LEGAL AND LEGISLATIVE DEVELOPMENTS IN 2015

Presented by Peter Dillon
Siskinds LLP

THE COMMONS INSTITUTE

PRACTITIONER SESSIONS ON FRANCHISE LAW

Toronto, ON (via webcast)
Monday, February 8, 2016

LEGAL AND LEGISLATIVE DEVELOPMENTS IN 2015

Index of Subject Headings

Appendices

LEGAL AND LEGISLATIVE DEVELOPMENTS IN 2015

Introduction

If franchise litigation were a wine, then 2015 would be a good year for franchisors.

The *Pet Valu* and *Pillar to Post* franchisee class actions were ended by the Court of Appeal. In *Caffé Demetri*, the Court of Appeal defined the term "material fact" narrowly, to the benefit of the franchisor. Other decisions of the Superior Court seem to be trending toward a more balanced application of franchise legislation in Ontario.

The Court of Appeal in Québec, on the other hand, delivered the rather stunning verdict in *Dunkin' Donuts* that will see the first franchise case since *Jirna v. Mr. Donuts* in 1971 make its way to the Supreme Court of Canada.

BC became Canada's six province to introduce franchise specific legislation. While both Acts are substantially similar, we will examine some of the important differences.

There was also a potpourri of other minor legislation introduced during the year that we will touch upon.

BC's New Act

BC's new *Franchises Act* SBC 2015, c 35 received Royal Assent on November 17, 2015. The BC Act has not yet been proclaimed, pending promulgation of companion regulations.

This will make BC the sixth Canadian province to introduce franchise specific legislation.

Notwithstanding that several other provinces have introduced franchise legislation since Ontario did so in 2000, and notwithstanding the model Uniform Franchises Act promulgated by the Uniform Law Conference of Canada in 2005, BC has chosen to model its Act closely on the Ontario Act.

The complete text of the BC Act is appended as Appendix B. A Table of Concordance comparing the Ontario and BC Acts on a section-by-section basis, is appended as Appendix C.

Similarities with Ontario

- the definitions in the BC Act are substantially similar
- the scope of application of the BC Act is substantially similar
- the exemptions from application are substantially similar
- the fair dealing and good faith obligation including a right of action, is substantially similar
- the right of Association, including a right of action, is substantially similar
- the disclosure obligations, including the disclosure of "all material facts" is substantially similar
- the disclosure exemptions are substantially similar
- the rescission provisions are substantially similar
- be damages for misrepresentation provisions are substantially similar
- BC, like Ontario, also includes:
    - joint and several liability
    - prohibition of any attempt to avoid jurisdictions of the BC courts
    - prohibition of any waiver of rights by a franchisee
    - establishment of the burden of proof

Differences From Ontario

There are some important differences between the BC Act and Ontario Acts. For the most part, these differences are improvements over the Ontario Act, in that they provide additional clarity. These differences include the following:

- **exclusion of distributorships**

The definition of "franchise" in the BC Act excludes payment or continuing payments that are made at reasonable wholesale prices for the purchase of reasonable amounts of goods or services. Because Ontario's Act does not include such an exemption, there is a continuing risk that common distributorships, which of course include payments to the manufacturer for goods or services, might be swept up into the definition of "franchise."

- **BC Binds the Crown**

The BC Act expressly binds the Crown, whereas Ontario exempts the Crown.

- **disclosure exemption for sales to officers and directors**

In BC, the disclosure exemption available for sales to officers or directors requires that the officer or director have held office in the six month period *immediately preceding* the grant. Ontario does not require that the six-month period immediately precede the grant.

- **clarification to the fractional franchise exemption**

The BC Act stipulates that only the first year of operations need be considered when calculating the percentage of sales anticipated by the parties that will be generated by the franchise business. Because Ontario does not contain this clarification, there remains uncertainty as to what period of operations is necessary for the parties to consider when determining the availability of the exemption.

- **no Small Investor Exemption in BC**

Ontario's Act excludes from the requirement to make disclosure franchises where the prospective franchisee will be required to make a total annual investment of less than $5000. BC does not have any minimum threshold for making disclosure.

- **exemption for confidentiality and site selection agreements**

Ontario requires that disclosure be made prior to the signing by the prospective franchisee of the franchise agreement, or *any other agreement relating to the franchise*. This means that franchisors involved in the sale and offering of franchises may provide tours, training, agreements, documents and materials to individuals who may then choose not to enter into a franchise agreement, but are not prohibited by contract from making use of any of the material or information that they have obtained. BC permits the execution of confidentiality agreements, or agreements designating a location, site or territory for the prospective franchise, without a requirement for disclosure.

- **methods of delivery of disclosure documents**

The BC Act expressly provides for delivery of a disclosure document by email. The Ontario Act does not, nor has the Minister responsible seen fit to promulgate a regulation specifically providing for such delivery. Whereas this has caused many a practitioner to suggests that electronic delivery should not be carried out in Ontario, I am firmly of the view that section 6 of the *Electronic Commerce Act, 2000*, SO 2000, c 17 clearly provides for electronic delivery of disclosure documents. That section reads in part as follows: "A legal requirement that a person provide information or a document in writing to another person is satisfied by the provision of the information or document in an electronic form…" Of course, the provisions of the Ontario Act requiring delivery of the disclosure document at one time and as a single document should be observed. That requirement can be met by delivering a pdf of the complete disclosure document including all exhibits, agreements and a signed certificate of disclosure.

- **methods of delivery of rescission notices**

BC limits methods of delivery of a notice of rescission to personal delivery, whereas Ontario includes delivery facsimile and registered mail. However, BC also provides for delivery by any other "prescribed method." One might anticipate that the BC regulation will expand the methods of delivery, but given that the methods of delivery of a disclosure document in the BC Act expressly include delivery by email, it remains to be seen how wide the scope of delivery for notices of rescission will be cast.

- **"substantial compliance"**

The BC Act provides that a statement of disclosure or statement of material change will comply with the disclosure requirements of section 5 of that Act "despite the presence of a defect in form, a technical irregularity or an error, if the defect in form, the technical irregularity or the error does not affect the substance of the disclosure document or the statement of material change, and the disclosure document or the statement of material change is substantially in compliance with this act." The Ontario Act does not contain a "substantial compliance" provision.

- **no election between rescission and damages**

The BC Act states that the franchisee is not required to elect between rescission under section 6, and his statutory rights of action for damages. This effectively codifies the common-law in Ontario, as established by the Court of Appeal in *1490664 Ontario Ltd. v. Dig this Garden Retailers Ltd.*, 2005 CanLII 25181

- **releases and waivers**

Like the Ontario Act, the BC Act prohibits any purported waiver or release by a franchisee of a right conferred by the Act, or of an obligation or requirement imposed on a franchisor or franchisor's associate under the Act.

BC's Act goes further and extends the prohibition against waivers and releases to include prospective franchisees. As can be seen from the discussion by the court in *Trillium Motor World Ltd. v General Motors of Canada Limited*, 2015 ONSC 3824 (discussed below), whether a person is a franchisee or a prospective franchisee can have a decisive impact on the scope of his protection under franchise legislation. The impact of extending this provision to prospective franchisees could be considerable.

The impact of the extension mentioned in the previous paragraph may be attenuated by the express provision in the BC Act – not found in the Ontario Act – that the prohibition against waivers and releases does not apply to a waiver or release by a franchisee, or by a prospective franchisee, made in accordance with a settlement of an action, claim or dispute. The decision in *518628 Ontario Inc. v. Tutor Time Learning Centre, LLC* 2006 CANLII 25276 effectively creates a similar provision in Ontario. Ontario also has the decision of the Court of Appeal in *405341 Ontario Limited v. Midas Canada Inc.* 2010 ONCA 478, which held that a release given as a condition to assignment or renewal of a franchise agreement is *prima facie* void pursuant to Section 11 and that a provision in a franchise agreement requiring such releases as conditions to the franchisor's consent to assignment or renewal is unenforceable.

- **venue for arbitration**

Like the Ontario Act, the BC Act prohibits any provision in a franchise agreement that purports to restrict the application of the law of British Columbia, or to restrict jurisdiction or venue to a form outside of BC.

The BC Act extends this provision to apply to arbitration provisions in franchise agreements. While on the surface this may seem like a reasonable provision, the fact is that there may be good reasons for arbitration to occur at another venue. For example, many arbitration agreements provide that the venue will be designated by the arbitrator. This may result in a place for the

arbitration midway between the franchisor and franchisee. There may also be instances where a franchisor agrees to arbitrate with a group of franchisees in different provinces. Would this provision prevents them from doing so? On its face, the answer is yes, although the courts in BC may take a similar approach to a provision like this as the Ontario courts have to releases—which the Ontario Act prohibits, but the courts have permitted in the context of negotiated settlements between the parties.

"Substantial Compliance"

As mentioned above, the BC Act provides that a statement of disclosure or statement of material change will comply with the disclosure requirements of section 5 of that Act "despite the presence of a defect in form, a technical irregularity or an error, if the defect in form, the technical irregularity or the error does not affect the substance of the disclosure document or the statement of material change, and the disclosure document or the statement of material change is substantially in compliance with this act."

The Ontario Act does not contain a "substantial compliance" provision. It should.

However, it is worth noting that Alberta's Act contains, in Regulation section 2(4), a provision that "a disclosure document is properly given for the purposes of section 13 of the Act if the document is substantially complete." This provision was not sufficient to prevent the Alberta Court of Appeal, in *Hi Hotel Limited Partnership v. Holiday Hospitality Franchising Inc.*, 2008 ABCA 276 from holding that the failure on the franchisor's part to include two signatures and to insert a month and day on the franchisor's certificate of disclosure was not substantial compliance with the Alberta Act, and the otherwise compliant disclosure document was held to be no disclosure at all, permitting the franchisee to rescind within two years from the date of signing the franchise agreement.

The decision of the Court of Appeal in *6792341 Canada Inc. v. Dollar It Limited*, 2009 ONCA 385 provides a good example of the difficult time courts may have applying a substantial compliance clause. In *Dollar It*, the trial judge found that "considered as a whole" the disclosure provided complied with the requirements of section 5 of the Ontario Act and that, even if that were not the case, the the want of compliance did not void the document *ab initio*. The trial judge stated that to the extent that there was defective disclosure, the franchisee had a right to pursue damages flowing from that incompleteness or any misrepresentations in the document.

Mme. Justice MacFarland did not think that went far enough. She stated that "the entire purpose of the Act… Is to protect franchisees." Failure to sign the certificate of disclosure is a fatal error and renders a document – otherwise complete and compliant – noncompliant and void. MacFarland J. cited as authority for her decision her earlier decision in *Dig this Garden* [*supra*].

2240802 Ontario Inc. v. Springdale Pizza Depot Ltd., 2015 ONCA 236 is another case where unsigned certificates of disclosure were considered fatal to the franchisor's disclosure document. The Court of Appeal upheld the motion judge's finding that the certificate of disclosure provided by the franchisor was deficient, in that it contained only one signature of an officer or director, whereas the Regulation required two signatures. The franchisor tendered evidence that a second certificate signed by another officer had been provided on the same day. The Court of Appeal rejected this as a violation of the requirement that the certificate must be a solitary document, not two.

It seems to me that the Court of Appeal is hanging its hat on technicalities. There are many instances of where the courts remind us that the purpose of the Act is to protect franchisees. There are also many examples of cases where the technical requirements for disclosure are cited, and any noncompliance found fatal.

But if, in fact, the franchisee receives all required disclosure, is the purposes of the Act and its spirit not satisfied? Whatever happened to the doctrine of "no harm no foul?" Isn't that true even if disclosure is provided in two separate documents? In fact, all Canadian franchise legislation provides for disclosure at different times and in separate documents and it is a common practice for franchisors to supplement disclosure by way of a statement of material change. Why then does there need to be such slavish adherence to the technical requirement that the disclosure document be bound together and delivered as one document?

There is a good precedent for this line of thinking. In *Emerald Developments Ltd. v.. 768158 Alberta Ltd.* 2001 ABQB 143 , a disclosure document was provided, but prior to signing the final form of franchise agreement, the franchisor company was restructured and the eventual franchise agreement was signed with a new franchisor corporation. The franchisee attempted to rescind. In denying the franchisee the remedy of rescission under the Alberta Act, the court stated that the purpose of providing franchise presale disclosure had been met, and that the approach of the court should be substantive, not technical. The court should not disregard the circumstances of the parties' negotiations and should be responsive to the needs of the business environment in which the parties operate. Who could argue with that logic?

In the Courts

A headnote of the leading franchise decisions from 2015 is included as Appendix A.

Other Sundry Legislation

- **Ontario's *Police Record Checks Reform Act, 2015* S.O. 2015 C. 30 ("PRCR")**

As of the date of this paper, the PRCR has received Royal Assent, but has not yet been proclaimed, pending promulgation of a regulation.

Franchisors and employers will frequently conduct police record checks of franchise applicants and prospective employees. The process has apparently been somewhat haphazard. With the advent of privacy legislation, there is greater pressure on the government to the standardize procedures and devote more attention to the type of information that should be released in various circumstances.

For example, the release of non-conviction information (i.e. charges laid but no conviction entered) may not be released unless several other vigorous criteria are satisfied. Similarly, any conviction for which a pardon has been granted may no longer be disclosed unless disclosure is authorized under the *Criminal Records Act* (Canada).

That said, not much has changed with the advent of the PRCR: a franchisor/employer can still ask for and require a prospective franchisee or employee to provide a Criminal Record Check.

The form (to be provided under the regulation) will require the prospective franchisee or employee to provide his or her consent to the record check (this was already the case). Now,

however, the prospect will receive a copy of the report prior to it being released to the franchisor or employer. The prospect must then provide his or her must additional consent to the report being sent to the franchisor/employer.

Disclosure of police records under the PRCR has been divided into three levels: criminal record check; criminal record check and judicial matters check; and vulnerable sector check. The type of information that may be released in respect of each of the three types of police record checks is best summarized in tabular form as follows:

Item	Column 1 Type of Information	Column 2 Criminal record check	Column 3 Criminal record and judicial matters check	Column 4 Vulnerable sector check
1.	Every criminal offence of which the individual has been convicted for which a pardon has not been issued or granted.	Disclose. However, do not disclose summary convictions if the request is made more than five years after the date of the summary conviction.	Disclose. However, do not disclose summary convictions if the request is made more than five years after the date of the summary conviction.	Disclose. However, do not disclose summary convictions if the request is made more than five years after the date of the summary conviction.
2.	Every finding of guilt under the Youth Criminal Justice Act (Canada) in respect of the individual during the applicable period of access under that Act.	Disclose.	Disclose.	Disclose.
3.	Every criminal offence of which the individual has been found guilty and received an absolute discharge.	Do not disclose.	Disclose. However, do not disclose if the request is made more than one year after the date of the absolute discharge.	Disclose. However, do not disclose if the request is made more than one year after the date of the absolute discharge.
4.	Every criminal offence of which the individual has been found guilty and received a conditional discharge on conditions set out in a probation order.	Do not disclose.	Disclose. However, do not disclose if the request is made more than three years after the date of the conditional discharge.	Disclose. However, do not disclose if the request is made more than three years after the date of the conditional discharge.
5.	Every criminal offence for which there is an outstanding charge or warrant to arrest in respect of the individual.	Do not disclose.	Disclose.	Disclose.
6.	Every court order made against the individual.	Do not disclose.	Disclose. However, do not disclose court orders made under the *Mental Health Act* or under Part XX.1 of the *Criminal Code* (Canada). Do not disclose court orders made in relation to a charge that has been withdrawn. Do not disclose restraining orders made against the individual under the Family Law Act, the Children's Law Reform Act or the *Child and Family Services Act*.	Disclose. However, do not disclose court orders made under the *Mental Health Act* or under Part XX.1 of the *Criminal Code* (Canada). Do not disclose court orders made in relation to a charge that has been withdrawn. Do not disclose restraining orders made against the individual under the Family Law Act, the Children's Law Reform Act or the *Child and Family Services Act*.

7.	Every criminal offence with which the individual has been charged that resulted in a finding of not criminally responsible on account of mental disorder.	Do not disclose.	Do not disclose.	Disclose. However, do not disclose if the request is made more than five years after the date of the finding or if the individual received an absolute discharge.
8.	Any conviction for which a pardon has been granted.	Do not disclose unless disclosure is authorized under the *Criminal Records Act* (Canada).	Do not disclose unless disclosure is authorized under the *Criminal Records Act* (Canada).	Do not disclose unless disclosure is authorized under the *Criminal Records Act* (Canada).
9.	Any non-conviction information authorized for exceptional disclosure in accordance with section 10.	Do not disclose.	Do not disclose.	Disclose. Set out the information in the prescribed form (if applicable).

- **Alberta's *Guarantees and Acknowledgment Act*, RSA 2000, c. G – 11**

Alberta has always had this little bear trap lying in wait for the unfamiliar. Essentially, the *Guarantees Acknowledgment Act* ("GAA") required that any personal guarantee must be notarized. Presumably the intent is a noble one – that the guarantor have explained to him or her the consequences of entering into such a covenant. Many a benefactor of a personal guarantor has been denied the benefit of the guarantee by reason of having failed to obtain the certificate required under the GAA.

Recent amendments mean that the certificate required under the GAA must now be provided by a member of the Law Society of Alberta (who has not been suspended and who is not merely an honorary member). For acknowledgement certificates obtained outside of Alberta, a lawyer who is entitled to practice in that jurisdiction may also provide the certificate.

For those of you with a GAA certificate appended to your form of personal guarantee, please note that the form of the certificate has been updated and you should accordingly update your own precedents.

- **Ontario's *Healthy Menu Choices Act* 2015, SO 2015, c 7, Sch 1**

The *Making Healthier Choices Act, 2015* ("MHCA") received Royal assent on May 28, 2015. Note that the act comes into force on Jan. 1, 2017.

The *Healthy Menu Choices Act* is a schedule to the MHCA. It requires that "owners and operators" of "regulated food service premises" display the number of calories of every "standard food item" that is sold or offered for sale on the premises. A "standard food item" is defined as a food or drink item sold or offered for sale in servings that are standardized for portion and content.

Labelling is also required if a combination of standard food items is sold or offered for sale as a combo meal, and with respect to each variety, flavour and size of standard food items sold or offered.

A “regulated food-service premise” is defined as a food-service premise that is part of a “chain of food service premises.” A “chain of food service premises,” in turn, means 20 or more food service premises in Ontario that operate under the same or substantially the same name, regardless of ownership, and that offer the same or substantially the same standard food items.

The specific application of the act to franchisors is awkwardly worded. Subsection 1(2) of the act states: “a person who owns or operates a regulated food-service premise means a person who has responsibility for and control over the activities carried on at a regulated food service premise, and may include a franchisor, licensor ... manager ...” [emphasis added].

Is it open for a franchisor to rebut the presumption that the franchisor owns or operates the premises in question? As we all know, it is the essence of a franchise system that the franchisor in fact does not own or operate individual locations — that is the purview of the franchisee. However, the safe bet is that the franchise or license agreement in question provides sufficient control to satisfy this definition, and that all franchisors and licensors should consider themselves bound by the act.

It is also noteworthy that the act imposes personal liability on directors and officers of corporations that own or operate regulated food-service premises. Fines can amount to $1,000 for every day or part day during which the offence under the act occurred or continued. Fines applicable to corporate owners and operators amount to $5,000 for every day or part day on which the offence occurs or continues and, in the case of a second or subsequent offence, the fine is increased to $10,000 per day.

Product labelling legislation has, of course, been around for several years with respect to pre-packaged foods sold in Canada. These items are regulated under the federal Food And Drug Regulations. However, the federal regulation exempts most foods sold in restaurants and food-service establishments, as well as foods ordered for take-out and delivery.

It’s unfortunate that the act exempts independent and smaller chains from compliance. Obviously, customers of those locations would benefit equally from access to the same kind of nutritional information. The rationale for the exemption, as explained in the debates surrounding the act, centre on the cost of obtaining nutritional analysis — a service that will no doubt become something of a cottage industry.

Not surprisingly, the Ontario legislation followed an initiative of the U.S. Food and Drug Administration, which introduced a similar federal nutritional disclosure law in the United States in 2010 (which came into force in 2014). British Columbia also introduced its Informed Dining Program in 2011, which creates a voluntary program for the disclosure of nutritional information.

Given the lemming-like behaviour of provincial governments on matters related to franchising, one wonders how long it will take before similar labelling requirements become law in other Canadian provinces, or whether the federal Parliament will see fit to make this a law of national application? Time will tell.

- **Bill C-49 The *Price Transparency Act (Canada)***

One piece of legislation that died in 2015 with the defeat of the Harper Conservatives was the *Price Transparency Act* ("PTA").

The PTA was intended to implement the federal government's promise to "end geographic price discrimination against Canadians," or more specifically, a higher price being charged in Canada than that charged for a similar product in the United States. The PTA would have given the Competition Bureau expansive tools to investigate companies that charge different prices in Canada and the United States.

- ***Canada's Anti-Spam Legislation* S.C. 2010, c. 23 ("CASL")**

On January 15, 2015, new rules about installing computer programs came into force. It is now illegal to install programs, such as malware, on someone's computer without consent.

If your client's business installs software or computer programs on other people's computer systems, the client must now comply with new requirements. The guidelines found at http://crtc.gc.ca/eng/internet/install.htm provide an overview of these requirements, which stem from section 8 of CASL, as well as practical examples.

CASL prohibits the installation of a computer program (software) to another person's computing device (e.g., laptop, smartphone, desktop, gaming console or other connected device) in the course of commercial activity without the express consent of the device owner or an authorized user (e.g., other family member or employee).

For example, under CASL, it is prohibited for a website to automatically install software on a visitor's computer without getting consent, or for software to be updated without first obtaining consent.

Usually, CASL requires the client to obtain consent from the owner or another authorized user of the computer or device prior to the installation of a computer program. However, in some circumstances, the client is considered to already have consent without having to request it. Depending on what your client's program does, the client may need to meet additional requirements. These circumstances and requirements are explained in the guidelines.

CASL does not apply to programs or apps owners or authorized users download themselves to install on their own computer or device, or updates they install for those programs.

Conclusion

Canada still remains one of the most difficult jurisdictions in the world in which to franchise. Personal liability of signatories to disclosure documents remains; open-ended disclosure of material facts remains; and an overly technical application of disclosure requirements in favour of franchisees subsists. Nonetheless, 2015 saw steady movement toward a more balanced approach that will benefit franchisors, franchisees, and all of us who benefit from the distribution of goods and services through franchised systems.

APPENDIX A –SUMMARY OF 2015 CASELAW

INDEX OF CASES

A. Good Faith and Fair Dealing

Caffé Demetre Franchising Corp. v. 2249027 Ontario Inc., 2015 ONCA 258

In the case of *Caffé Demetre Franchising Corp. v. 2249027 Ontario Inc.* 2015 ONC 258, Mme. Justice Epstein established some very helpful parameters for the interpretation of the definition of "material fact" under the Act, the test for the determination of issues by way of summary judgment, and also reinforced the distinction between disclosure for content deficiencies in the disclosure document that would permit rescission within 60 days of following receipt of a disclosure document, and the level of deficiency in a disclosure document that would amount, effectively, to no disclosure, permitting a franchisee to rescind within two years following receipt of a disclosure document.

In May 2011, the franchisee acquired a Caffé Demetre franchise on Dufferin Street in Toronto. In July of that year they executed a franchise agreement. On the same day as the franchise agreement was signed, the franchisor commenced an action against a former Caffé Demetre franchisee who was operating a competing business called Spin Dessert, some 7.5 km away from the franchisee's location.

In 2012, the franchisor introduced a new upscale menu, that required the franchisee to perform upgrades estimated at $50,000. The franchisee did not perform any of the required work. Later that same year, the franchisor discovered underreporting of sales by the franchisee and commenced a series of default proceedings. The franchisee did not respond to any of the franchisor's inquiries for information regarding the alleged underreporting.

In July 2013, the franchisee served a notice of rescission of the franchise agreement, changed the locks on their location, rebranded their operation, and continued under a different trade name, in competition with the franchisor. The franchisor commenced proceedings claiming termination of the franchise agreement and damages.

In their Statement of Defence, the franchisee claimed that the franchise agreement was validly terminated in reliance upon subsection 6(2) of the Act, on the basis of that the franchisor was obliged to disclose but did not disclose: 1. that the franchisor was involved in the Spin Dessert litigation; 2. that the franchisor was contemplating implementing a policy prohibiting franchisees from taking a share of their employees tips; 3. that the franchisor was contemplating altering the ice cream policy to make franchisee owner principles directly responsible for the production of ice cream; and 4. that the Dufferin Street location would require $50,000 in renovations. The franchisor brought a motion for summary judgment seeking a declaration that the franchisee was not entitled to rescission.

The motions judge applied the test from *Hryniak v. Mauldin* 2014 SCC 7, and held that he had the evidence required to fairly and justly adjudicate on the rescission issue in a timely, affordable and proportionate manner. The Court of Appeal agreed. Because the facts were essentially undisputed, there was no risk of inconsistent findings if the matter issue were to proceed to trial. Finally, the Court of Appeal endorsed the trial judge's finding that if the rescission claim were dismissed, the landscape for resolution would be fundamentally altered and the prospects for avoiding a lengthy trial would be greatly enhanced.

The motions motions judge summarily dismissed the three of the four bases for rescission, and the Court of Appeal upheld these findings. With respect to the tip out policy, he found that the issue arose 14 months after the disclosure document was discovered, was at least in part in response to proposed legislation that would also prohibit employers from taking a share of employee tips, and found that as a practical matter, the change in policy had had no impact on the franchisee's profitability, since the franchisee had refused to abide by the policy.

With respect to the ice cream manufacturing policy, the facts revealed that the policy arose some 20 months following the delivery of the disclosure document and, once again, the franchisee had suffered no financial loss as a result of the policy, since he had refused to implement it. Accordingly, it did not amount to a disclosure deficiency.

With respect to the remodeling renovations, the policy was not announced until some 14 months after the delivery of the disclosure document. The franchisee had not undertaken any of the required repairs and therefore had not incurred any cost. Interestingly, the motions judge also reasoned that because the franchise agreement obliged the franchisee to conduct such repairs, that such a contingent liability would have been factored into the original purchase price of the franchise.

The really interesting part of the decision focused on the nondisclosure of the Spin Dessert litigation. Both the motions judge and the Court of Appeal agreed that the test for rescission under section subsection 6(2) of the Act for failure to provide a disclosure document must be distinguished from the test under subsection 6(1) of the Act for rescissions where the contents of the disclosure document did not meet the requirements of the Act. The motions judge and the Court of Appeal cited *6792341 v. Dollar It Ltd.* 2009 ONCA 385 for the proposition that "stark and material deficiencies" in a disclosure document are required for a court to find that the disclosure document amounts—effectively—to no disclosure, permitting a rescission under subsection 6(2) for a period of 2 years following signature of the franchise agreement.

However, the motions judge was of the view that the Spin Dessert litigation constituted a material fact and ought to have been disclosed. Notwithstanding this fact, he was of the view that such nondisclosure was a "content deficiency" that would give rise to rescission rights under section 6(1) if identified within 60 days of signing the franchise agreement, but was not a "stark and material deficiency" such as to permit rescission under section 6(2) of the Act within two years of signing the franchise agreement.

On this point, the Court of Appeal disagreed. The Court commenced its analysis by stating that there was no specific provision of the Act or Regulation requiring disclosure of franchisor-initiated litigation. As such, disclosure would only be required if the litigation fell within the definition of a "material fact" in the sense of being "information about the business, operations, or control of the franchisor or franchisor's associates, or about the franchise system, that would reasonably be expected to have a significant effect on the value or price of the franchise to be granted or the decision to acquire the franchise," as contemplated by subsection 1(1) of the Act.

The Court continued its analysis by stating that, although there was no specific requirement to disclose franchisor-initiated litigation, subsection 2(5) of the Regulation *did* identify specific categories of litigation that must be disclosed; namely, litigation against the franchisor or those associated with the franchisor based on claims of unfair or deceptive business practices, or violating a law that regulates franchises or businesses. In the Court's view, the type of litigation required to be disclosed pursuant to subsection 2(5) "does inform the fact-specific analysis of whether the litigation in issues material."

The Court reviewed the motion judge's consideration of *2240802 Ontario Inc. v. Springdale Pizza* 2013 ONSC 7288, where the motions judge stated "I accept that if a franchisor is involved in ongoing litigation, this should be disclosed to prospective franchisees." The Court then reviewed the motion judge's summary of the instant facts when he stated that "the Spin Desserts lawsuit was a protective measure taken by the franchisor, at the request of and for the benefit of the franchisees. It did not constitute a potential liability that might attach to the franchise system as a whole. Given the distance between the competing outlet and the subject premises, there is no basis for inferring that it could have had any and economic impact on the [franchisee's] operation, nor is there any evidence that it did so."

The Court stated that the decision of the Superior Court in *Springdale Pizza does not* stand for the proposition identified by the motions judge; i.e. that *any* litigation involving a franchisor amounts to material fact – no matter what the nature and circumstances of the litigation. Rather, the Court stated that "ongoing or prospective litigation involving the franchisor is not, by definition, a material fact… If the litigation in issue does not fall within [subsection 2(5) of the

Regulation] then whether it is a material fact, as contemplated by the Act, will be a question of fact determined on a case-by-case basis." The court went on to state that given the protective nature of the litigation, the fact that it did not constitute a potential liability that might attach to the franchise system, and would not financially impact the Dufferin Street location of the franchisee, that the lawsuit did not constitute a material fact and hence its disclosure was not required. Moreover, stated the Court, the failure to discuss to mention the Spin Dessert litigation did not effectively deprive the franchisee of the opportunity to make a properly informed decision to invest in the Caffé Dimitre franchise system.

The high-handed and callous behavior of the franchisee in this case surely contributed to a dispassionate Court being able to analyze the legal issues without the hindrance of the usual judicial inclination to "help the little guy." Such bad conduct by the franchisee also no doubt motivated the Court to decide the issue by way of summary judgment. In any event, the case provides considerable assistance to those who must weigh, on an item-by-item basis, whether a particular fact rises to the level of materiality. Although considerable danger still exists for franchisors and their counsel who omit to disclose facts, the implication of the *Caffé Demetre* decision is that helpful or positive facts will not be considered material, and therefore their omission will not be grounds for rescission. The result is a fairer and more level playing field, and that's good for everyone involved in franchising.

***Bhasin v. Hrynew,* [2014] 3 SCR 495, 2014 SCC 71**

The parties were competitors of one another within a common licensed system. The defendant licensee wanted to capture the plaintiff's lucrative niche market and had previously approached him to propose a merger of their businesses. The defendant licensee also actively urged the defendant licensor to force a merger. The licensor elevated the defendant licensee to a position where he would have a certain amount of authority over the plaintiff, including access to his financial records. The licensor repeatedly misled the plaintiff with respect to decisions and plans it had made, and with respect to the defendant licensee's access to the plaintiffs financial records. The trial judge found the licensor in breach of the implied term of good faith, and found that the defendant licensee had intentionally induced a breach of contract. It held both the defendant licensee and licensor liable for civil conspiracy. The Court of Appeal allowed the appeal and dismissed the plaintiffs lawsuit. The Supreme Court held that that Canadian common law in relation to good faith performance of contracts is unsettled and unclear. The court determined that to settle the law this area, the first step was to acknowledge good faith in contractual performance to be "a general organizing principle." The second step was to recognize a common law duty to act honestly and reasonably and not capriciously or arbitrarily in the performance of a party's contractual obligations. In carrying out his or her performance of the contract, a contracting party "should have appropriate regard to the legitimate contractual interests of the contracting partner." "Appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship. It requires that a party not seek to undermine those interests in bad faith. It does not amount to a fiduciary duty, which is a much higher obligation. Good faith does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first. The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. Good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

***Trillium Motor World Ltd. v General Motors of Canada Limited*, 2015 ONSC 3824**

This class-action was commenced by a group of former GM dealers following the abrupt termination of their franchise agreements by GM at the nadir of the global financial crisis in 2008/2009.

The first issue of interest, and a matter of considerable practical importance to practitioners, was the extension of the provisions of the *Arthur Wishart Act* to dealers operating in other provinces, including PEI and Alberta, in spite of the express provision of s. 2(1) of the Ontario Act, which states that the Act applies to franchise agreements entered into by franchisees operating partly or wholly in Ontario. Notwithstanding this provision, the court found that where the parties have stated an intention within the agreement that Ontario law should apply, the court will give effect to that provision. The court further justified this decision on the basis that doing so was consistent with the remedial nature of the Alberta and Prince Edward Island franchise legislation, and facilitated the conduct of a national class-action. Conversely, the court rejected GM's argument that the provisions of the Alberta and PEI Acts that restricted the application of the law to the laws of those provinces respectively, and prohibited a choice of jurisdiction outside of the province did not, for the reasons given, oust the application of the Ontario Act.

Importantly, the court rejected the dealer's argument that GM had breached its statutory duty of fair dealing. The dealers argued that the six-day period given to them to consider the wind down agreements was insufficient. The court held that, given the dire economic circumstances in which GM found itself, the actions taken by GM were reasonable and therefore not in breach of GM's duty of fair dealing.

The dealers also alleged that GM had breached its disclosure obligations under the Ontario Act, by failing to provide a disclosure document along with the wind down agreement. The court rejected any obligation on the part of GM to provide such disclosure, on the basis that the dealers were not "prospective franchisees" to whom the disclosure obligation was owed. The court also held that the wind down agreement was not "a franchise agreement or any other agreement relating to the franchise" for purposes of the section 5 of the Ontario Act. The court interpreted this phrase restrictively to mean an agreement having the effect of changing the signatory's legal status from "prospective franchisee" to "franchisee." The wind down agreement in question had the opposite effect.

Interestingly, the court was also called to consider a duty of disclosure in connection with the fair dealing provisions of section 3 of the Ontario Act. In the dire and swiftly developing circumstances of this case, the court found that the rather limited amount of information disseminated by GM to the dealers was neither dishonest, nor intended to maintain secrecy with respect to their plans. The court found as a fact that the plans had not crystallized to the point where meaningful disclosure could be made, and furthermore that information concerning GM's intention to wind a number of dealers down had been communicated to the dealers association and to a steering committee of the dealers, but not to the dealers individually. The potential requirement that compliance with the fair dealing obligation may require ongoing disclosure by a franchisor to its franchisee's is a development worth watching, and may be given legs in combination with the Court of Appeal decision in *Pet Valu* [see below].

at trial, the 21 a number of Québec-based Dunkin' Donuts franchisees received a damages award exceeding $16 million as damages for lost profits for the repeated and continuous failure of the franchisor to fulfill its obligation to protect and enhance the Dunkin' Donuts brand in response to competition in Québec are from the Tim Horton's brand. The franchise is also succeeded in their claim that the franchisor failed to enforce brand standards and tolerated underperforming franchisees who cause damage to the brand.

On appeal, Dunkin' Donuts argued that the trial division decision was: ""unprecedented in the annals of franchise law, not only in Quebec and Canada but also in the United States" and that the court mistakenly imposed on it "a new unintended obligation to protect and enhance the brand, outperform the competition and maintain indefinitely market share".

The Court of Appeal upheld the trial decision, but produced the damages slightly to around $10 million. The court found that the duty of good faith had been well-established in the province by the *Provigo* decision [*Provigo Distribution inc. v. Supermarché A.R.G. inc.*, 1997 CanLII 10209 (QC CA), [1998] R.J.Q. 47 (C.A.).].

The Court of Appeal endorsed the trial judges finding that the franchisor had breached a number of "explicit obligations as well as obligations that may be inferred from their nature." [Para 31] The court stated: "Applying the law to the facts, the judge decided that the most important explicit obligation agreed to by the Franchisor was its promise "to protect and enhance both its reputation and the 'demand for the products of the Dunkin' Donuts System'; in sum, the brand" (para. [54]). In his view, the Franchisor had done neither. He ascribed "a host of other explicit and implicit failings" to the Franchisor during the period from 1995 to 2005: failure to consult, support and assist the Franchisees; absence of a corporate store to train new staff and test new products; inordinately high turnover of its executives; too few consultants for the network of franchisees; failure to remove underperforming franchisees from the network; and the implementation and subsequent withdrawal of frozen products, "to name but a few – all chronicled in considerable detail at pages 278 to 341 inclusive of Plaintiffs' "'Plan d'argumentation'" (para. [55]). He concluded that these faults had "for the most part been substantiated convincingly from the evidence adduced by the Franchisees and from the acknowledgments and admissions flowing from several of Defendant's witnesses and exhibits" (para. [56])." [para 32]

In the ordinary course, I would say that a decision of a Québec court is of minimal precedential value, given its typical reliance on provisions of the Civil Code. In this case however, the decision is based on a plain interpretation of the contractual provisions, and legal concepts well known in the common law, such as good faith and principles such as the "business judgment rule." The Court of Appeal dismissed the franchisor's reliance on the business judgment rule stating that: "The Franchisor proposes to apply the business judgment rule without regard to its proper meaning in order to avoid ordinary liability for breach of contract to the Franchisees as independent businesses under the franchise agreements. The parameters of the business judgment rule, described notably by the Supreme Court in *Peoples' Department Store (Trustee of) v. Wise*,[2004 SCC 68 (CanLII), [2004] 3 S.C.R. 461, especially paras. 64 to 66] are both well known and limited in scope in matters of civil liability. The rule is usually applied in matters relating principally to the personal responsibility of directors and officers to shareholders and not as a means of exculpating a corporate contracting party from liability for fault under a contract

with third parties. As legal scholars have explained, the rule is designed to allow for directors to take appropriate risks without undue fear of personal liability, but not as a shield against civil liability of their corporations." [para 101]

The decision is under appeal to the Supreme Court of Canada and its outcome will be keenly anticipated as perhaps the only franchise decision of the Supreme Court since *Jirna v. Mr. Donut* [*Jirna Ltd. v. Mr. Donut of Canada Ltd.* (1973) 40 D.L.R. (3d) 303].

***1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2016 ONCA 24**

The Franchisor is a well known wholesaler and retailer of pet food, supplies, and related services. It has almost 300 franchised stores in Canada and almost 300 corporate stores in Canada and the United States. The plaintiff is a former franchisee. He sold his franchise at a considerable profit.

The plaintiff commenced an action against Pet Valu alleging, among other things, that Pet Valu had not shared volume rebates it received from suppliers with franchisees. The action was certified as a class action on June 29, 2011. The class consists of about 150 former Pet Valu franchisees. In reasons released January 14, 2011, the certification judge concluded that the only claim advanced by the plaintiff that was appropriate for certification was its claim in relation to the volume rebates: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287, at para. 4.

The certification judge identified the common issues arising out of the plaintiff's volume rebates claim and invited the parties to reach appropriate language to express those issues.

The motion judge released reasons on October 31, 2014, dismissing common issues 1 through 5: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2014 ONSC 6056 (CanLII) (the "October Reasons"). Common issue 1 asked whether Pet Valu had breached its contractual duty to class members by failing to share Volume Rebates with them. With respect to this common issue, which the motion judge characterized at para. 2 as the "core issue", the motion judge wrote, at para. 29: "I conclude that there were no undisclosed or "phantom" rebates; that all of the Volume Rebates were passed on and shared with the franchisees; and that the franchisor's mark-ups were not unreasonable." Indeed, the motion judge found that the average franchisee's cost for products was about 15% lower than outside distributor's prices and that Pet Valu negotiated the best price it could obtain and bestowed a range of benefits on its franchisees: at paras. 20 and 27-28.

The Court of Appeal was stearn in its indictment of the motion judge's modification of the language of the common issues, as certified. His alteration of the wording, without input from counsel, was prejudicial and hence unsupportable.

The Court of Appeal also dismissed the motion judge's conclusion that the franchisor had breached its fair dealing obligations under section 3 of the Ontario Act. The court left open the issue of whether, post-*Bhasin*, nondisclosure by a franchisor in the course of the performance and enforcement of a franchise agreement could constitute a breach of section 3 of the Ontario Act. However, the Court of Appeal stated that the "nondisclosure" in this case did not amount to such a breach. The court went on to state that a failure to include all material facts in a disclosure document did not constitute unfair dealing in the "performance" of a franchise agreement, since disclosure is required to be provided *before* the prospective franchisee signs the franchise agreement. Importantly, the court stated that ss. 6 and 7 of the Ontario Act provide specific

remedies for a franchisor's failure to comply with its disclosure obligations under s. 5 – suggesting that a resort to the fair dealing obligations under s. 3 to support a failure of disclosure was unnecessary.

***Addison Chevrolet Buick GMC Limited et al. v General Motors of Canada Limited et al.*, 2015 ONSC 3404**

In this case, a number of GM dealers signed dealer agreements in 2005 that were renewed in 2010. In 2009, GM filed for bankruptcy. Its assets were transferred to GM US. The plaintiffs claimed that certain government bailout funds should be made available to them.

Firsty, the court stated that unless a franchisor's associate was a party to the relevant franchise agreement, the franchisor's associate could not be sued under section 3(2) of the Ontario Act, which provides a for an award of damages for breach of the duty of fair dealing.

Secondly, the plaintiffs failed in their attempt to classify GM US as a "franchisor's associate." Although GM US did exercise control over GM, it did not satisfy the second part of the test, which required that GM US be involved in reviewing or approving the grant of the franchise, or making representations to the prospective franchisee.

Thirdly, the plaintiff franchisees failed in their attempts to pierce the corporate veil and attribute alleged breaches of GM's contractual duties of good faith to GM US. There was no evidence of any fraud or dishonesty, and a distinct absence of any pleadings that would otherwise permit the court to pierce the corporate veil.

Fourthly and finally, the plaintiffs were not able to establish any specific contractual duty to support their claim for a breach of the duty of fair dealing: "The doctrine of good faith is not the source of contractual obligations but a guide to the application of them." [para 112]. The plaintiffs claimed that GM had breached its duty of good faith by acting in its own interests. The judge stated that preferring one's own interests by itself is not actionable under section 3 of the Ontario Act. Furthermore, on the basis of the *Shelanu* decision [*Shelanu v. Print Three Franchising Corp.* (2003) 2003 CanLII 52151 (ON CA)], it is well-established that a franchisor does not owe a fiduciary duty to a franchisee, and that the duty of good faith therefore does not preclude the franchisor from preferring its own interests, so long as it acts honestly and reasonably. [Para 110]

On October 30, 2015, the Divisional Court denied the plaintiff franchisees' leave to appeal in respect of GM's successful motion to strike the duty of good faith claims [2015 CarwellOnt 16573].

***C.M. Takacs Holdings Corporation et al. v 122164 Canada Limited o/a New York Fries*, 2015 ONSC 5358**

The defendant franchisor sought summary judgment disposing of the plaintiffs' action, seeking damages for wrongful termination of the plaintiffs' New York Fries franchises. The franchisor had terminated four franchise agreements and subleases without notice. The businesses were then run as corporate stores by the franchisor. The record showed that the franchisee was in arrears in respect of multiple obligations to the extent of about $500,000.

The court found that the subleases in particular did require formal notice of pending termination, and that on prior occasions of default, the franchisor had given notice to rectify, thus raising a possible issue of estoppel. The court also considered whether the franchisor's duty to treat franchisees fairly in and of itself give rise to a notice requirement.

In the circumstances, the subleases were very much of secondary importance. The estoppel argument was disposed of on the basis that the franchise agreement contained a nonwaiver clause which precluded estoppel as an argument. With respect to the duty of fair dealing under the Ontario Act, the judge decided that, in the context of the case, a notice requirement did not arise because of it. The franchisees were experienced, they were aware of the ongoing default, and there was no evidence that notice would in fact have made any material difference in the outcome. The franchisee presented no evidence of their financial ability to cure the default: "The Arthur Wishart Act does not automatically mandate either the deletion or addition of contractual terms which years worth of hindsight indicate the franchisee might now find convenient. Context is important." [para 11]

***Thadathil v Golden Griddle Inc.*, 2015 ONSC 5033**

Lest anyone think that this case resonates with the *Dunkin' Donuts* decision of the Québec Court of Appeal [*supra*], it should be stressed at the outset that no one appeared on behalf of the franchisor respondents, the trustee in bankruptcy, or any of the landlords of the various premises. The outcome of the case should therefore be interpreted restrictive restrictively.

It's also worth noting that the outcome is at odds with a line of decisions lead by *Majdpour v. M&B Acquisition Corp.*, 2001 CanLII 8622 (ON CA), in which the Court of Appeal held that franchisees were not entitled to a finding that the bankruptcy of the franchisor resulted in a fundamental breach of their franchise agreements entitling them to terminate their franchise agreements and receive an assignment of the leases for their store locations.

The judge in the instant case found that the respondents had failed to maintain the integrity of the brand by failing to provide, amongst other things, advertising, a website, training and manuals, pre-approved suppliers, logoed products including napkins and mugs, staff uniforms, quarterly and annual meetings … amounting to a fundamental breach of the franchise agreements. In the result, the court terminated the franchise agreements, assigned the leases in question to the franchisees, and declared the noncompetition clauses in the franchise agreements null and void.

***MEDIchair LP v DME Medequip Inc.*, 2015 ONSC 3718**

The franchisees in this case purchased the franchise from its original owners. The franchisor consented to the purchase and the individual owners of the franchise executed personal covenants agreeing to comply with the restrictive covenants of the franchise agreement. The restrictive covenants survived expiration of the agreement by 18 months, and prevented the franchisee and its owners from directly or indirectly operating a "similar business" within the 30 mile radius of any existing store or the nearest franchisee in Canada.

Immediately upon expiration of the agreement, the franchisee removed the franchisor's signage and continued to operate their business with the same employees, and selling the same products under a different name. The franchisor brought an application seeking to have the restrictive covenant enforced.

The respondents argued that they should not be bound by the restrictive covenants because the franchisor had failed to provide disclosure to the accordance with the Ontario Act. The court found that the franchisor was entitled to rely on the exemption found in s. 5(7)(a)(iv) of the Ontario Act, on the basis that the grant of the franchise was not effected "by or through the franchisor." The court found that the franchisor's role was passive, merely agreeing to the sale and doing little else but providing some documents. The court also found that even though the franchisor had provided some limited disclosure documentation it was not estopped from relying on the disclosure exemption under the Ontario Act.

With respect to the validity of the restrictive covenant, the court did not accept as a general proposition that restrictive covenants are, *per se*, unreasonable as a restraint on trade. The court cited with approval the recent decision of the Supreme Court of Canada in *Payette v. Guay*, 2013 SCC 45 (CanLII), [2013] 3 S.C.R. 95 at para. 58 in which the court held that restrictive covenants in commercial contracts are presumptively lawful "unless it can be established on a balance of probabilities that its scope is unreasonable." Instead, the court must analyze the particular provisions and determine whether they are reasonable in the circumstances.

The respondent's argument that the restrictive covenant was ambiguous because of its use of the phrase "similar to," was also rejected. The court found that the franchisor had a legitimate business interest to protect, including a method of operation, goodwill, products and services. The 18 month period and 30 mile radius were found to be reasonable, even considering that the franchisor was experiencing difficulty and had no plans to open or operate a store in the vicinity of the former franchisee. The judge stated that: "in my view, there are other important factors to consider, such as the integrity of the franchise system, which would be significantly compromised if franchisees were simply allowed to walk away from the terms of the Agreement if [the franchisor] was unable to establish that another store was going to open in the same area." [para 29] He went on to say: "I cannot ignore the importance of maintaining commercial certainty by enforcing terms of agreements to which parties have freely entered into. The respondents knew of the restrictive covenant, chose to ignore it, failed to settle the issue, and now are left to face the unfortunate consequences." [para 35]

***1598631 Ontario Inc. v Imvescor Restaurant Group Inc.*, 2015 ONSC 1888**

The franchisees and principles of the franchisee in this case sought a declaration that a post term restrictive covenant was void and unenforceable or, in the alternative, that their proposed menu did not contravene the provisions of the covenant, and damages for breach of the franchisor's fair dealing obligation.

The contention by the applicants that a restrictive covenant of five years was unreasonable was rejected. The court held that the temporal component of the restrictive covenant cannot be considered in isolation. Because the scope of prohibited activity was restricted to use of the franchisor's recipes, which the court found to be very limited, five-year period preventing use of confidential recipes was held to be reasonable. The court was also influenced by the long-term relationship between the parties.

With respect to the geographic scope of the covenant, the court found a 10 km radius to be reasonable, notwithstanding that a protected territory of only 2 km was granted to the franchisee.

The court rejected the franchisee's claim for damages for breach by the franchisor of its fair dealing obligation. Basically, the franchisor was entitled to seek to uphold its rights under the restrictive covenants, and seeking to do so could not amount to bad faith conduct.

***Brister v. 2145128 Ontario Inc.*, 2014 ONSC 6714**

The franchisee sought to rescind a franchise agreement on the basis of nondisclosure. The franchisor attempted to rely on the exemption available under s. 5(7)(a)(iv) on the basis that the transfer was not made "by or through the franchisor."

The court found that the exemption was not available, on the basis that the franchisor "was actively involved in settling the terms for the transfer" [paragraph 14] including interviewing the transferee personally prior to approving her, requiring that the transferee be trained by its personnel, requiring the transferee to assume its lease obligations to the landlord, the requirement that the transferee provide a general security agreement (whereas the former franchisee had not been required to do so, a requirement that a new franchise agreement be signed which included a provision to have the transferee take over the lease of premises in the place of the franchisor. In effect, the court held, the franchisor stipulated terms of the transaction. Having received significant advantages as a result of the transfer, the franchisor was precluded from relying upon the disclosure exemption.

It seems unfortunate that the court cited the franchisor's personal meeting with the transferee and insistence that it train the transferee as bases for removing reliance on the exemption. These two requirements on the part of a franchisor make good business sense, and a court should not, I submit, require franchisors to proceed blindly in the approval of new operators, or their subsequent training. These are fundamental attributes of franchising.

***2256306 Ontario Inc. v. Dakin News Systems Inc.*, 2015 ONSC 566**

That the franchisee sought rescission of its franchise agreement on the basis for nondisclosure. The franchisor resisted the summary judgment motion on the basis of three possible exemptions under the Ontario Act.

First, if the franchisor argued the availability of the exemption under s. 5(7) (a) (iv), on the basis that the franchisee had purchased the assets directly from it from a former franchisee. However, the former franchisees franchise agreement had expired, and the franchisor required a new agreement to be signed. This was enough, in the court's view, to make the exemption unavailable.

Second, with respect to the exemption under s. 5(7)(f), (no disclosure required where there is a renewal or extension of a franchise agreement with there's been no interruption in the operation of the business and no material change), the court found that execution of a new agreement meant that the situation was not one of a renewal or extension and hence the exemption was not available. The statement by the judge that the transfer amounted to a material fact seems flawed, given the definition of "material fact" in the Ontario Act relates to the business of the franchisor, and not the franchise or franchisee.

Third, with respect to the exemption under s. 5(7)(g)(ii) (no disclosure required if the franchise is not valid for longer than a year and the grant is not involve payment of a nonrefundable franchise

fee fee), in this case, the franchise agreement required the new franchisee to pay a franchise fee, thereby precluding reliance on the exemption.

***2147191 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2015 ONCA 116**

The Court of Appeal in this case upheld and earlier trial decision holding that the franchisor could not avail itself of the "resale" exemption from disclosure provided in s. 5(7)(a)(iv) of the Ontario Act.

The Court of Appeal considered it fatal that the franchisor met with the prospective franchisee on three occasions and the discussions included the *possibility* that a new franchise agreement would be required.

This finding seems quite harsh. Perhaps the fact that the franchisor also required the transferee to execute an acknowledgment that provided certain additional protection to it makes the decision come on balance, easier to accept.

***2176693 Ontario et al. v. The Cora Franchise Group Inc. et al.*, 2015 ONSC 1265**

In a prior motion, several bases for rescission were rejected by the court on the basis that they fell outside the two year period for rescission under s. 5 of the Ontario Act. This motion concerned the ability of the franchisee to continue its claim on the basis of non-rescissionary causes of action.

The court examined the fair dealing obligation under section 3 of the Ontario Act relative to the franchisor's presale disclosure, in particular the fact that disclosure was made to the franchisee by a number of separate documents, and not at one time in a single document as required by the Act.

Because matters relating to disclosure predate formation of the franchise agreement, the parties were not yet bound by the contractual performance obligations created by section 3 of the Act.

The court stated that there is no common law tort dealing with the content of franchise disclosure documents, or requiring that they all be contained in one document. The recent decision of the Supreme Court in *Bhasin v. Hrynew*, 2014 SCC 71 (CanLII) did not assist the plaintiffs. The Court in that case recognized a contractual duty of honesty (a duty not to overtly lie to your contractual counterparty). This has no relevancy to an alleged claim against a franchisor for failing to disclose to a prospective franchisee all required documents together in the form of one document as required by the statute.

Moreover, prior to the opening of their franchised business the plaintiffs had received and signed all of the agreements that they allege were missing from the disclosure document that they received. Therefore, they could not establish causation at common law in any event.

***Yazdi Integrated Health Group Ltd. v. Unihealth Management Ltd.*, 2014 BCSC 2218**

In a summary judgment motion, the judge found the franchisee in breach of the franchise agreement, based on evidence that it had unilaterally ceased operations after 19 months of operations under a franchise agreement with a 10 year term.

In assessing the franchisor's damages, the court stated that: "Where there has been a breach of a franchise agreement, damages are based on the time the franchisor would need to establish a new location in the same area." [Para 15] The court went on to quote with approval the decision of Belobaba J. in *2 for 1 Subs Ltd. v. Ventresca* (2006), 17 B.L.R. 94th) 179, [at para 34]: "The courts have held that in cases such as this, where a franchise is lost to a competitor, the measure of damage should be the monetary loss sustained by the franchisor for the period of time that it would need to mitigate its loss by establishing another franchise in the same territory. The case law suggests that a reasonable period of time for the franchisor to open a new franchise in the same area is in the range of 18 to 24 months: *A & W Food Services of Canada Ltd. v. Leslie*, (1989), 93 N.S.R. (2d) 111, 242 A.P.R. 111 (N.S.T.D.); *Pizza Delight Corp. v. White Rock Pizza Take-Out Ltd.,* (1985), 1985 CanLII 734 (BC SC), 9 C.P.R. (3d) 282 (B.C.S.C.); *Damack Holdings Ltd. v. Saanich Penninsula Savings Credit Union* (1982) 1980 CanLII 546 (BC SC), 19 B.C.L.R. 46 (B.S.S.C.)." However, "Those cases involved franchisors who, in attempting to establish a new franchise in the same area, would face competition from their former franchisee. That is not the case here. [The franchisor] made no effort to continue the business on its own or under another name. It follows, in my view, that the reasonable period to establish a new franchise would be shorter." [Para 18]

With respect to the franchisor's claim for damages to its brand and reputation, the judge found that: "I find that [the franchisor] has failed to prove damages to its brand and reputation. Any such loss would have been avoided or minimized by the opening of a new franchise in North Vancouver within a reasonable time." [Para 21]

Finally, with respect to the franchisor's claim for damages in respect of staffing expenses incurred during the term of the franchise agreement, the court found that the damages: qualified neither as "expectation damages," or "reliance damages." The expenditure would have been incurred even if the contract had been fully performed, and there was no provision in the agreement entitling the franchisor to be reimbursed for those expenses over and above what it received as compensation under the franchise agreement. [Para 24]

***1146845 Ontario Inc. v. Pillar to Post Inc.*, 2014 ONSC 7400**

The franchisees in this case argued that Section 4 of the Ontario Act [the right to associate] effectively trumped their election under the respective franchise agreements to refer all disputes to arbitration. The Court cited with approval the Supreme Court decision in *Seidel v. TELUS Communications Inc.* 2011 SCC 15, and went on to say:
I…do not have to determine the *bona fides* of the manoeuvres for arbitration or for a class proceeding, because as a result of the Supreme Court of Canada's decision in, *Seidel*, the issue of whether a class proceeding should be stayed because of the plaintiff's and the class members' agreement to arbitrate their disputes is essentially a matter of statutory interpretation independent of the motives of the parties." [Para 63] In determining that the Ontario Act did not contain language contrary to the arbitration clause in the franchise agreement, the court cited with approval the Court of Appeal decision in *MDG Kingston Inc. v. MDG Computers Canada Inc.*, 2008 ONCA 656 (CanLII) , [2008] O.J. No. 3770 (C.A.), which stated, inter alia, that the Ontario Act "does not limit or restrict the right of parties to a franchise agreement to agree to resolve disputes by arbitration, which is another way of saying that there is no legislative intervention to relieve the court of its obligation to give effect to the terms of an arbitration clause." [Para 100]

***2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152**

This case examined at the ability of the franchisor to craft a form of release that did not violate section 11 of the Ontario Act, which states that "any purported waiver or release by a franchisee of a right given under this Act… is void."

The franchisor argued that the form of release was drafted in a way so as not to affect the franchisee's rights under the Act, but merely to release nonstatutory claims. The Court of Appeal held that the provision in the franchise agreement requiring that the franchisee provide a release as a condition of an assignment of the franchise agreement was not void, but was unenforceable.

Similarly, at the Court of Appeal refused to adopt a "blue pencil" approach to sever offensive portions of the release. Part of the court's rationale for refusing to sever offensive portions of the contract was based on a finding that doing so would frustrate the Act's objectives of mitigating the power imbalance inherent in franchise relationships, and that doing so might invite franchisors to draft overly-broad provisions in the expectation that the courts would eventually read them down.

A finding that the release provision of the franchise agreement was unenforceable would not result, said the court, in an unjustified windfall to the franchisee. The primary purpose of the assignment provisions was to ensure that the franchisor had sufficient control over the assignment process to ensure that assignments were made only to competent new franchisees. Refusing to enforce the requirement for a release would not unduly prejudice this contractual objective, nor unduly benefit the franchisee.

***2240802 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 2015 ONCA 236**

As a preliminary matter, the Court of Appeal found that a franchisee's right to rescission could be resolved by way of summary judgment, applying to the *Combined Air* [*Combined Air Mechanical Services v. Flesch*], 2011 ONCA 764 and *Hryniak* [*Hryniak v. Mauldin*], 2014 SCC 7 tests.

The motions judge had identified is three main disclosure deficiencies. The first of these was the fact that the financial statements were Notice to Reader statements. The franchisor argued that, effectively, this did not alter the quality of the information provided to the prospect. The Court of Appeal stated that inclusion of review engagement statements was mandatory and that anything less was materially deficient.

The Court of Appeal also upheld the motion judge's finding that the certificate of disclosure provided by the franchisor was deficient, in that it contained only one signature of an officer or director, whereas the Regulation required two signatures. The franchisor tendered evidence that a second certificate signed by another officer had been provided on the same day. The Court of Appeal rejected this as a violation of the requirement that the certificate must be a solitary document, not two.

Thirdly, the franchisor had failed to disclose ongoing litigation with another franchisee based on deficient disclosure. The Court of Appeal supported the motion judge's finding that this information amounted to a material fact that, pursuant to s. 5(4)(a) of the Act, had to be disclosed.

In the result, the Court was of the opinion that the failure to provide review engagement statements was sufficiently material as to permit the franchisee to rescind, pursuant to subsection 6(2) within two years of entering into the franchise agreement. The other two deficiencies – the defective certificate and failure to disclose the litigation – strengthened the validity of the franchisee's case that the disclosure provided effectively amounted to no disclosure.

***2313103 Ontario Inc. et al. v JM Food Services Ltd. et al.*, 2015 ONSC 4029**

In this summary judgement motion, three individuals incorporated a holding corporation to hold their 50% interest in an operating company, with the other 50% being held by the franchisor. The operating company entered into a master franchise agreement with the franchisor. When the operating company ran into financial difficulties, the individual shareholders sought to rescind the master franchise agreement and obtain damages under section 6 of the Ontario Act. The issue in the case was whether the three individual shareholders had standing *as franchisees* to enforce provisions of the Ontario Act that provide rights to "franchisees" as defined therein.

In this case, the parties had always treated the operating company as the *de facto* franchisee. The "grant" of the franchise have been made to the operating company. The three individuals had never been required to provide any guarantee of the obligations of the operating company under the franchise agreement. The court distinguished the decision in *Salah v. Timothy's Coffees of the World Inc.,* 2010 ONCA 673, on the basis of that the individual in that case had initially been the named franchisee under the franchise agreement, and following assignment of the franchise agreement to his holding company, was required to personally guarantee all of the obligations of the franchisee. The individual was therefore the franchisee who had initially received the grant of the franchise.

In this case, the court found that: "There is simply no credible basis to assert that the individual plaintiffs are "franchisees" in their own right." [Para 65]

***Target Canada Co. (Re),* 2015 ONSC 1028**

This rather unusual case involved the disclaimer of a number of franchise agreements for pharmacy operations inside the soon to be defunct Target stores by the monitor of Target Canada, pursuant to the provisions of the *Company's Creditors Arrangement Act* (Canada).

In the result, the court permitted the disclaimer, on the basis that doing so would enhance the prospects of a viable compromise or arrangement being made in respect of the insolvent company, and that the disclaimer would not have the effect of causing significant financial hardship to the franchisees.

It was stressed by the court that, whether or not the franchise agreements were disclaimed, the stores within which the franchised pharmacies were located would soon close.

The case stands for the proposition that, regardless of the extensive protections provided to franchisees under provincial franchise laws, which has been highly remedial, the interpretation and application of other legislation touching upon franchisees will be conducted pursuant to the intent and purpose of that legislation, which may result in much less favourable outcomes to franchisees.

***France v. Kumon Canada Inc.*, 2014 ONSC 7181**

This decision followed an earlier decision of Goldstein J granting summary judgment to the franchisor permitting it to terminate and oral franchise agreement: France v. Kumon, 2014 ONSC 5890. The franchisee had operated under the oral agreement for almost 20 years and had consistently refused to sign a written agreement. While the judge did permit summary judgment, he stated that the a notice period of 12 months was not adequate and requested further submissions by the parties. The franchisorrelied on a series of cases in the context of distributorships for the proposition that a 12-month notice period was adequate: Western Equipment Ltd. v. A.W. Chesterton Company, 1983 CanLII 527 (BC SC), [1983] B.C.J. No. 1831, 46 B.C.L.R. 64 (B.C.S.C.). I disagreed. I found that the distributorship cases did not fully apply in the franchise context given the duties on a franchisor: Shelanu v. Print Three Franchising Corp. (2003), 2003 CanLII 52151 (ON CA), 64 O.R. (3d) 533, 226 D.L.R. (4th) 577, [2003] O.J. No. 1919 (C.A.) the franchisor also argued that He argues that the employment cases are inapplicable since Ms. France was simply not an employee, but an independent business person. He also argues that Ms. France had the benefit of running her business using Kumon's methods and materials but without agreeing to the uniform contract that all other North American franchisees had signed. In effect, counsel for Kumon argues that Ms. France would be made better off by her intransigence.

The franchisee argued that reasonable notice for a long-standing employee like herself was something over 20 months: *Campbell v. Petro-Canada Inc*. (1992), 44 C.C.E.L. 234, [1992] O.J. No. 1813; *Brito v. Canac Kitchens*, 2011 ONSC 1011 (CanLII), [2011] O.J. No. 1117 (Sup.Ct.). She further argued that given her age and limited employability, she was a vulnerable employee and should therefore have been provided 24 months' notice: *Johnston v. Algoma Steel Corp.* (1989) 24 C.C.E.L. 1, [1989] O.J. No. 124 (H.C).

In an employment situation, the Court will look to what is reasonable in the circumstances. In *Bardal v. Globe and Mail Ltd*. (1960), 24 D.L.R. (2d) 140, [1960] O.J. No. 149 (H.C.) McRuer C.J.O. stated at para. 21:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

In a distributorship situation, the Court will also look to what is reasonable in the circumstances. In *1193430 Ontario Inc. v. Boa-Franc Inc.* (2005), 2005 CanLII 39862 (ON CA), 260 D.L.R. (4th) 659, 78 O.R. (3d) 81, 2005 CarswellOnt 5661 (C.A.) Feldman J.A. stated at para. 45:

> What is reasonable will depend on the circumstances of each case including such factors as the expectations of the parties, the duration or intended duration of the relationship, the dependency of the business of the terminated party on the arrangement and the commercial climate for the product.

The judge stated that a franchise situation is closer to an employment situation than it is to a distributorship situation, but did not agree with the franchisee that she was entitled to the 20 or 24 month notice period she was seeking. "That said, there must be some discount for the fact that

a franchisee is still an independent contractor, and must bear much of the risk associated with being an independent contractor. It is true that she is in a vulnerable position, but that is not Kumon's fault…I therefore agree that a franchisee is closer to an employee than to a distributor with significant commercial power, a franchisee is still not an employee – and a franchisor is not a fiduciary." [Para 15]

The judge went on to say at Para 17: "Without attempting to lay down any absolute rule, I would say that what is a reasonable notice period in the circumstances of the franchise context will depend on a number of factors. I suggest that some of those factors might be:

• The length of the relationship between the franchisee and the franchisor;

• Whether there was a history of oppressive conduct or bad faith on the part of the franchisor;

• Whether there was a history of poor performance by the franchisee;

• Whether the franchisor or franchisee, as the case may be, has acted in good faith throughout the course of the relationship; and,

• Whether there have been violations of the Wishart Act;

I also note that there are stronger and weaker franchisees. Some franchisees are multi-million dollar businesses, with multiple locations and numerous employees. Some are small operations, like [the franchisee's] Centre. The size and relative power of the franchisee may also be a factor to take into account." [Para 17]

Applying these factors, the court found the appropriate notice period to be 18 months.

***WCAT-2015-00273 (Re)*, 2015 CanLII 42375 (BC WCAT)**

Somewhat in contrast to the case discussed above (*France v. Kumon*) the tribunal in this case was charged with the application of workers compensation legislation, which it stated was "to be interpreted in a manner that favors inclusion or exclusion where appropriate;" i.e., that the tribunal is charged with sweeping as many workers into coverage under the act (as employees) as it reasonably can.

The tribunal therefore proceeded to apply the traditional common law factors to differentiate between a contract of service (i.e. employment) and a contract for service (independent contractor status), as enunciated in *Montreal (City) v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (SCC) and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59. In this case, the tribunal considered the following ten factors: i) were labour services only supplied, or were labour and materials provided?; ii) what degree of control is exercised over the worker?; iii) did the worker enjoy a chance of profit and was he subject to a risk of loss; iv) was the worker required to provide his own equipment?; v) was the worker subject to regulatory licensing in respect of his business?; vi) were the contractual terms in force between the parties consistent with normal contractual terms between independent contractors?; vii) who is best able to fulfill the safety obligations under the Act?; viii) did the worker provide services to more than one entity?; ix) who was responsible for any staff engaged by the worker?; x) was the express intention of the parties to create a contract for services?

In the end, the tribunal was unable to make a determination as to whether the franchisees in question should be other employees or independent contractors for purposes of the Act. Instead, the franchisees were classified under the "labour contractor" status of the Act. However, since the labour contractor status is not available to incorporated entities, the tribunal further ordered that any franchisees who were incorporated could not be considered labour contractors. In the result, unincorporated franchisees were included in determining the franchisor's Workers Compensation assessment, and incorporated franchisees were excluded.

***Treats International Franchise Corporation v 2247383 Ontario Inc.*, 2015 ONSC 7399**

The defendant franchisee operated a franchise for just a few days under two years, when they abandoned the premises and claimed rescission under the Ontario Act. The franchisor sued for arrears of rent and damages for breach of the franchise agreement. The franchisee brought a motion for summary judgment.

Just prior to the date on which the Statement of Defence and Counterclaim was filed by the corporate franchisee and two of the individual shareholders, one of the individual shareholders made an assignment in bankruptcy.

The court found that, by virtue of Section 71 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, once a bankruptcy order is made, subject to the Act and the rights of secured creditors, the bankrupt's property passes to the trustee named in the bankruptcy order. The exception to this rule relates to claims or losses that were personal in nature, such as damages for personal injury or defamation. In this case, the cause of action related to business losses from the franchisee and therefore became property of the trustee. The Statement of Defence was therefore a nullity, and the defendants' summary judgment motion was dismissed.

APPENDIX B—BC FRANCHISES ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Definitions and interpretation

1 (1) In this Act:

"disclosure document" means a disclosure document required by section 5;

"franchise" means a right to engage in a business in which a franchisee is required by contract or otherwise to make a payment or continuing payments, whether direct or indirect, or a commitment to make that payment or those payments, to a franchisor, or a franchisor's associate, in the course of operating the business or as a condition of acquiring the franchise or commencing operations, and

(a) in which

(i) the franchisor grants the franchisee the right to sell, offer for sale or distribute goods or services that are substantially associated with the franchisor's or the franchisor's associate's trademark, trade name, logo or advertising or other commercial symbol, and

(ii) the franchisor or the franchisor's associate exercises significant control over, or offers significant assistance for, the franchisee's method of operation, including building design and furnishings, locations, business organization, marketing techniques or training, or

(b) in which

(i) the franchisor or the franchisor's associate grants the franchisee the representational or distribution rights, whether or not a trademark, trade name, logo or advertising or other commercial symbol is

involved, to sell, offer for sale or distribute goods or services supplied by the franchisor or a supplier designated by the franchisor, and

(ii) the franchisor or the franchisor's associate, or a third person designated by the franchisor, provides location assistance, including

(A) securing retail outlets or accounts for the goods or services to be sold, offered for sale or distributed, or

(B) securing locations or sites for vending machines, display racks or other product sales displays used by the franchisee;

"franchise agreement" means any agreement that relates to a franchise and is entered into between

(a) a franchisor or franchisor's associate, and

(b) a franchisee;

"franchise system" includes the following:

(a) the marketing, marketing plan or business plan of a franchise;

(b) the use of or association with a trademark, trade name, logo or advertising or other commercial symbol;

(c) the obligations of a franchisor and franchisee with regard to the operation of the business operated by the franchisee under a franchise agreement;

(d) the goodwill associated with the franchise;

"franchisee" means a person to whom a franchise is granted, including

(a) a subfranchisor with regard to that subfranchisor's relationship with a franchisor, and

(b) a subfranchisee with regard to that subfranchisee's relationship with a subfranchisor;

"franchisor" means any person who grants or offers to grant a franchise, including a subfranchisor with regard to that subfranchisor's relationship with a subfranchisee;

"franchisor's associate" means a person

(a) who, directly or indirectly,

(i) controls or is controlled by a franchisor, or

(ii) is controlled by another person who also controls, directly or indirectly, a franchisor, and

(b) who

(i) is directly involved in the grant of a franchise

(A) by being involved in reviewing or approving the grant of the franchise, or

(B) by making representations to a prospective franchisee on behalf of the franchisor for the purpose of granting the franchise, marketing the franchise or otherwise offering to grant the franchise, or

(ii) exercises significant operational control over a franchisee and to whom the franchisee has a continuing financial obligation in respect of a franchise;

"franchisor's broker" means a person, other than a franchisee, franchisor or franchisor's associate, who grants, markets or otherwise offers to grant a franchise, or who arranges for the grant of a franchise;

"grant", in respect of a franchise, includes the disposition of the franchise or of an interest in the franchise and, for this purpose, an interest in the franchise includes the ownership of shares in the corporation that owns the franchise;

"master franchise" means a franchise that is a right granted, by a franchisor to a subfranchisor, to grant or offer to grant franchises for the subfranchisor's own account;

"material change" means a change in the business, operations, capital or control of the franchisor or franchisor's associate, or in the franchise or the franchise system, that would reasonably be expected to have a significant adverse effect on the value or price of the franchise to be granted or on the decision to acquire the franchise, including a decision to implement the change made by the board of directors of the franchisor or franchisor's associate or by senior management of the franchisor or franchisor's associate who believe that confirmation of the decision by the board of directors is probable;

"material fact" means any information about the business, operations, capital or control of the franchisor or franchisor's associate, or about the franchise or the franchise system, that would reasonably be expected to have a significant effect on the value or price of the franchise to be granted or on the decision to acquire the franchise;

"misrepresentation" includes

(a) an untrue statement of a material fact, or

(b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it was made;

"prospective franchisee" means a person

(a) who has indicated, directly or indirectly, to a franchisor, franchisor's associate or franchisor's broker an interest in entering into a franchise agreement, and

(b) whom a franchisor, franchisor's associate or franchisor's broker invites, directly or indirectly, to enter into a franchise agreement;

"subfranchise" means a franchise granted by a subfranchisor to a subfranchisee.

(2) For the purposes of this Act, a reference to a franchise includes a master franchise and a subfranchise.

(3) For the purposes of this Act, a franchisee, franchisor or franchisor's associate that is a corporation is deemed to be controlled by another person or persons, if

(a) voting securities of the franchisee, franchisor or franchisor's associate carrying more than 50% of the votes for the election of directors are held, otherwise than by way of security only, by or for the benefit of the other person or persons, and

(b) the votes carried by the securities are entitled, if exercised, to elect a majority of the board of directors of the franchisee, franchisor or franchisor's associate.

(4) For the purposes of the definition of "franchise" in subsection (1), a reference to a payment or continuing payments, as described in that definition, does not include a payment made in respect of a purchase described in section 2 (3) (g).

Application

2 (1) This Act applies with respect to

(a) a franchise agreement entered into on or after the coming into force of this section, and

(b) a renewal or extension, entered into on or after the coming into force of this section, of a franchise agreement that was entered into before, on or after the coming into force of this section

if the business operated or to be operated by a franchisee under the franchise agreement is wholly or partly in British Columbia.

(2) Sections 3, 4, 5 (8) (d) and 10 to 13 apply with respect to a franchise agreement entered into before the coming into force of this section, if the business operated or to be operated by a franchisee under the franchise agreement is wholly or partly in British Columbia.

(3) This Act does not apply to the following:

(a) an employer-employee relationship;

(b) a partnership;

(c) a membership in

(i) an organization, operated on a cooperative basis by and for independent retailers, that

(A) purchases, or arranges for the purchase of, on a non-exclusive basis, wholesale goods or services primarily for resale by the organization's member retailers, and

(B) does not grant representational rights to or exercise significant operational control over the organization's member retailers,

(ii) a cooperative corporation, as defined in section 136 (2) of the *Income Tax Act* (Canada) or as would be defined in that section, but for section 136 (2) (c) of that Act,

(iii) a cooperative incorporated under the *Canada Cooperatives Act*, or

(iv) an association incorporated under the *Cooperative Association Act*;

(d) an arrangement arising from an agreement to use a trademark, trade name, logo or advertising or other commercial symbol designating a person who offers on a general basis, for consideration, a service for the evaluation, testing or certification of goods, commodities or services;

(e) an arrangement arising from an agreement between a licensor and a single licensee to license a specific trademark, trade name, logo or advertising or other commercial symbol, if the licence is the only one of its general nature and type to be granted in Canada by the licensor with respect to the trademark, trade name, logo or advertising or other commercial symbol;

(f) a relationship or arrangement arising out of an oral agreement, if there is no writing that evidences any material term or aspect of the relationship or arrangement;

(g) an arrangement arising out of an agreement

(i) for the purchase and sale of a reasonable amount of goods at a reasonable wholesale price, or

(ii) for the purchase of a reasonable amount of services at a reasonable price.

Fair dealing

3 (1) Every franchise agreement imposes on each party a duty of fair dealing in the performance and enforcement of the franchise agreement, including in the exercise of a right under the franchise agreement.

(2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing.

(3) For the purposes of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

Right to associate

4 (1) A franchisee may associate with other franchisees and may form or join an organization of franchisees.

(2) A franchisor and a franchisor's associate must not interfere with, prohibit or restrict, by contract or otherwise, a franchisee from associating with other franchisees, or from forming or joining an organization of franchisees.

(3) A franchisor and a franchisor's associate must not, directly or indirectly, penalize, attempt to penalize or threaten to penalize a franchisee for associating with other franchisees, or for forming or joining an organization of franchisees.

(4) If a provision in a franchise agreement or other agreement relating to a franchise purports to interfere with, prohibit or restrict a franchisee from associating with other franchisees, or from forming or joining an organization of franchisees, the provision is void.

(5) If a franchisor or a franchisor's associate contravenes subsection (2) or (3), a franchisee has a right of action for damages against the franchisor or the franchisor's associate, as the case may be.

Disclosure

5 (1) A franchisor must provide a prospective franchisee with a disclosure document as set out in this section, and the prospective franchisee must have received the disclosure document at least 14 days before the earlier of

(a) the signing, by the prospective franchisee, of the franchise agreement or any other agreement relating to the franchise, and

(b) the payment, by or on behalf of the prospective franchisee to the franchisor or the franchisor's associate, of any consideration relating to the franchise.

(2) A disclosure document may be delivered personally, by email or by any other prescribed method.

(3) A disclosure document must be delivered as one complete document and delivered at one time.

(4) A disclosure document must contain the following:

(a) prescribed financial statements;

(b) copies of all proposed franchise agreements, and other agreements relating to the franchise, to be signed by a prospective franchisee;

(c) prescribed statements that have the purpose of assisting a prospective franchisee to make informed investment decisions;

(d) other prescribed information;

(e) copies of other prescribed documents.

(5) In addition to the statements, documents and information required by subsection (4), a disclosure document must include all material facts.

(6) A franchisor must provide a prospective franchisee with a written statement of any material change, and the prospective franchisee must receive the statement of material change as soon as practicable after the change has occurred and before the earlier of the following:

(a) the signing, by the prospective franchisee, of a franchise agreement or any other agreement relating to a franchise;

(b) the payment, by or on behalf of the prospective franchisee to the franchisor or franchisor's associate, of any consideration relating to the franchise.

(7) All information in a disclosure document and a statement of material change must be set out accurately, clearly and concisely.

(8) This section does not apply to the following:

(a) the grant of a franchise by a franchisee, if

(i) the franchisee is not the franchisor, the franchisor's associate or a director, officer or employee of the franchisor or of the franchisor's associate,

(ii) the grant of the franchise is for the franchisee's own account,

(iii) in the case of a master franchise, the entire franchise is granted, and

(iv) the grant of the franchise is not effected by or through the franchisor;

(b) the grant of a franchise to a person who has been an officer or director of the franchisor or of the franchisor's associate for at least 6 months immediately before the grant of the franchise, for that person's own account;

(c) the grant of an additional franchise to an existing franchisee, if

(i) the additional franchise is substantially the same as the existing franchise that the franchisee is operating, and

(ii) there has been no material change since the existing franchise agreement, or latest renewal or extension of the existing franchise agreement, was entered into;

(d) the grant of a franchise by an executor, administrator, sheriff, receiver, trustee, trustee in bankruptcy, liquidator or guardian on behalf of a person other than the franchisor or the estate of the franchisor;

(e) the grant of a franchise to a person to sell goods or services within a business in which that person has an interest, if the sales arising from those goods or services, as anticipated by the parties or that should be anticipated by the parties at the time the franchise agreement is entered into, will not exceed 20% of the total sales of the business during the first year of operation of the franchise;

(f) the renewal or extension of a franchise agreement, if there has been

(i) no interruption in the operation of the business operated by the franchisee under the franchise agreement, and

(ii) no material change since the franchise agreement, or the latest renewal or extension of the franchise agreement, was entered into;

(g) the grant of a franchise, if the franchise agreement, including any renewal or extension of that franchise agreement,

(i) is valid, or would be valid, for one year or less, and

(ii) does not involve the payment of a non-refundable initial franchise fee, renewal fee or extension fee;

(h) the grant of a franchise, if section 55 of the *Competition Act* (Canada) applies to the franchisor;

(i) the grant of a franchise, if the prospective franchisee is investing an amount greater than a prescribed amount in the acquisition of the franchise.

(9) For the purposes of subsection (8) (a) (iv), a grant is not effected by or through a franchisor merely because

(a) the franchisor has a right, exercisable on reasonable grounds, to approve or disapprove the grant, or

(b) a fee must be paid to the franchisor in an amount set out in a franchise agreement or in an amount that does not exceed the reasonable actual costs incurred by the franchisor to process the grant.

(10) Subsection (4) (a) does not apply if the franchisor is the government of British Columbia.

(11) For the purposes of subsections (1) and (6), an agreement is not a franchise agreement or any other agreement relating to a franchise, if the agreement only contains terms in respect of

(a) keeping confidential or prohibiting the use of any information or material that may be provided to a prospective franchisee, or

(b) designating a location, site or territory for a prospective franchisee.

(12) Despite subsection (11), an agreement that only contains terms described in paragraph (a) or (b) of that subsection is a franchise agreement or any other agreement relating to a franchise for the purposes of subsections (1) and (6), if the agreement

(a) requires keeping confidential, or prohibits the use of, information

(i) that is in or comes into the public domain without breaching the agreement,

(ii) that is disclosed to any person without breaching the agreement, or

(iii) that is disclosed with the consent of all of the parties to the agreement, or

(b) prohibits the disclosure of information to an organization of franchisees, to other franchisees of the same franchise system or to a franchisee's professional advisors.

(13) For the purposes of subsections (1) (b) and (6) (b), the payment of any consideration relating to a franchise does not include the payment of a deposit that

(a) does not exceed an amount prescribed by regulation,

(b) is refundable without any deductions, if a prospective franchisee does not enter into a franchise agreement, and

(c) is given under an agreement with a franchisor concerning the deposit that does not obligate the prospective franchisee to enter into any franchise agreement.

Right of rescission

6 (1) A franchisee may rescind a franchise agreement, without penalty or obligation, within 60 days after receiving a disclosure document, if

(a) a franchisor failed to provide the disclosure document or a statement of material change within the time required by section 5, or

(b) the contents of the disclosure document did not meet the requirements of section 5.

(2) A franchisee may rescind a franchise agreement, without penalty or obligation, within 2 years after entering into the franchise agreement, if a franchisor never provided a disclosure document.

(3) A notice of rescission must be in writing and delivered to a franchisor, personally or by any other prescribed method, at the franchisor's address for service or to any other person designated for that purpose in the franchise agreement.

(4) A notice of rescission is effective,

(a) if delivered personally, on the day the notice is delivered, or

(b) if delivered by any other prescribed method of delivery, on the day determined in accordance with the regulations.

(5) A franchisor or franchisor's associate, as the case may be, must, within 60 days after the effective date of a rescission,

(a) refund to a franchisee any money received from or on behalf of the franchisee, other than money for inventory, supplies or equipment,

(b) purchase from the franchisee any inventory that the franchisee had purchased under the franchise agreement and remaining on the effective date of rescission, at a price equal to the purchase price paid by the franchisee,

(c) purchase from the franchisee any supplies and equipment that the franchisee had purchased under the franchise agreement at a price equal to the purchase price paid by the franchisee, and

(d) compensate the franchisee for any losses that the franchisee incurred in acquiring, setting up and operating the franchise, less the amounts set out in paragraphs (a) to (c).

Damages

7 (1) If a franchisee suffers a loss because of a misrepresentation contained in a disclosure document or in a statement of material change, or as a result of a franchisor's failure to comply in any way with section 5, the franchisee has a right of action for damages against the following:

(a) the franchisor;

(b) the franchisor's broker;

(c) the franchisor's associate;

(d) every person who signed the disclosure document or statement of material change.

(2) Subject to section 8 (1), if a disclosure document or statement of material change contains a misrepresentation, a franchisee who

acquired a franchise to which the disclosure document or statement of material change relates is conclusively deemed to have relied on the misrepresentation.

(3) Subject to section 8 (1), if a franchisor failed to comply with section 5 with respect to a statement of material change, a franchisee who acquired a franchise to which the material change relates is conclusively deemed to have relied on the information set out in the disclosure document provided by the franchisor under section 5.

Exceptions and defences to liability

8 (1) A person is not liable in an action under section 7 (1) for misrepresentation, if the person proves that the franchisee acquired the franchise with actual knowledge of the misrepresentation or the material change.

(2) A person, other than a franchisor, is not liable in an action under section 7 (1) for misrepresentation, if the person proves any of the following:

(a) that the disclosure document or statement of material change was provided to the franchisee without that person's knowledge or consent and, on becoming aware that the disclosure document or statement of material change had been provided, that person promptly gave written notice to the franchisee and the franchisor that the disclosure document or statement of material change had been provided without that person's knowledge or consent;

(b) that, after the disclosure document or statement of material change was given to the franchisee and before the franchise was acquired by the franchisee, on becoming aware of any misrepresentation in the disclosure document or statement of material change, that person withdrew consent to it and gave written notice to the franchisee and the franchisor of the withdrawal of consent and the reasons for it;

(c) that, with respect to any part of the disclosure document or statement of material change purporting to be

made on the authority of an expert or purporting to be a copy of or an extract from a report, opinion or statement of an expert, that person had no reasonable grounds to believe, and did not believe, that

(i) there had been a misrepresentation,

(ii) the part of the disclosure document or statement of material change did not fairly represent the report, opinion or statement of the expert, or

(iii) the part of the disclosure document or statement of material change was not a fair copy of or extract from the report, opinion or statement of the expert;

(d) that, with respect to any part of the disclosure document or statement of material change purporting to be made on the authority of a statement in writing by a public official or purporting to be a copy of or an extract from a report, opinion or statement of a public official, that person had no reasonable grounds to believe, and did not believe, that

(i) there had been a misrepresentation,

(ii) the part of the disclosure document or statement of material change did not fairly represent the report, opinion or statement of the public official, or

(iii) the part of the disclosure document or statement of material change was not a fair copy of or extract from the report, opinion or statement of the public official;

(e) that, with respect to any part of the disclosure document or statement of material change not purporting to be made on the authority of an expert or of a statement in writing by a public official and not purporting to be a copy of or an extract from a report, opinion or statement of an expert or public official, that person

(i) conducted an investigation sufficient to provide reasonable grounds for believing there was no misrepresentation, and

(ii) believed there was no misrepresentation.

Substantial compliance

9 A disclosure document or a statement of material change complies with section 5 despite the presence of a defect in form, a technical irregularity or an error, if

(a) the defect in form, the technical irregularity or the error does not affect the substance of the disclosure document or the statement of material change, and

(b) the disclosure document or the statement of material change is substantially in compliance with this Act.

Joint and several liability

10 (1) If 2 or more parties to a franchise agreement are found to be liable in an action brought under section 3 (2), or accept liability with respect to an action brought under that section, they are jointly and severally liable.

(2) If 2 or more franchisors or franchisor's associates are found to be liable in an action brought under section 4 (5), or accept liability with respect to an action brought under that section, they are jointly and severally liable.

(3) If 2 or more persons specified in section 7 (1) are found to be liable in an action brought under that section, or accept liability with respect to an action brought under that section, they are jointly and severally liable.

No derogation of other rights

11 (1) Subject to this section, the rights conferred under this Act are in addition to and do not derogate from any other right or remedy any party to a franchise agreement may have at law.

(2) A franchisee is not required to elect between rescission under section 6 and the statutory rights of action for damages.

(3) A franchisee is not entitled to be indemnified by way of damages in respect of a loss recovered through rescission of a franchise agreement.

Attempt to affect jurisdiction void

12 (1) If a provision in a franchise agreement purports to restrict the application of the law of British Columbia or to restrict jurisdiction or venue to a forum outside British Columbia, the provision is void with respect to claims arising under a franchise agreement to which this Act applies.

(2) Without limitation, subsection (1) applies to a provision in a franchise agreement providing for disputes under the franchise agreement to be submitted to arbitration.

(3) Subsection (1) does not apply to a claim if an action based on the claim was commenced before the coming into force of this section.

Rights cannot be waived

13 (1) Any purported waiver or release by a franchisee, or by a prospective franchisee, of a right conferred under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate under this Act is void.

(2) Subsection (1) does not apply to a waiver or release by a franchisee, or by a prospective franchisee, made in accordance with a settlement of an action, claim or dispute.

Burden of proof

14 In a proceeding under this Act, the burden of proving an exemption or exclusion from a requirement or provision is on the person claiming the exemption or exclusion.

Section 5 of *Offence Act*

15 Section 5 of the *Offence Act* does not apply to this Act or the regulations.

Regulations

16 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

(a) exempting, with or without conditions, a person or class of persons completely or partially from the application of section 5;

(b) prescribing methods of delivery and rules with respect to the use of the methods of delivery for the purposes of section 5 (2);

(c) prescribing and governing the financial statements to be contained in a disclosure document for the purposes of section 5 (4) (a);

(d) prescribing statements, information and documents for the purposes of section 5 (4) (c) to (e);

(e) prescribing an amount for the purposes of section 5 (8) (i);

(f) prescribing a deposit amount for the purposes of section 5 (13) (a);

(g) prescribing methods of delivery and rules with respect to the use of the methods of delivery for the purposes of section 6 (3) and (4), including the day on which a notice of rescission delivered by such methods is effective for the purposes of section 6 (4) (b);

(h) prescribing forms and providing for their use.

(3) In making regulations under this Act, the Lieutenant Governor in Council may make different regulations for different circumstances, persons or things, or for different classes of circumstances, persons or things.

Commencement

17 This Act comes into force by regulation of the Lieutenant Governor in Council.

Explanatory Note

This Bill enacts the *Franchises Act*, an Act that will apply with respect to franchise agreements relating to franchises that are operated wholly or partly in British Columbia and will

- confirm the duty of fair dealing of parties to a franchise agreement and provide for remedies in the event of the breach of that duty,
- confirm a franchisee's right of association and provide for remedies in the event of the infringement of that right,
- require the disclosure, by a franchisor to a prospective franchisee, of financial information and other relevant information about a franchise or a franchise system before the prospective franchisee enters into a franchise agreement,
- provide conditions for rescinding a franchise agreement,
- provide circumstances in which there may be liability for damages, and
- prevent the waiver of the application of the law of British Columbia or, in the event of a claim or dispute under a franchise agreement, of the restriction of jurisdiction or venue to a forum outside British Columbia for proceedings in relation to the claim or dispute.

Explanatory Note

This Bill enacts the Franchises Act, an Act that will apply with respect to franchise agreements relating to franchises that are operated wholly or partly in British Columbia and will

•confirm the duty of fair dealing of parties to a franchise agreement and provide for remedies in the event of the breach of that duty,

•confirm a franchisee's right of association and provide for remedies in the event of the infringement of that right,

•require the disclosure, by a franchisor to a prospective franchisee, of financial information and other relevant information about a franchise or a franchise system before the prospective franchisee enters into a franchise agreement,

•provide conditions for rescinding a franchise agreement,

•provide circumstances in which there may be liability for damages, and

•prevent the waiver of the application of the law of British Columbia or, in the event of a claim or dispute under a franchise agreement, of the restriction of jurisdiction or venue to a forum outside British Columbia for proceedings in relation to the claim or dispute.

APPENDIX C—TABLE OF CONCORDANCE—ONTARIO VS. BC ACTS

ON	BC	Commentary
1(1) "disclosure document"	1(1)	• substantially identical
1(1) "franchise"	1(1)	• substantially identical
1(1) "franchise agreement"	1(1)	• substantially identical
1(1) "franchisee"	1(1)	• substantially identical
1(1) "franchise system"	1(1)	• substantially identical
1(1) "franchisor"	1(1)	• ON says "one or more persons" whereas BC refers only to "any person"
1(1) "franchisor's associate"	1(1)	• substantially identical
n/a	1(1) "franchisor's broker"	• found in s. 7(1)(b) of the ON Act • means a person, other than a franchisee, franchisor or franchisor's associate, who grants, markets or otherwise offers to grant a franchise, or who arranges for the grant of a franchise
1(1) "grant"	1(1)	• substantially identical
1(1) "master franchise"	1(1)	• substantially identical
1(1) "material change"	1(1)	• substantially similar • BC includes a change in the franchise, but excludes prescribed changes
1(1) "material fact"	1(1)	• substantially similar
1(1) "misrepresentation"	1(1)	• substantially identical
1(1) "prescribed"	n/a	•
1(1) "prospective franchisee"	1(1)	• substantially similar • ON includes "agent"
1(1) "subfranchise"	1(1)	• identical
1(2) Master Franchise	1(2)	• substantially similar
1(3) Deemed Control	1(3)	• substantially identical
n/a	1(4) "payment or continuing payments"	• does not include a bona fide wholesale purchases
2(1) Application	2(1)	• ON includes, in addition to franchise agreements, the "business operated under such an agreement"
2(2) Existing Franchise Agreements	2(2)	• substantially similar

ON	BC	Commentary
2(3) Non-Application	2(3)	• ON includes the words "does not apply to the following *continuing commercial relationships or arrangements"*
2(3)1 Employment	2(3)(a)	• substantially identical
2(3)2 Partnership	2(3)(b)	• identical
2(3)3 Cooperative as prescribed	2(3)(c)	• BC's exemption is more inclusive
n/a	2(3)(i)	• an organization operated on a cooperative basis
n/a	2(3)(ii)	• as defined in the *Income Tax Act* (Canada)
n/a	2(3)(iii)	• as defined in the *Canada Cooperatives Act*
n/a	2(3)(iv)	• as defined in the *The Cooperative Association Act*
2(3)4 Evaluation Services	2(3)(d)	• substantially identical
2(3)5 Single License	2(3)(e)	• BC restricts the geographic scope of the license to Canada (Note that this exemption likely does NOT provide an exemption to a grant of a master license)
2(3)6 Leased Department	n/a	• BC for no apparent reason does not provide this exemption
2(3)7 Oral Agreements	2(3)(f)	• substantially identical
2(3)8 Arrangements with the Crown	n/a	• ON exempts the Crown; BC (by s.13) expressly binds the Crown
n/a	2(3)(g) Bona fide wholesale purchases	• ON does not include this obvious exemption that seems so necessary to exempt distributorships and dealerships
3(1) Fair Dealing	3(1)	• BC includes the "performance and enforcement" of the agreement, but then states "including in the exercise of a right under the franchise agreement"
3(2) Right of Action	3(2)	• substantially similar
3(3)	3(3)	• substantially similar
4(1) Right to Associate	4(1)	• substantially identical
4(2) No Prohibition of Association	4(2)	• substantially identical
4(3) No Penalty for Association	4(3)	• ON uses "and" and BC "or" as the conjunction between franchisor and franchisor's associate

ON	BC	Commentary
4(4)Provision Void	4(4)	• substantially similar
4(5)Right of Action	4(5)	• substantially similar
5(1) Obligation to Disclose	5(1)	• substantially similar
5(2) Method of Delivery	5(2)	• BC includes delivery by email, but does not include delivery by registered mail (which may be included in the Regulation)
5(3) Single Document	5(3)	• substantially similar
5(4) Contents of Disclosure Document	5(4)	• substantially similar (but does not include "all material facts," which BC includes in a separate clause
n/a	5(5)	• a disclosure document must include all "material facts" (see s. 5(4)(a) of the ON Act)
5(5) Obligation to Disclose Material Change	5(6)	• substantially similar
5(6) Information to be Accurate, Clear and Concise	5(7)	• substantially similar
5(7) Disclosure Exemptions	5(8)	
5(7)(a) Sale by Franchisee	5(8)(a)	• substantially identical
5(7)(b) Sale to Officer or Director	5(8)(b)	• BC requires that the 6 month period immediately precede the grant
5(7)(c) Sale of Additional Franchise	5(8)(c)	• substantially identical
5(7)(d) Sale by Executor	5(8)(d)	• substantially identical
5(7)(e) Fractional Franchise	5(8)(e)	• in addition to specifying 20% as the prescribed percentage, BC also stipulates that only the first year of operation need be considered
5(7)(f) Renewal	5(8)(f)	• substantially identical
5(7)(g)(i) Small Investor	n/a	• small investor exemption not available in BC
5(7)(g)(ii) Term of Less Than 1 Year	5(8)(g)	• BC includes any renewal or extension
5(7)(g)(iii) Multi-Level Marketers	5(8)(h)	• substantially similar
5(7)(h) Large Investor	5(8)(h)	• substantially similar
5(8) Interpretation re Sale by Franchisee Exemption	5(9)	• substantially identical
n/a	5(10) Crown Exemption from Financial Disclosure	
n/a	5(11) Exception for Confidentiality	• exempts from ss. 5(1) and 5(6)

ON	BC	Commentary
	and Site Selection Agreements	confidentiality and site selection agreements
n/a	5(12) Limitation re Confidentiality Agreements	• loss of s. 5(11) exemption if confidentiality restrictions are excessive
n/a	5(13)	• exempts from ss. 5(1) and 5(6) fully refundable deposits that do not exceed the prescribed amount
6(1) Rescission for Late Disclosure	6(1)	• substantially identical
6(2) Rescission for No Disclosure	6(2)	• substantially identical
6(3) Notice of Rescission	6(3)	• BC limits method of delivery to personal delivery; ON includes fax and registered mail
6(4) Effective Date of Rescission	6(4)	• substantially similar
6(5) Service on Holidays	n/a	
6(6) Franchisor's Obligations on Rescission	6(5)	• substantially identical
7(1) Damages for Misrepresentation	7(1)	• BC does not include "agent"
7(2) Deemed Reliance on Misrepresentation	7(2)	• substantially identical
7(3) Deemed Reliance on Disclosure Document	7(3)	• substantially similar
7(4) Defence re Franchisee's Knowledge	8(1)	• BC adds the word "actual" knowledge of the misrepresentation
7(5)(a)(b)(c) Defence re Person's Lack of Knowledge	8(2))(a)(b)(c)	• BC also requires notice be given to the franchisor
n/a	7(5) (d) Defence with Respect to Reliance of Statements of a Public Officer	•
n/a	7(5) (e) Due Diligence Defence	•
n/a	9 Substantial Compliance	• a "technical irregularity" not affecting the substance of the document that is otherwise in substantial compliance will be deemed compliant with s. 5
8 Joint and Several Liability	10	• substantially similar
9 No Derogation of Other Rights	11(1)	• BC uses "any party to a franchise agreement" which is potentially more expansive than "a franchisee or franchisor," as used in ON
n/a	11(2)	• in BC, a franchisee is not required to elect between rescission and damages

ON	BC	Commentary
n/a	11(3)	• in BC, a franchisee is not entitled to be indemnified by way of damages for a loss recovered via a rescission claim
10(1) Attempt to Avoid Jurisdiction Void	12(1)	• substantially similar
n/a	12(2) Application to arbitration provisions	• a provision requiring arbitration of disputes will not be able to designate a venue outside of BC
n/a	12(3) Exception for Existing Claims	•
11 Rights Cannot be Waived	13(1)	• BC includes "prospective franchisee"
n/a	13(2)	• BC excludes from the non-waiver provision any waiver or release made as part of a settlement
12 Burden of Proof	14	• substantially similar
n/a	15 Section 5 of Offence Act does not apply	•
13(2)(3)(4)(5)(6) Financial Disclosure Exemption	n/a	• there is no exemption from financial disclosure in the BC Act. Note that several provinces accomplish this in their regulation
14 Regulations	16	• substantially similar
n/a	17 Commencement	•