the merits of the claim on certification, it accepted that there was a triable common issue in respect of whether GMCL owed a duty of fair dealing and whether it had breached its duty to its dealers by:

(a) delivering the wind-down agreements and requiring acceptance within six days;

(b) not disclosing to class members the identities of dealers offered a wind down agreement;

(c) advising the offerees that GMCL would not be renewing the dealer agreements when they expired;

(d) advising offerees that it continued to be GMCL's position that the *Arthur Wishart Act (Franchise Disclosure) 2000* was not applicable to the dealer agreement or relations between the parties; and

(e) advising the offerees that the offer was conditional upon all of the offerees accepting the offer within six days.[25]

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[25] *Trillium* certification decision, Strathy J., para. 110.

This certification decision also referred to section 11 of the *Arthur Wishart Act, 2000* which provides:

> Any purported waiver or release by a franchisee of a right given under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void.

The court therefore certified another common issue to answer whether the release and the wind down agreement offended this section. These common issues have not yet been tried.

The duty of fair dealing was addressed again in *Spina v. Shoppers Drug Mart Inc.*[26] Justice Perell certified franchisees' claims in respect of certain so-called professional allowances, although he rejected similar claims for rebates. Justice Perell summarized recent cases dealing with the duty of good faith and fair dealing as follows:

> [149] The duty of good faith and fair dealing has been considered in several cases involving claims by franchisees. These cases reveal that the duty of good faith and fair dealing requires a franchisor:
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> - To exercise its powers under the franchise agreement in good faith and with due regard to the interests of the franchisee: *Shelanu Inc. v. Print Three Franchising Corp., supra* at paras. 66 and 69.
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> - To observe standards of honesty, fairness and reasonableness and to give consideration to the interests of the franchisees: *Landsbridge Auto Corp. v. Midas Canada Inc.*, [2009] O.J. No. 1279 (S.C.J.) at para. 15*; Shelanu Inc. v. Print Three Franchising Corp.*, *supra* at paras. 5, 68-71.
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> - To ensure that the parties do not act in such a way that eviscerates or defeats the objectives of the agreement that they have entered into: *Transamerica Life Inc. v. ING Canada Inc*., *supra* at para. 53; *Landsbridge Auto Corp. v. Midas Canada Inc.*, *supra* at para. 17.
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> - To ensure that neither party substantially nullifies the bargained objective or benefit contracted for by the other, or causes significant harm to the other, contrary to the original purpose and expectation of the parties: *Katotikidis v. Mr. Submarine Ltd.*,[2002] O.J. No. 1959 at para. 72

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[26] 2012 ONSC 5563, released October 3, 2012, Perell J.

(S.C.J.); *TDL Group Ltd. v. Zabco Holdings Inc.*, [2008] M.J. No. 316 at para. 272 (Q.B.).

- Where the franchisor is given a discretion under the franchise agreement, the discretion must be exercised reasonably and with proper motive and not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties: *Landsbridge Auto Corp. v. Midas Canada Inc., supra* at para. 17; *CivicLife.com Inc. v. Canada (Attorney General)* [2006] O.J. No. 2474 (C.A.), at para. 50; *Shelanu Inc. v. Print Three Franchising Corp., supra* at para. 96.

[150] In *1117304 Ontario Inc. (c.o.b. Harvey's Restaurant) v. Cara Operations Ltd.*, [2008] O.J. No. 4370 (S.C.J.), Justice Kershman summarized the content of the duty of good faith in the franchise context as follows, at paras. 68-72:

- 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 (e.g. serious misrepresentations of material facts); and

- 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."[27]

While these general statements do not provide much "meat" to the duty to disclose "bone", Justice Perell did distinguish the *Shoppers Drug Mart* case from *Trillium Motor World*. Justice Perell acknowledged that *Trillium Motor World* held that the franchisor GMCL might have had an obligation to disclose all material facts known to it that might reasonably have affected its franchisees' decisions to accept the wind down agreement.[28]

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[27] *Spina*, *supra*, Perell J. at paras. 149 and 150.

[28] *Spina*, *supra*, Perell J. at para. 217.

Justice Perell found, however, that it was clear in *Shoppers Drug Mart* that the franchisees had no tenable claim for a breach of the duty of good faith and fair dealing (with respect to rebates) because the claim was based on the allegation that, during the currency of the franchise relationship, Shoppers was obliged to provide all information necessary for franchisees to verify that Shoppers Drug Mart had not breached the franchise or associates agreements. As Justice Perell stated:

> [219] Apart from the fact that complying with this pre-litigation-oriented duty of disclosure is likely impossible and a recipe for strife, it is not consistent with the relationship between franchisor and franchisee and rather turns over the design, supervision, and management of the franchise system to each franchisee, who gets to fish for grounds to sue the franchisor based on the franchisee's interpretation of the Associates Agreement.
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> [220] In my opinion, it is plain and obvious that neither at common law or under the *Arthur Wishart Act* are the Plaintiffs' Duty of Disclosure claims legally tenable. They should be struck from the Amended Statement of Claim.[29]

OTHER GUIDELINES FOR CONDUCT IN THE NEGOTIATION AND SETTLING OF A FRANCHISE DISPUTE

LSUC Rules of Professional Conduct

Apart from the statutory obligations on the parties to a franchise dispute, the lawyers of the franchise parties are also subject to the Law Society's Rules of Professional Conduct. Those which are most likely applicable are attached as schedule "A". While Ontario's common law adversarial system requires every lawyer to be a "fearless" advocate for their client, they are still officers of the court who must:

(a) encourage their client to compromise or settle a dispute whenever it is possible to do on a reasonable basis;[30]

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[29] *Spina*, *supra*, Perell J. at paras. 219 and 220.

[30] Rules of Professional Conduct, rule 2.02(2).

(b) be accurate, candid and comprehensive when dealing with an unrepresented opponent in a mediation;[31]

(c) not suppress what ought to be disclosed or knowingly assert as true a fact when its truth cannot be supported by the evidence.[32]

The relevant commentary does not assist in identifying "what ought to be disclosed."

Franchise Code of Ethics

It is also worth noting that parties to a franchise dispute may have committed to apply the Code of Ethics of the Canadian Franchise Association[33] or the Code of the International Franchise Association.[34] While these Codes are somewhat superficial and provide little practical guidance, the Canadian Code does emphasize that "fairness should characterize all dealings between a franchisor and franchisee."[35] The International Code goes somewhat further to set out the foundational principle of "trust and honesty" and to state that honesty embodies "openness, candor and truthfulness".[36]

Neither the Canadian nor the International Code discuss the extent to which parties in a franchise dispute must disclose to each other material information in their possession which is relevant to settlement discussions. The International Franchise Association does have an ombudsman who is:

> "an independent third-party who can assist franchisors and franchisees by facilitating dialogue to avoid disputes and to work together to resolve disputes."

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[31] *Ibid.* at rule 4.01(1) commentary.

[32] *Ibid.* at rule 4.01(2)€ and (g).

[33] See schedule "B".

[34] *Ibid.*.

[35] *Ibid.* at Code of the International Franchise Association, para. 6.

[36] *Ibid.* at Trust, Truth and Honesty.

The only somewhat relevant rule in the Canadian Code is:

> A franchisor should encourage open dialogue with franchisees through franchise advisory councils and other communication mechanisms. A franchisor should not prohibit a franchisee from forming, joining or participating in any franchisee association, or penalize a franchisee who does so.[37]

AN ANALYSIS OF THE ETHICAL LIMITS IN FRANCHISE DISPUTE NEGOTIATIONS

The established ethical codes add little to our understanding of the scope of duty of the fair dealing and the duty to act in good faith in accordance with reasonable commercial standards[38] over the course of a dispute. As we have seen above, the courts have suggested that franchise agreements, like insurance policies, require the "utmost good faith". The courts have stated that parties must disclose "material facts" in settlement negotiations. It is also reasonable to conclude from the class action cases that parties cannot use intimidation, threats or coercion to force a settlement on favourable terms. But what are "material facts"? Also, what about the various types of negotiating conduct that might arise:

(a) *Some party makes threats or acts coercively.* This is clearly unacceptable on any standard.

(b) *A party lies.* Again, this is clearly unacceptable and unethical.[39]

(c) *A party exaggerates: e.g. a car dealer/franchisor may exaggerate the prospects for success of a forthcoming product or the degree of interest of replacement franchisees at that particular location.* This is essentially a euphemism for lying, even though it may be based on a kernel of truth. "Likewise, exaggerations are

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[37] *Ibid.* at Code of Ethics of the Canadian Franchise Association, rule 10.

[38] s. 3(3) of the Act.

[39] It should be noted that lying can be highly effective and there are some apologists for such conduct up to a point. See the lengthy discussion in Gerald B. Wetlaufer, "The Ethics of Lying in Negotiations", [1990] 76 Iowa Law Review 1219.

intended to deceive and gain advantage at another's expense."[40] If the exaggeration is deceptive or misleading and not obvious puffery it should be prohibited.

(d) *A party chooses not to disclose material facts.* It is submitted that this is not permitted even in a settlement discussion in the context of litigation, although Justice Brown in the *Hyundai* case did not foreclose the possibility of limits on this obligation to disclose.[41]

If a party to a franchise agreement (requiring utmost good faith) chooses not to disclose material facts it can only be acceptable in very limited circumstances, such as where the non-disclosing party highlights the nature of the information it is withholding and the other side is properly represented.

(e) *A party makes careless misstatements of fact or law.* This may well be a breach of the duty of good faith dealings if the party knows that the other side will rely on the statement and fails to make proper investigation before making its statement. If, however, the statement was made innocently but carelessly and the representor has not claimed special knowledge on the point, then it may not be found to be a statement made in bad faith in breach of the ethical and legal duty in s. 3 of the Act.

(f) *A party makes excessive initial demands.* Some lawyers will make such demands in order later to more easily settle on terms which appear to be a dramatic concession but in fact represent what the party would initially have settled for. This approach smacks of bad faith and probably contravenes the Law Society rules, although it will be difficult to police.

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[40] H. Joseph Reitz, James A. Wall, Jr. & Mary Sue Love, "Ethics in Negotiation: Oil and Water or Good Lubrication?" *Business Horizons* (May-June 1998) 5 at 9.

[41] *Hyundai of Thornhill*, *supra*, at para. 86, where he left the limits to be determined at trial.

(g) *A party engages in distraction, e.g., by producing excessive documentation, evading questions or pretending certain issues are more important than they are.* Again this smacks of bad faith but some authors conclude that distraction is acceptable because:

> Burying issues that you see as important or surrounding critical questions with questions you consider trivial reflect your own judgments. They may not be correct; they do not limit the opponent's options; they provide an opponent with opportunities to learn from them; they certainly involve risk on your part.[42]

(h) *A party maintains an unreasonable position and engages in protracted litigation with little merit to take advantage of economic disparity between the parties.* Again this amounts to bad faith. If a franchise relationship is indeed based on trust and honesty and the parties are mutually interested in promoting the brand and system, it is difficult to see how such a relationship can be maintained if the party in the better financial position exploits that economic disparity to take advantage of the other.

(i) *A party expressly advises the other that it will not provide specific information and directs the other to obtain independent legal advice.* This situation may deal adequately with the tension noted by Justice Brown in the *Hyundai* case between the obligation to disclose material facts on the one hand and the need to protect strategic litigation advice on the other hand. It would appear to be reasonable and consistent with the foundations of franchising if a party with specific confidential, business information that it does not want to disclose, expressly advises the other party that the topic is within that domain, that they are not disclosing the information and that the other party should obtain independent legal advice. It may be, of course, that if the undisclosed fact is material and central to the franchise relationship that it may nonetheless need to be disclosed.

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[42] *Supra*, note 38 at 11.

(j) *A party knowingly fails to correct another party's mistaken assumption.* It will be unethical to fail to disclose the truth where this will harm one's opponent. As has been noted elsewhere:

> Hiding a product or service defect or flaw that would mislead the other about the value of the item being bargained for would be wrong.[43]

But you are not required to disclose personal information that would be harmful to your case. As the same authors have noted:

> You need not reveal that you are able and/or willing to pay far more for an item than the asking price. And you are not required to disclose your reservation price, although you are not permitted to lie about it.[44]

Certainly a franchisor cannot take advantage of someone such as an unrepresented franchisee who is incapable of properly evaluating the worth of a particular negotiating point or proposed settlement.

(k) *A party makes persuasive but accurate presentations to third parties or the media.* A party cannot use information obtained by illegal or unethical means if it participated in obtaining that information. However, if, for example, a media investigation has revealed that a franchisor or franchisee acted illegally or information which puts them in an embarrassing light, the other side is permitted to use the information to their advantage. The parties must be careful, however, not to commit defamation or to make threats amounting to extortion. Ethical negotiations are particularly important in franchise relationships which are based to a large extent on mutual trust and confidence.

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[43] *Supra*, note 38 at 10.

[44] *Supra*, note 38 at 10-11.

CONCLUSION

Unethical negotiations bear the likelihood of damaging future negotiations, damaging the relationship between the parties, damaging the reputation of the party who engages in them and causing lost opportunities because of the lack of trust they generate.

While the extent of a franchisor's duty of disclosure in the context of a settlement discussion is not yet settled, it can reasonably be concluded that a franchisor should disclose information which, on an objective standard, would be material to the a franchisee's decision to resolve an outstanding dispute, where such information is not otherwise readily available to the franchisee. It is not fair and reasonable for a franchisor to expect its franchisees to make a settlement and sign a release on the basis of limited and incomplete information, when the franchisor has material data or information readily at hand.

SCHEDULE "A"

Relevant extracts from the LSUC Rules of Professional Conduct:

1.02 "Conduct unbecoming a barrister" includes taking improper advantage of the youth, inexperience, lack of education, unsophistication, ill health or un-businesslike habits of another, or conduct which undermines the administration of justice.

"Professional misconduct" is conduct that tends to bring discredit upon the legal profession including conduct prejudicial to the administration of justice.

1.03(d) The rules are intended to express to the profession and to the public the high ethical ideals of the legal profession.

1.03(f) A lawyer should observe the rules in the spirit as well as in the letter.

2.01(1)(c) A competent lawyer should apply appropriate skills including alternative dispute resolution.

2.02(2) A lawyer shall advise and encourage the client to compromise or settle a dispute wherever it is possible to do so on a reasonable basis . . .

2.02(3) A lawyer shall consider the use of alternative dispute resolution for every dispute and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.

2.02(4) A lawyer shall not advise, threaten or bring a criminal or quasi criminal prosecution in order to secure a civil advantage for the client.

2.04(14) Where a lawyer is dealing on a client's behalf with an unrepresented person the lawyer shall (a) urge the unrepresented person to obtain independent legal representation; (b) take care to see that the unrepresented person is not proceeding under the impression that his/her interest will be protected by the lawyer; and (c) make clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client and accordingly his/her comments may be partisan.

4.01(1) A lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.

Commentary

The lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal [the definition of "tribunal" includes mediators and bodies that resolve

disputes, regardless of informality] with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing where justice can be done.

This rule . . . extends . . . to mediators and others who resolve disputes regardless of their function or the informality of their procedures.

In adversary proceedings the lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged . . . . to assist an adversary or advance matters derogatory to the client's case.

When opposing interests are not represented. . .. the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not mislead.

4.01(2) When acting as an advocate the lawyer shall not do anything (b) dishonest or dishonourable; (e) knowingly attempt to deceive a tribunal or influence the course of justice by misstating facts or law, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime or illegal conduct; (f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority; (g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal.

4.06(1) A lawyer shall encourage public respect for and try to improve the administration of justice.

6.01(1) A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession.

SCHEDULE "B"

Code of Ethics of the Canadian Franchise Association, revised March 19, 2007[45]:

Code of Ethics
Revised March 19, 2007

The Canadian Franchise Association (CFA) is dedicated to encouraging and promoting excellence in franchising in Canada. Each member of the Association, by becoming a member and upon renewing its membership from time to time, agrees to abide by this Code of Ethics and to further the Associations goals in encouraging and promoting excellence in franchising in Canada. Each member of the Association agrees to comply with the spirit of this Code of Ethics in its general course of conduct and in carrying out its general policies, standards, practices. The following are considered by the Association to be important elements of ethical franchising practices:

1. Franchise system and a franchise support services member should fully comply with Federal and Provincial laws, and with the policies of the Canadian Franchise Association.

2. A franchisor should provide prospective franchisees with full and accurate written disclosure of all material facts and information pertaining to the matters required to be disclosed in advance to prospective franchisees about the franchise system a reasonable time [at least fourteen (14) days] prior to the franchisee executing any binding agreement relating to the award of the franchise.

3. All matters material to the franchise relationship should be contained in one or more written agreements, which should clearly set forth the terms of the relationship and the respective rights and obligations of the parties.

4. A franchisor should select and accept only those franchisees who, upon reasonable investigation, appear to possess the basic skills, education, personal qualities and financial resources adequate to perform and fulfil the needs and requirements of the franchise. Franchise systems and franchise support services members of the Association should not discriminate based on race, colour, religion, national origin, disability, age, gender or any other factors prohibited by law.

5. A franchisor should provide reasonable guidance, training, support and supervision over the business activities of franchisees for the purposes of safeguarding the public interest and the ethical image of franchising, and of maintaining the integrity of the franchise system for the benefit of all parties having an interest in it.

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[45] http://www.cfa.ca/About_Us/Code_of_Ethics/

6. Fairness should characterize all dealings between a franchisor and its franchisees. Where reasonably appropriate under the circumstances, a franchisor should give notice to its franchisees of any contractual default and grant the franchisee reasonable opportunity to remedy the default.

7. A franchisor and its franchisees should make reasonable efforts to resolve complaints, grievances and disputes with each other through fair and reasonable direct communication, and where reasonably appropriate under the circumstances, mediation or other alternative dispute resolution mechanisms.

8. A franchisor and a franchise support services member should encourage prospective franchisees to seek legal, financial and business advice prior to signing the franchise agreement.

9. A franchisor should encourage prospective franchisees to contact existing franchisees to gain a better understanding of the requirements and benefits of the franchise.

10. A franchisor should encourage open dialogue with franchisees through franchise advisory councils and other communication mechanisms. A franchisor should not prohibit a franchisee from forming, joining or participating in any franchisee association, or penalize a franchisee who does so.

11. A franchise support services member in providing products or services to a franchisor or franchisee should encourage the franchises to comply with the spirit of this Code of Ethics. A franchise support services member should not offer or provide products or services if legislative or professional qualification is required to do so unless the franchise support services member has such qualification.

Code of the International Franchise Association[46]:

Our Mission Statement, Vision, and Code of Ethics

IFA's Mission Statement

The International Franchise Association protects, enhances, and promotes franchising.

IFA's Vision

IFA: The preeminent voice and acknowledged leader for franchising worldwide.

IFA'S CODE OF ETHICS

PREFACE:

The International Franchise Association Code of Ethics is intended to establish a framework for the implementation of best practices in the franchise relationships of IFA members. The Code represents the ideals to which all IFA members agree to subscribe in their franchise relationships. The Code is one component of the IFA's self-regulation program, which also includes the IFA Ombudsman and revisions to the IFA bylaws that will streamline the enforcement mechanism for the Code. The Code is not intended to anticipate the solution to every challenge that may arise in a franchise relationship, but rather to provide a set of core values that are the basis for the resolution of the challenges that may arise in franchise relationships. Also the Code is not intended to establish standards to be applied by third parties, such as the courts, but to create a framework under which IFA and its members will govern themselves. The IFA's members believe that adherence to the values expressed in the IFA Code will result in healthy, productive, and mutually beneficial franchise relationships. The Code, like franchising, is dynamic and may be revised to reflect the most current developments in structuring and maintaining franchise relationships.

TRUST, TRUTH, AND HONESTY:

Foundations of Franchising

Every franchise relationship is founded on the mutual commitment of both parties to fulfill their obligations under the franchise agreement. Each party will fulfill its obligations, will act consistently with the interests of the brand, and will not act so as to harm the brand and system. This willing interdependence between franchisors and franchisees, and the trust and honesty upon which it is founded, has made franchising a worldwide success as a strategy for business growth.

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[46] http://www.franchise.org/industrysecondary.aspx?id=3554

Honesty embodies openness, candor, and truthfulness. Franchisees and franchisors commit to sharing ideas and information and to facing challenges in clear and direct terms. IFA members will be sincere in word, act, and character—reputable and without deception.

The public image and reputation of the franchise system is one of its most valuable and enduring assets. A positive image and reputation will create value for franchisors and franchisees, attract investment in existing and new outlets from franchisees and from new franchise operators, help capture additional market share, and enhance consumer loyalty and satisfaction. This can only be achieved with trust, truth, and honesty between franchisors and franchisees.

MUTUAL RESPECT AND REWARD:

Winning together, as a team

The success of franchise systems depends upon both franchisors and franchisees attaining their goals. The IFA's members believe that franchisors cannot be successful unless their franchisees are also successful, and conversely, that franchisees will not succeed unless their franchisor is also successful. IFA members believe that a franchise system should be committed to help its franchisees succeed, and that such efforts are likely to create value for the system and attract new investment in the system.

IFA's members are committed to showing respect and consideration for each other and to those with whom they do business. Mutual respect includes recognizing and honoring extraordinary achievement and exemplary commitment to the system. IFA members believe that franchisors and franchisees share the responsibility for improving their franchise system in a manner that rewards both franchisors and franchisees.

OPEN AND FREQUENT COMMUNICATION:

Successful franchise systems thrive on it

IFA's members believe that franchising is a unique form of business relationship. Nowhere else in the world does there exist a business relationship that embodies such a significant degree of mutual interdependence. IFA members believe that to be successful, this unique relationship requires continual and effective communication between franchisees and franchisors.

IFA's members recognize that misunderstanding and loss of trust and consensus on the direction of a franchise system can develop when franchisors and franchisees fail to communicate effectively. Effective communication requires openness, candor, and trust and is an integral component of a successful franchise system. Effective communication is an essential predicate for consensus and collaboration, the resolution of differences, progress, and innovation.

To foster franchising as a unique and enormously successful relationship, IFA's members commit to establishing and maintaining programs that promote effective communication within franchise systems. These programs should be widely publicized within systems, available to all members of the franchise system, and should facilitate frequent dialogue within franchise systems. IFA members are encouraged to also utilize the IFA Ombudsman to assist in enhancing communication and collaboration about issues affecting the franchise system.

OBEY THE LAW:

A responsibility to preserve the promise of franchising

IFA's members enthusiastically support full compliance with, and vigorous enforcement of, all applicable federal and state franchise regulations. This commitment is fundamental to enhancing and safeguarding the business environment for franchising. IFA's members believe that the information provided during the presale disclosure process is the cornerstone of a positive business climate for franchising, and is the basis for successful and mutually beneficial franchise relationships.

CONFLICT RESOLUTION:

IFA's members are realistic about franchise relationships, and recognize that from time to time disputes will arise in those relationships. IFA's members are committed to the amicable and prompt resolution of these disputes. IFA members believe that franchise systems should establish a method for internal dispute resolution and should publicize and encourage use of such dispute resolution mechanisms. For these reasons, the IFA has created the IFA Ombudsman program, an independent third-party who can assist franchisors and franchisees by facilitating dialogue to avoid disputes and to work together to resolve disputes. The IFA also strongly recommends the use of the Franchise Mediation Program (FMP) when a more structured mediation service is needed to help resolve differences.

Support of IFA and the Member Code of Ethics

Franchisees and franchisors have a responsibility to voice their concerns and offer suggestions on how the Code and the International Franchise Association can best meet the needs of its members. Franchisors and franchisees commit to supporting and promoting the initiatives of the IFA and advocating adherence to the letter and spirit of the Member Code of Ethics. Members who feel that another member has violated the Code in their U.S. operations may file a formal written complaint with the President of the IFA.

For more information contact the IFA at (202) 628-8000.