Canada: It's Like Watching A Car Crash in Slow Motion[1]

Peter Dillon

There are strange things done in the midnight sun
By the men who moil for gold;
The Arctic trails have their secret tales
That would make your blood run cold;
The Northern Lights have seen queer sights,
But the queerest they ever did see
Was that night on the marge of Lake Lebarge
I cremated Sam McGee.[2]

Peter Dillon

With homage to the writings of Robert Service, this article examines the current mixed and maturing state of the developing franchise jurisprudence in Canada and posits that there are other queer happenings in the land of the midnight sun. Since the inception of franchise-specific legislation in Ontario in 2000, there have been some initial judicial decisions that have led the author to question whether franchising would—or could—survive as a business model in Canada.[3] Some of these early cases, worrisome to the author, continue to stand. Practitioners preparing disclosure documents for use in Canada should be acutely aware of these cases and other issues, especially given the fact that the amount paid by the captive bar insurance company on behalf of Ontario practitioners to settle claims doubled in the period 2002–2006 to 2007–2011.[4] From 2011 to 2013, LawPro has been paying over $2 million annually to settle an average

1. The author's initial title for this paper was "Those Awkward Teenage Years: The Slow and Sometimes Painful Process of the Maturation of Franchise Disclosure Laws In Canada." Recent case law has motivated me to provide a somewhat more stark characterization of the state of the Canadian franchise landscape.

2. ROBERT W. SERVICE, *The Cremation of Sam McGee*, *in* SONGS OF A SOURDOUGH (1907).

3. Peter Dillon, *Will Franchising Survive As a Business Model Under Canadian Franchise Laws And Regulations?*, 26 FRANCHISE L.J. 32 (2006).

4. Andraya Frith, Darrell Jarvis & Rosanne Manson, *Lessons Learned: the Most Common Mistakes Made by Franchise Counsel in the Disclosure Process and How to Avoid Them*, The 12th Annual Franchise Law Conference, Ontario Bar Association (Nov. 6, 2012).

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of fifteen franchise negligence cases per year.[5] Because this early case law was created by a Court of Appeal, it is of particular concern because it may require legislative amendment to overturn its impact.[6] From time to time, a minor rebalancing of the judicial interpretation of franchise laws provides what the author sees as a more balanced approach in determining the relative rights of franchisors and franchisees. With this regulatory context in mind, this article is intended to provide an overview of the current essentials of franchise disclosure in Canada.

I. Some Significant Differences

Most U.S. attorneys understand that Canada and the United States have a lot in common. We share a common language, the Anglo-Norman common-law tradition, and have more cultural commonalities than differences. Superficially, the franchise laws in place in six Canadian provinces[7] have much in common with the pre-sale disclosure regime established by the FTC Franchise Rule[8] (although, unlike some U.S. state jurisdictions, no Canadian jurisdiction

5. E-mail from Tim Lemieux, Claims Prevention & Stakeholder Relations Coordinator, Lawyers' Professional Indemnity Company (LAWPRO) to the author (Feb. 13, 2017, 11:08:24 a.m. EST) (on file with author). In terms of the causes of franchise claims, the breakdown for the past ten years consists of: (i) Communication-related errors: 47% (Examples include: (1) failing to inform a franchisor client about the disclosure requirements under the Arthur Wishart Act and the severe consequences of inadequate disclosure; (2) failing to document in writing that a client instructed the lawyer to take a course of action that was different from the one the lawyer recommended; and (3) retainer did not clearly specify work that was to be done by the lawyer and/or outside expert (e.g., accountant or tax expert)); (ii) Errors of law: 21% percent (Examples include: (1) failing to provide proper advice to the franchisee with regards to the information disclosed by the franchisor pursuant to the requirements under the Arthur Wishart Act; and (2) failing to be sufficiently aware of the disclosure requirements under the Arthur Wishart Act); (iii) Inadequate investigation: 18% (Examples include: (1) failing to adequately review a disclosure document; (2) failing to do due diligence that might discover encumbrances, liens, or outstanding debts; and (3) overlooking or failing to advise clients properly as to their rights of rescission); (iv) Time and deadline errors (7%) and conflicts of interest (7%). *Id.*

6. The prospect of legislative amendment is, at least in the short to medium term, unlikely. The regulation of franchising falls within provincial jurisdiction under the Canadian Constitution. This means that, in order to be effective, legislative amendment would need to be coordinated across all six jurisdictions that currently regulate the subject matter. That's not likely to happen, because most politicians in Canada view franchise legislation as an easy way to make themselves look good by protecting the consumer, as opposed to what the author views as the more balanced approach taken by the FTC in its rulemaking process.

7. Alberta was the first province to introduce franchise specific legislation in 1971. The securities-type franchise law in Alberta was completely gutted and replaced by a presale disclosure law in 1995, at about the same time that Michigan, Wisconsin, and Indiana were also disassembling their registration regimes. *See Franchises Act*, R.S.A. 2000, c.F–23. Ontario followed with its strangely named *Arthur Wishart Act (Franchise Disclosure)*, 2000 S.O. 2000, c.3. Prince Edward Island, New Brunswick, Manitoba and, most recently, British Columbia, have since followed suit. *Franchises Act*, S. P. E. I. 2005, C. 36; *Franchises Act* S.N.B. 2007, c. F–23.5; *Franchises Act*, C.C.S.M. c. F156; *Franchises Act*, SBC 2015, c 35. The Ontario Act was initially dubbed *Bill 33, The Franchise Disclosure Act, 1999*. It was subsequently renamed, as part of a compromise in its drafting stage, for the Minister of Justice and Attorney General who held office in the early 1970s, when a legislative report first recommended franchise legislation for Ontario.

8. 16 C.F.R. § 436 et. seq.

requires registration of the disclosure document). However, there are some major differences in the legislation, and certainly in the judicial interpretation of that legislation, that have created significant practical differences between the two countries. Minor slip-ups north of the forty-ninth parallel can easily result in an otherwise thorough and complete disclosure document being rendered completely non-compliant. Non-compliance in Canada can have considerably more severe repercussions than non-compliance in the United States or other jurisdictions. Here is a potpourri of some of those differences and their repercussions.

A. *Expansive Personal Liability*

Everything else aside, the prospect that a senior officer or director of a corporate franchisor might lose everything that he or she has amassed over a lifetime of endeavor as the result of a deficient disclosure document should focus a franchisor's—and its attorney's—attention on scrupulous compliance with Canadian disclosure requirements. The fact that many instances of personal liability have arisen from noncompliance with formulaic or technical requirements should be even more attention-getting.[9]

Personal liability arises in *all* Canadian jurisdictions if a franchisee suffers a loss *because of* a misrepresentation contained in the disclosure document or in a statement of material change, or *as a result of* the franchisor's failure to otherwise comply with its disclosure obligations.[10] Parties potentially facing personal liability include the franchisor (if he or she is an individual), the franchisor's agent, the franchisor's broker, the franchisor's associates,[11] and every person who signed the disclosure document or statement of material change. Each of the six Canadian statutes requires that two officers or directors of the franchisor sign the disclosure document, certifying that the disclosure document contains no untrue information, representation, or statement, and that it includes every material fact, financial statement, statement, or other information required to be included.[12]

The notion of certification is nothing new for U.S. practitioners. It exists in all registration jurisdictions, but typically requires only that the individual certify that he or she has read and is aware of the contents of the application and documents, and that "all material facts stated in all those documents are

9. For example, failure to sign the Certificate of Disclosure has been held to render an otherwise compliant document completely invalid. 1490664 Ontario Ltd. v. Dig this Garden Retailers Ltd., 2005 CanLII 25181 (ON CA); 6792341 Can. Inc. v. Dollar It Ltd., 2009 ONCA 385 (CanLII), 95 OR (3d) 291, 310 DLR (4th) 683, 60 BLR (4th) 1, 250 OAC 280; Hi Hotel Ltd. P'ship v. Holiday Hospitality Franchising Inc., (2007) 436 A.R. 185 (Q.B.), *aff'd* (2008) 437 A.R. 225 (A.C.A.).

10. *Arthur Wishart Act (Franchise Disclosure)*, 2000 S.O. 2000, c.3, s. 7(1); *Franchises Act*, S. P. E. I. 2005, C. 36, s. 7(1); *Franchises Act* S.N.B. 2007, c. F–23.5, s. 7(1); *Franchises Act*, C.C.S.M. c. F156, s. 7(1); *Franchises Act*, R.S.A. 2000, c.F–23, s. 9(1); *Franchises Act*, SBC 2015, c 35, s. 7(1).

11. For a discussion as to who may constitute a "franchisor's associate," *see* discussion *infra*, Section I.G.

12. If the franchisor has only a single officer and director, then only one signature is required.

accurate and those documents do not contain any material omissions."[13] An officer or director in the United States is liable only for his or her material involvement in a misrepresentation contained in the document.[14] In Canada, not only is a signatory exposed to unlimited personal liability for a misrepresentation contained in the disclosure document—but he or she is also liable if the disclosure document is found non-compliant "in any way."[15]

As if the personal liability arising under the misrepresentation provisions of each of Canada's six franchise statutes were not enough, Canadian courts have followed the Ontario Court of Appeal's decision in *1490664 Ontario Ltd. v. Dig this Garden Retailers Ltd.*[16] and held that the personal liability provisions *also apply* to an award of damages flowing from a statutory rescission claim. The author suggests that this interpretation is contrary to the clear wording of the statute.

The author believes that the judicial interpretation giving rise to this unlimited personal liability in the context of a rescission claim is rather convoluted. It commences with a statutory rescission claim of the franchisee (Section 6 of the Ontario Franchise Disclosure Act (Ontario Act)), on the basis that the franchisor failed to provide a disclosure document in accordance with its Section 5 obligations. The Section 6 rescission claim results in a claim for an amount of damages calculated in accordance with that subsection, i.e., subsection 6(6). Note that subsection 6(1) specifies that these damages are payable *only by the franchisor* or the franchisor's associate, "as the case may be."

Based on the *Dig This* decision, courts have permitted Section 6 losses to form the basis of a claim under Section 7 of the Ontario Act. Section 7 provides for the liability of, among others, every person who signs the disclosure document.[17] However, the clear wording of Section 7 requires as a condition

13. N. Am. Secs. Admins. Ass'n, 2008 Franchise Registration and Disclosure Guidelines at 9, http://www.nasaa.org/wp-content/uploads/2011/08/6-2008UFOC.pdf (last visited Sept. 12, 2017).

14. *See* To-Am Equip. Co. v. Mitsubishi Caterpillar Forklift Am., Inc., 913 F. Supp. 1148, 1152 (N.D. Ill. 1995), *aff'd* 152 F.3d 658 (7th Cir. 1998) (holding that defendant officers and directors of a franchisor must "materially aid in the act or transaction constituting the violation [of the Illinois Franchise Act] to be held liable.") (citing Vukusich v. Comprehensive Accounting Corp., 501 N.E. 2d 1332 (Ill. App. Ct. 1986)); *see also* Bixby's Food Sys., Inc. v. McKay, 193 F. Supp. 2d 1053, 1063 (N.D. Ill. 2002) (holding that an officer and director of a franchisor is liable under the Illinois Franchise Disclosure Act when he materially aids in a transaction that the franchisor admits is a violation of the act and admits that he made untrue statements to the franchisees).

15. *Arthur Wishart Act (Franchise Disclosure)*, 2000 S.O. 2000, c.3, s. 7(1); *Franchises Act*, S. P. E. I. 2005, C. 36, s. 7(1); *Franchises Act* S.N.B. 2007, c. F–23.5, s. 7(1); *Franchises Act*, C.C.S.M. c. F156, s. 7(1). In Alberta, personal liability is included for misrepresentations in the document, but not for non-compliance. *Franchises Act*, R.S.A. 2000, c.F–23, s. 9(1).

16. 2005 CanLII 25181 (ON CA).

17. The franchisee has a right of action under § 7 of the Ontario Act against: (a) the franchisor; (b) the franchisor's agent; (c) the franchisor's broker, being a person other than the franchisor, franchisor's associate, franchisor's agent or franchisee, who grants, markets or otherwise offers to grant a franchise, or who arranges for the grant of a franchise; (d) the franchisor's associate; and (e) every person who signed the disclosure document or statement of material change.

of this personal liability that the loss be "*as a result*" of the franchisor's failure to comply with its disclosure obligations. This provision clearly requires proof that the loss incurred by the franchisee was caused by either the misrepresentation or the failure of the franchisor to comply with its Section 5 obligations. For example, a franchisor's failure to include financial statements that reveal the poor financial health of the franchisor, which in turn contribute to the franchisor's inability to properly perform its obligations under the franchise agreement, might qualify as one example creating a causal connection.

Instead, the court in *Dig This* found that the mere failure of the franchisor to pay the Section 6 damages amounted to a Section 7 loss resulting from the initial Section 5 failure to provide a disclosure document.[18] Of course, if the franchisor simply pays the amount claimed by the franchisee, the signatories to the disclosure document won't have to pay the tab,[19] but this does not detract from what the author believes to be the questionable reasoning that underpins the personal liability in the *Dig This* decision. In the author's view, the court's decision is a circularity of reasoning, and a fusion of what is intended to be two separate and distinct types of claims, with distinct and identified responsible parties. The individual signatories to a certificate of disclosure (or, in the case of *Dig This*, non-signatory officers and directors) were not intended, in the author's view, to be held personally liable for the damages found due under a rescission claim *simpliciter*. The fact that they have been has indelibly modified the franchise landscape in Canada.

B. *All Material Facts*

Canadian franchise disclosure laws require that two categories of information be disclosed to a franchise prospect. First, franchisors must disclose all specified information prescribed by regulation. This is a "closed" list of facts similar to the twenty-three prescribed Items of disclosure found in the FTC Franchise Rule.

The second category of information that franchisors must disclose is an "open-ended" requirement that the disclosure document contain "all material facts, including material facts as prescribed."[20] The definition of material fact contained in the Ontario Act reads as follows:

18. *Dig This*, 2005 CanLII 25181 at ¶ 38 (". . . s. 7 clearly provides that if a franchisee suffers a loss as a result of a franchisor's failure to comply in any way with s. 5, the franchisee has a right of action for damages. Failure to comply in any way with s. 5 includes a failure to provide the disclosure document that the section requires. In circumstances where a franchisor fails to make the payments required of it under s. 6(6), those damages could include such amounts. As well, if a franchisee suffered any other loss as a result of the franchisor's failure to comply with s. 5, the franchisee may sue for such damages under s. 7.").

19. *Id.* at ¶ 49.

20. The requirement to disclose all material facts was likely an introduced oversight. Alberta's original franchise legislation, introduced in 1971, was securities-type disclosure requiring a certificate from the filing franchisor stating that the document made "full, plain and true" disclosure. When that Act was completely revised in 1995, the wording of the certificate was modified to require that the disclosure document "contain all material facts including [those] . . . set out in

> material fact includes any information about the business, operations, capital or control of the franchisor or franchisor's associate 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; . . .[21]

In light of the breadth of this definition, the list of what might constitute a material fact is limitless. Although the definition requires that the information have "a significant effect on the value or price of the franchise . . . or the decision to acquire the franchise,"[22] there is no requirement that the value be *negatively* affected. Based on the definition, even a material fact that might have a significant *positive* effect on the value or price of the franchise must be disclosed.

Franchisees argue that the additional information required by the "all material facts" language is important for them to consider in making the decision to invest in a particular franchise. However, the author believes that when the legislature departed from the certainty of a closed list of disclosure items and required disclosure of information about a franchisor or a franchise system that might have a significant effect on price, or the decision to buy, it created problems of where to draw the line. The following list is a sampling of issues the author has had to consider with clients and decide whether to disclose: (1) information regarding industry trends; (2) information known to the franchisor about competition to the franchise system; (3) information about suppliers (agreements coming up for renewal, disputes, supply to competitors, etc.); (4) future plans for development and expansion (foreign and international); (5) information about products in development; (6) retirement plans of key executives; (7) health issues facing key executive and significant shareholders; (8) financial difficulties of the franchisor; and (9) deteriorating banking relationships and capitalization issues generally. This list is by no means exhaustive. And in the author's experience, most franchisors will be reluctant to reveal much or any of this information. Conversely, one can only imagine the list of questions asked by counsel for a franchisee on an examination for discovery (in the United States, a deposition) in order to discover facts known to the franchisor that were not disclosed.

C. *Site-Specific Disclosure (!)*

Yes, you read that correctly. The Court of Appeal of Ontario in *6792341 Canada Inc. v. Dollar It Limited*[23] held that a generic form of disclosure document was not adequate to allow a prospect to make an "informed" decision regarding a proposed purchase of a franchise. In particular, the court found

schedule 1." A strong argument therefore exists that the open-ended "all material facts" disclosure regime started in Alberta and was replicated without serious consideration across the country.

21. *Arthur Wishart Act (Franchise Disclosure)*, 2000 S.O. 2000, c.3, subsection 1(1) (emphasis added).

22. *Id.*

23. 2009 ONCA 385 (CanLII); 95 OR (3d) 291; 310 DLR (4th) 683; 60 BLR (4th) 1; 250 OAC 280.

that the disclosure document lacked information regarding the specific territory to be granted, as well as a copy of the head lease for that particular property. The court made this finding despite the fact that the definition of "material fact" in the Ontario Act, and none of the information that the general regulation requires franchisors to disclose, mentions anything about a specific location. Instead, the author believes the court ignored the first part of the definition:

> material fact includes any information about the *business, operations, capital or control of the franchisor or franchisor's associate or about the franchise system*[24]

(which, on its face, makes no mention of location) and focused solely on the second part of the definition:

> *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; . . .*[25]

in order to conclude that to satisfy the test of compliant disclosure, the prospective franchisee must receive "full and accurate disclosure . . . so the [prospect] can make a properly informed decision about whether or not to invest in a franchise."[26]

The advent of site-specific disclosure obligations has exponentially increased the time and energy expended by franchisors and their counsel to provide compliant disclosure and has resulted in a concomitant increase in the risk of failing to do so. The idea that one can hand out a "one size fits all" disclosure document, and then proceed with the business of finalizing the terms of the franchise agreement and development of the location, must be completely discarded.

In response to the *Dollar It* decision, franchisors developed various "site specific" disclosure strategies.[27] One strategy saw the franchisor use a two-stage process of disclosure. At the initial phase, the franchisor would deliver a complete "generic" form of disclosure document and receive a receipt for that disclosure. Once a site was selected and a deal negotiated, the franchisor prepared the final documents for execution, appended them to the generic form of disclosure document together with any other documents relevant to the location (for example, master leases or head leases and supply agreements), and sent all of these documents to the prospect. The franchisor would then provide the franchisee with a second fourteen-day cooling off period. Franchisors then collected monies and signed-around agreements only after the second cooling off period ended. A second strategy shortened this process by including the site-specific materials, information, and agreements into a Statement of Material Change, which may be delivered at any time

24. *Arthur Wishart Act (Franchise Disclosure)*, 2000 S.O. 2000, c.3, subsection 1(1) (emphasis added).

25. *Id.* (emphasis added).

26. *Dollar It*, 2009 ONCA 385, at ¶ 16.

27. Which, if the court's decision in *Raibex*, discussed *infra*, Section I.D., is upheld on appeal, must be closely re-examined.

prior to payment of consideration or execution of documents without re-starting the fourteen-day cooling off period.

In deciding on any course of action or in advising clients, counsel should bear in mind that the Ontario Act is being, for the most part, strictly construed against the interests of franchisors, as mandated by this edict of the Ontario Court of Appeal:

> The purpose of the legislation is to protect franchisees and the mechanism for so doing is the imposition of rigorous disclosure requirements and strict penalties for non-compliance. The legislation must be considered and interpreted in light of this purpose.[28]

Prospective franchisees may believe that strict construction of the Ontario Act against franchisors is necessary to balance what they see as the unequal bargaining power of franchisors and prospective franchisees. But the economic and administrative burden placed on franchisors to provide generic disclosure followed by a disclosure document specifically tailored to the facts and circumstances of each and every location is hard to quantify, even if the somewhat faster and simpler Statement of Material Change option is employed. As most U.S. practitioners know, such a practice would be illegal in any registration state, where franchisors are permitted only to deliver the form of document on record with the state.[29] Aside from the cost and inconvenience (including a second fourteen-day cooling off period), the opportunity for administrative error, technical oversight, or substantial omission multiplies the risk exponentially that the franchisor may be exposed to a claim for rescission, and its concomitant personal liability, discussed previously under the heading of "Expansive Personal Liability."

As a decision of the Ontario Court of Appeal, the impact of the *Dollar It* decision will be pervasive and long-lasting. This article provides two appendices to assist practitioners in dealing with the repercussions of the *Dollar It* decision, including a questionnaire to help determine whether an entity is an associate of the franchisor[30] and a summary checklist of the missing material facts that the Court of Appeal found fatal to the disclosure document. As a further assistance to the practitioner, this article includes suggested wording for a limitation of an attorney's retainer relative to any franchise disclosure work to be undertaken.

28. *Dollar It*, 2009 ONCA 385, at ¶ 72.

29. For example, Section 10 of the Illinois Franchise Disclosure Act provides that: "No franchisor may sell or offer to sell a franchise in this State . . . unless the franchisor has registered the franchise with the Administrator by filing such form of notification and disclosure statement as required under Section 16." 815 ILL. COMP. STAT. 705/10.

30. Whether an entity is an "associate" of the franchisor is critical in all Canadian jurisdictions. Under *Dollar It*, a failure to correctly identify all associates of the franchisor and to include the prescribed information (and all other material facts) relative to those associates, may result in a finding of "no disclosure" being made.

D. Raibex *and Premature Disclosure*

The issue of site-specific disclosure obligations is particularly problematic in light of the recent decision of the Ontario Superior Court of Justice in Raibex Canada Ltd v ASWR Franchising Corp.[31] Decided in the late fall of 2016, and currently under appeal, *Raibex* is highly problematic to franchisors who sign franchise agreements with prospects before a site has been selected. In *Raibex*, the franchisee sought to rescind the franchise agreement on the basis that the disclosure document was deficient in content and that the form of certification attached to the disclosure document was also deficient.[32] Given that the franchisor had delivered a disclosure document and that more than sixty days had elapsed since the date of signing of the franchise agreement, it was necessary for the franchisee to show that the disclosure provided amounted to no disclosure for purposes of the Ontario Act.[33]

In mid-October 2012, the franchisor delivered its disclosure document to the principals of the franchisee prospect.[34] Approximately four weeks later, the franchisor obtained a signed copy of the franchise agreement, and its agent received payment of the franchise fee.[35] However, at the time the parties signed the franchise agreement, they had not yet selected a site or executed a head lease.[36] Accordingly, although the franchisee received the franchisor's standard form of sublease, it did not receive a copy of the head lease until sometime later during lease negotiations.[37]

After a few months of operating its location, the franchisee brought a claim for rescission and moved for summary judgment. The franchisee based its claim for rescission on a number of alleged deficiencies in the franchisor's disclosure document, including a failure to include a copy of the head lease; a failure to disclose adequate estimates for the development costs of the franchise; deficiencies in the disclosure certificate, which was signed by the sole officer and director of the franchisor; and a failure to deliver the disclosure document as one document at one time.[38]

The trial judge found that the franchisee was entitled to rescind the franchise agreement both because the disclosure document did not include a copy of the head lease for the location, and because there was insufficient disclosure with respect to the estimated development costs of the restaurant.[39] The trial judge acknowledged that the practice of selecting a location after signing a franchise agreement "may not be unusual," but nonetheless found that it gave rise to a material deficiency in the disclosure provided.

31. 2016 ONSC 5575.
32. *Id.* at ¶ 58.
33. *Id.* at ¶ 55.
34. *Id.* at ¶ 13.
35. *Id.* at ¶¶ 23–24.
36. *Id.* at ¶ 25.
37. *Id.* at ¶ 28.
38. *Id.* at ¶ 55.
39. *Id.* at ¶ 114.

The judge based her finding on what she described as the potential for franchisors to abuse prospective franchisees by disclosing "prematurely" and thus avoid the requirement to disclose material facts that are not yet known.[40] The court reached this conclusion despite finding no evidence of any such "abuse" by the franchisor in this case.[41] The judge gave little or no weight to the fact that the franchisee was given the option to decline the location in question and receive his deposit back, or continue to look for a different location, and opted to accept the location.[42]

The judge also found that the development cost estimate provided to the franchisee was materially deficient, and itself formed the basis for a valid rescission claim.[43] Although the actual development cost was in line with the pro forma development cost contained in the disclosure document, the development cost in the disclosure document related to construction from a "shell" structure, as opposed to the conversion of an existing location, which this franchisee developed. The judge once again stated that disclosure ought to have followed a determination that the development would be made relative to an existing structure, rather than from a shell.[44] The disclosure document in question did contain broad disclaimers concerning cost estimates. The judge, however, stated that disclaimers do not excuse a franchisor from its mandatory disclosure obligations and furthermore may themselves amount to an admission that the franchisor could not meet its statutory disclosure obligations.[45]

Raibex, simply stated and if upheld on appeal, means that a franchisor may not disclose to a prospect until all material facts are known. The practical implication of the case to franchisors is enormous. Many systems will disclose to a prospect and commence training pending a final site selection. Now, franchisors will have to wait to disclose until a site is found and an accurate development cost estimate for the location is determined. This creates a potential risk that franchisors who enter into binding leases may, after disclosing to the prospect, find themselves without a franchisee for the location. It also means that a franchisor cannot train the franchisee or expose it to any of the franchisor's confidential information prior to finding a location, because the franchisor cannot enforce a confidentiality agreement signed prior to disclosure.

E. *What Constitutes a Loss and Accounting for Profits*

In the *Springdale Pizza* series of cases,[46] the franchisor sought to reduce the amount it had to pay to a franchisee for supplies and equipment on a rescission claim under Section 6(6) of the Ontario Act. The franchisor claimed

40. *Id.* at ¶ 73.
41. *Id.* at ¶ 76.
42. *Id.* at ¶ 27.
43. *Id.* at ¶ 114.
44. *Id.* at ¶ 85.
45. *Id.* at ¶ 83.
46. *Springdale* is a confusing case to track because there are so many decisions and appeals. For a summary of the various decisions, *see* Mary Paterson, *Springdale Pizza, Eleven Decisions on Disclosure, Rescission and Damages (and Counting)*, Osler Update (May 2014), https://www.

that the equipment was in very poor condition and that the franchisee was therefore "unable" to return the equipment.[47] The Master found that the poor condition of the equipment was in part caused by the franchisor's lengthy opposition to the franchisee's attempts to rescind the franchise agreement.[48] Because the Ontario Act is intended to be remedial, the Master stated that the franchisee had no duty to mitigate, and that the franchisor's obligation to repurchase the equipment existed regardless of its condition.[49] Presumably the rescinding franchisee must still be in possession of the equipment for which he or she seeks reimbursement , i.e., it would not be enough to claim reimbursement for equipment that the former franchisee no longer possessed.

In *Springdale Pizza*, the rescinding franchisee had earned a small net profit during the period of operation prior to rescission.[50] The issue was not whether a profitable franchisee had the same right to rescind as a franchisee that had incurred losses; rather, the court was asked to determine whether the net profits of the franchisee should be set off against the losses for which the franchisee was to be compensated pursuant to Sections 6(6)(a)–(c) of the Ontario Act, or whether the franchisee was simply entitled to no compensation pursuant to Section 6(6)(d) of the Ontario Act. The court concluded that the Ontario Act does not provide for a franchisor to set off any revenue against other amounts awarded. The court stated: "if it were otherwise, sections (a) to (c) of the Act would not be necessary. A single section providing compensation for losses would suffice if the intention of the Act was simply to put a franchisee back into its former position."[51]

And so, at least in Ontario, a rescinding franchisee may end up better off than he would otherwise have been had he never purchased the franchise.

F. *Failure of the Franchisor to Provide Support*

In *Allied Domecq Retailing International Canada Ltd. v. Bertico Inc.*, after a trial on the merits, twenty-one Québec-based Dunkin' Donuts franchisees received a damages award exceeding $16 million 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 from the Tim Horton's brand.[52] The franchisees also succeeded in their claim that the franchisor failed to enforce brand standards and tolerated under-performing franchisees that caused damage to the brand.[53]

osler.com/en/resources/regulations/2014/franchise-review-may-2014/springdale-pizza-eleven-decisions-on-disclosure (last visited Sept. 12, 2017).

47. 2189205 Ontario Inc. v. Springdale Pizza Depot Ltd., 2014 ONSC 530.
48. *Id.* at ¶ 4.
49. *Id.*
50. 2189205 Ontario Inc. v. Springdale Pizza Depot Ltd. et al., 2013 ONSC 1232.
51. *Id.* at ¶ 30.
52. 2015 QCCA 624.
53. *Id.*

On appeal, Dunkin' Donuts argued that the trial division decision was "unprecedented in the annals of franchise law, not only in Québec 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."[54] The Court of Appeal upheld the trial decision, but reduced the damages to around $10 million. In upholding the decision, the Court of Appeal found that the duty of good faith, well-established in the province,[55] imposed an obligation on the franchisor to provide a certain level of support. In reliance on this principle, the Court of Appeal endorsed the trial judge's finding that the franchisor had breached a number of "explicit obligations as well as obligations that may be inferred from their nature."[56] 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.[57]

In the trial court's view, the franchisor had done neither. The trial court ascribed "a host of other explicit and implicit failings" to the franchisor during the period from 1995 to 2005: (1) failure to consult, support, and assist the franchisees; (2) absence of a corporate store to train new staff and test new products; (3) inordinately high turnover of its executives; (4) too few consultants for the network of franchisees; (5) failure to remove under-performing franchisees from the network; and (6) implementation and subsequent withdrawal of frozen products.[58] The trial court 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."[59]

In the ordinary course, the author would say that a decision of a Québec court is not of significant precedential value, given its typical reliance on provisions of the Civil Code (i.e., decisions of Québec courts are not considered to have precedential value in the common law courts of the other provinces).[60] In this case, however, the decision included an interpretation of

54. *Id.*

55. The court expressly relied on the duty of good faith as announced in *Provigo Distribution Inc. v. Supermarché A.R.G. Inc.*, 1997 CanLII 10209 (QC CA), [1998] R.J.Q. 47 (C.A.).

56. Allied Domecq Retailing Int'l Can. Ltd. v. Bertico Inc. Dunkin Donuts, 2015 QCCA 624 at ¶ 30.

57. *Id.* ¶ 32.

58. *Id.*

59. *Id.*

60. Although cited in several subsequent decisions of Québec courts, the *Dunkin' Donuts* decision has not been cited by a common law court of any province. Furthermore, certain commentators have suggested that the case is constrained in its application as a result of the court's reliance on a specific provision of the *Code Civil*; namely article 1434, which provides that "a contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law." *See* Jennifer Dolman & Alexandre Fallon, *Dunkin Donuts Decision has*

the plain meaning of contractual provisions and consideration of the business judgement rule, legal concepts well known in the common law. 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*,[61] 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*.[62]

The case is also notable because although it was appealed to the Supreme Court of Canada, the court refused to hear the appeal, thereby effectively affirming the decision.[63]

G. *Disclosure Relative to "Franchisor's Associates"*

Among other things, the court in *Dollar It* found that the disclosure document was non-compliant because it did not contain information about a "franchisor's associate" that was sufficiently adequate to permit the prospect to make an informed decision to purchase the franchise. This niggling detail might easily escape the notice of a practitioner.

Who is a franchisor's associate? The definition from the Ontario Act reads as follows:

> "franchisor's associate" means a person, (a) who, directly or indirectly, (i) controls or is controlled by the franchisor, or (ii) is controlled by another person who also controls, directly or indirectly, the franchisor, and (b) who (i) is directly involved in the grant of the franchise, (A) by being involved in reviewing or approving the grant of the franchise, or (B) by making representations to the 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 the franchisee and to whom the franchisee has a continuing financial obligation in respect of the franchise.[64]

The definition requires that two criteria be met. First, by part (a), the persons have to be under common control. That frequently happens when a group of corporations exists within a franchise system, each fulfilling a dif-

limited Application outside of Quebec, CAN. LAWYER (May 4, 2015), http://www.canadianlawyermag.com/5580/Dunkin-Donuts-decision-has-limited-application-outside-Quebec.html (last visited Sept. 12, 2017).

61. 2004 SCC 68 (CanLII), [2004] 3 S.C.R. 461.

62. *Allied Domecq*, 2015 QCCA 624 at ¶ 101 (emphasis added).

63. Dunkin' Brands Canada Ltd. v. Bertico Inc., 2016 CanLII 13728.

64. *Arthur Wishart Act (Franchise Disclosure)*, 2000 S.O. 2000, c.3, s. 1(1)

ferent function. Second, by part (b), the associate has to be directly involved in the grant of the franchise, or exercise significant operational control over a franchisee which has a continuing obligation under the franchise agreement that is owed to the associate.

Determining who is a "franchisor's associate" is important not only for the purposes of making accurate and complete disclosure. Section 7 of the Ontario Act also includes a franchisor's associate in its list of those who may be personally liable for damages under that section (which, may include damages for rescission under Section 6).[65]

The *Dig This* decision was the first decision of the Court of Appeal to consider the definition of franchisor's associate. In that case, two individuals who each owned fifty percent of the shares were found to be associates of the franchisor on the basis of their control[66] and on the basis that both were directly involved in granting the franchise to the respondents by making representations to the respondents on behalf of the franchisor.[67] Accordingly, the court in *Dollar It* determined that the corporate sub-landlord of the franchisee was an associate of the franchisor.[68] The two corporations (the sub-landlord and the franchisor) shared common ownership, but is it fair to say that a sub-landlord exercises significant operational control over a franchisee? Certainly any lease has many, many operational provisions, but are they relevant to the franchise relationship? And likewise, just because the franchisee is paying rent, is that payment relevant to the franchise relationship? Equally strange, a different panel on a cross-appeal of *Dollar It* found the individual in question to be a franchisor's associate based solely upon an analysis of the first branch of the test (control), without considering the second branch of the test, namely involvement in the grant of the franchise or operational control.[69]

Although potentially a subject of debate, until legislative change or a new line of cases emerges, the conclusion is that any entity:

- under common control;
- exercising any operational control (which will most likely be found to be present in the form of a contract such as a lease or supply agreement); and
- to whom the franchisee makes payments

should be considered a "franchisor's associate," and the relevant disclosure made.

65. *See* discussion, *supra* Section I.A.

66. Oddly, the court did not reference the definition of "deemed control" under § 1(3) that requires that voting securities carrying *more than* fifty percent of the votes for the election of directors be held for a finding of deemed control.

67. 1490664 Ontario Ltd. v. Dig this Garden Retailers Ltd., 2005 CanLII 25181 (ON CA) at ¶ 43.

68. 6792341 Can. Inc. v. Dollar It Ltd., 2009 ONCA 385 (CanLII) at ¶ 42.

69. *Id.* at ¶ 5 ("In our view, it is clear that the finding that Merali controls the franchisor renders him a franchisor's associate for the purpose of the Act . . .").

H. *What Needs To Be Disclosed About "Franchisor's Associates"*

1. Material Facts

As mentioned above, all Canadian jurisdictions require disclosure of all "material facts." The definition of material fact includes ". . . any information about the business, operations, capital or control of the . . . franchisor's associate."[70]

What then, is material? It is frankly impossible to say that any particular fact might not *be of interest* to a prospective franchisee. For example, the fact that the president's mother has voting control of the franchisor corporation is of interest. How old is she? Where does she live? Is she in good health? Does she exercise good business judgement? Has she ever been bankrupt (if she is not an officer or director, and is not involved in the grant of franchises, this will not be mandated disclosure)? Is she of sound mind? What happens to voting control on her death? One can say that any one of these facts and a hundred more would be of interest to a prospective franchisee.

The author believes that sound business and legal arguments can be made to the effect that the list of prescribed facts set out in Canadian franchising regulations (collectively, the Regulation)[71] should be considered full and complete disclosure, subject to the usual proviso found in the United States that any claim that contradicts the information found in the disclosure document will constitute an unfair and deceptive trade practice, or the failure to state a fact required to be included so that the information is not otherwise misleading.[72]

The judge in *Dollar It* said "by having no information about [the sub-landlord], the franchisee cannot make an informed decision in relation to the franchise. It knows nothing about the party with which it is expected to sign a sublease."[73] This begs the question "how much does a prospect need to know in order to make an informed decision?" It also ignores the reality that this kind of information is not generally available in non-franchise situations. Why then, are franchises treated differently? And even in franchise situations, the franchisee won't be entitled to disclosure about an arm's-length landlord.

70. *Arthur Wishart Act (Franchise Disclosure)*, 2000 S.O. 2000, c.3, s. 1(1); *Franchises Act*, S. P. E. I. 2005, C. 36, s. 1(1); *Franchises Act* S.N.B. 2007, c. F–23.5, s. 1(1); *Franchises Act*, C.C.S.M. c. F156, s. 1(1); *Franchises Act*, R.S.A. 2000, c.F–23, s. 1(1); *Franchises Act,* SBC 2015, c 35, s. 1(1).

71. Each provincial regulation contains a list of prescribe facts: General Regulation 240/95, made under the *Franchises Act*, R.S.A. 2000, c.F–23; General Regulation 581/00, made under the *Arthur Wishart Act (Franchise Disclosure)*, 2000 S.O. 2000, c.3; General Regulation EC 2006-232, made under the *Franchises Act*, S. P. E. I. 2005, C. 36; General Regulation 2010-92, made under the *Franchises Act* S.N.B. 2007, c. F–23.5; and General Regulation 29/2012, made under the *Franchises Act*, C.C.S.M. c. F156.

72. An International Institute for the Unification of Private Law (UNIDROIT) panel of governmental experts has agreed that a closed list of disclosure items is preferable to an open ended list. Model Franchise Law Explanatory Report at ¶¶ 76–78, http://www.unidroit.org/english/documents/2002/study68/s-68-48-e.pdf (last visited Sept. 12, 2017).

73. *Dollar It*, 2009 ONCA 385, at ¶ 44.

The Regulation requires the following disclosure to be made about a franchisor's associate:

2.3. A statement, including a description of details, indicating whether, during the ten years immediately preceding the date of the disclosure document, the franchisor's associate has been convicted of *fraud*, *unfair or deceptive business practices*, or a violation of a law that regulates franchises or business or if there is a charge pending against the person involving such a matter;

2.4 A statement, including a description of details, indicating whether the franchisor's associate has been subject to *an administrative order or penalty* imposed under a law of any jurisdiction regulating franchises or business or is the subject of any pending administrative actions to be heard under such a law;

2.5. A statement, including a description of details, indicating whether the franchisor's associate has been found liable in a *civil action of misrepresentation*, *unfair or deceptive business practices or violating a law that regulates franchises or businesses*, including a failure to provide proper disclosure to a franchisee, or if a civil action involving such allegations is pending against the franchisor's associate;

2.6. Details of *any bankruptcy or insolvency proceedings*, voluntary or otherwise, any part of which took place during the six years immediately preceding the date of the disclosure document, against the franchisor's associate;

6.4. The terms and conditions of the *financing arrangements* that the franchisor's associate offers directly or indirectly to franchisees;

6.5. A description of any *training or other assistance* offered to franchisees by the franchisor's associate, including whether the training is mandatory or optional, and if the training is mandatory, a statement specifying who bears the costs of the training;

6.6. If the franchisee, as a condition of the franchise agreement, is required to contribute to an advertising fund, a statement describing *the percentage of the fund*, other than the percentage described in sub-subparagraph A, that has been *retained by the franchisor's associate* in the two fiscal years immediately preceding the date of the disclosure document;

6.6 Another statement describing, a projection of the percentage of the fund to be retained by the franchisor's associate in the current fiscal year;

6.7. A description of any restrictions or requirements imposed by the franchise agreement with respect to *obligations to purchase or lease* from the franchisor's associate or suppliers approved by the franchisor's associate;

6.8. A description of whether the franchisor's associate receives a *rebate*, *commission*, *payment or other benefit* as a result of purchases of goods and services by a franchisee and, if so, whether rebates, commissions, payments or other benefits are shared with franchisees, either directly or indirectly;

6.9. A description of the rights the franchisor's associate has to the *trade-mark*, *service mark*, *trade name*, *logo or advertising or other commercial symbol* associated with the franchise; and

6.16. For each closure of a franchise of the type being offered within the three fiscal years immediately preceding the date of the disclosure document, the reasons for the closure, including *whether the franchisor's associate terminated or cancelled the*

> *franchise agreement*, or the franchisor's associate refused to renew the franchise agreement.[74]

Accordingly, the preparation of a compliant disclosure document requires adequate care and attention be directed to this aspect of disclosure. This is especially true for foreign systems entering the Canadian market, since the concept of "franchisor's associate" is not in use outside Canada. To assist with this analysis, this article includes a questionnaire at Appendix A to help identify entities that may qualify as "franchisor's associates" under Canadian law.

2. Material Changes

A material change is defined as follows:

> [A] change in the business, operations, capital or control of the franchisor or franchisor's associate, or a change in the franchise system, or a prescribed change, that would reasonably be expected to have a significant adverse effect on the value or price of the franchise to be granted or the decision to acquire the franchise and includes a decision to implement such a 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.[75]

Material changes in the business, operations, capital, or control of the franchisor and of the franchisor's associate(s) need to be disclosed.[76] The period during which material changes need to be disclosed starts on the date that disclosure is made and ends (subject to the proviso that the initial disclosure was not premature, as per *Raibex*) on the date an agreement relating to the franchise is signed, or a payment is made.

As with the definition of "material fact" discussed previously, the author believes the definition of material change was clearly never intended to apply to a particular location, because it references only the franchisor, the franchisor's associate, and the franchise system—with no mention of the proposed location or business under negotiation. However, the author has little confidence in a post-*Dollar It* court to make this distinction, and accordingly the same site-specific disclosure strategy is recommended when a *material change* occurs to information that has previously been disclosed to a prospect.

74. General Regulation 581/00, made under the *Arthur Wishart Act (Franchise Disclosure)*, 2000 S.O. 2000, c.3, Part II, s. 6.16 (emphasis added).

75. *Arthur Wishart Act (Franchise Disclosure)*, 2000 S.O. 2000, c.3, s. 1(1); *Franchises Act*, S. P. E. I. 2005, C. 36, s. 1(1); *Franchises Act* S.N.B. 2007, c. F–23.5, s. 1(1); *Franchises Act*, C.C.S.M. c. F156, s. 1(1); *Franchises Act*, R.S.A. 2000, c.F–23, s. 1(1); *Franchises Act*, SBC 2015, c 35, s. 1(1).

76. *Arthur Wishart Act (Franchise Disclosure)*, 2000 S.O. 2000, c.3, s. 5(5); *Franchises Act*, S. P. E. I. 2005, C. 36, s. 5(5); *Franchises Act* S.N.B. 2007, c. F–23.5, s. 5(6); *Franchises Act*, C.C.S.M. c. F156, s. 5(7); *Franchises Act*, R.S.A. 2000, c.F–23, ss. 4(4),(5); *Franchises Act*, SBC 2015, c 35, s. 5(6).

I. Form over Substance

The author believes that the notion of "no harm, no foul" has found no traction in the judicial interpretation of the disclosure requirements under the Canadian Acts. On the contrary, the author posits that a rigorous technical approach has been the order of the day.[77] Perhaps no better example of this can be found than in the willingness of the courts to dispense with an entirely compliant franchise disclosure document because the certificate of disclosure is unsigned.[78] In reality, of course, whether a disclosure document is signed or not adds nothing to the quality or quantity of the information disclosed. The author sees a certain irony in that the court in *Dig This* justified its edict that disclosure with an unsigned certificate amounted to no disclosure because the required signatures of officers and directors on the document provided the statutory basis for personal liability, while simultaneously imposing personal liability on the officers and directors of the franchisor whose signatures were absent from the certificate![79] Clearly, the courts' conclusion that signatures are necessary to form the basis for a claim against those individuals is difficult to understand. All the court need do, as it did in *Dig This*, is to find those same individuals to be "franchisor's associates," and the personal liability then flows as a result of the conflation of Sections 6(6) and 7.[80]

Springdale Pizza,[81] a decision of the Ontario Court of Appeal, is in the author's opinion another victory of form over substance. First, the court noted that the financial statements were Notice to Reader statements. The franchisor argued that, effectively, this did not alter the quality, accuracy, or sufficiency 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. Second, the Court of Appeal also upheld the motion judge's finding that the certificate of disclosure was deficient because it contained only one signature of an officer or director, instead of the required two signatures. Although 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.

On the latter point, it is true that the majority of Canadian jurisdictions require that the disclosure document be delivered "as one document, at one time."[82] Alberta does not require delivery of the disclosure document as a single document at one time. This, along with a "substantial compli-

77. *See Dollar It*, 2009 ONCA 385.

78. *See* Hi Hotel Ltd. P'ship v. Holiday Hosp. Franchising Inc., (2007) 436 A.R. 185 (Q.B.), *aff'd* (2008) 437 A.R. 225 (A.C.A.).

79. *Dig This*, 2005 CanLII 25181.

80. *See* discussion, *supra* Section I.A.

81. 2240802 Ontario Inc. v. Springdale Pizza, 2013 ONSC 7288.

82. *Arthur Wisbart Act (Franchise Disclosure)*, 2000 S.O. 2000, c.3, s. 5(3); *Franchises Act*, S. P. E. I. 2005, C. 36, s. 5(3); *Franchises Act* S.N.B. 2007, c. F–23.5, s. 5(3).

ance" provision in the Alberta Act[83] has, on occasion, permitted a more flexible review by the courts on the adequacy of disclosure, rather than an "all or nothing" approach.[84] However, the substantial compliance provision found in the Alberta regulation, which states that "a disclosure document is properly given . . . if the document is substantially complete" did not save the disclosure document in the *Hi Hotel*[85] decision, where the absence of a signed certificate of disclosure was held to be a fatal flaw. Manitoba appears to have attempted to avoid an overly technical approach to the interpretation of its Act by stating that "substantial compliance" will satisfy the requirements of the Manitoba Act, "*even if* the disclosure document contains a technical irregularity or mistake not affecting the substance of the document."[86] British Columbia's Act, the newest on the Canadian legislative stage, appears to go even further, allowing "a defect in form, a technical irregularity or an error . . ."[87] Time will tell whether courts will give effect to these legislative directives for a purposive approach to statutory interpretation.

The Court of Appeal for Ontario, in a decision just released, further entrenched what the author sees as a formalistic approach to interpretation of the Ontario Act. In *Mendoza v. Active Tire & Auto Centre Inc.*,[88] the franchisee brought a motion for summary judgment, seeking rescission. The motions judge reviewed the franchisee's prior business experience and found it significant that the franchisee had employed a franchise broker, an accounting firm, and a boutique financial and legal firm as part of his investigation of the franchise. The franchisee was provided with a 175-page disclosure document and a number of other documents over approximately three months, after which he signed the franchise agreement and paid a franchise fee.

The franchisee based his claim for rescission on five defects in the disclosure document. First, the disclosure document was signed by the franchise development manager, and not by two officers or directors of the franchisor. Second, only a portion of the franchisor's financial statements was included in the disclosure document. Third, the materials provided to the franchisee were not delivered at one time as part of a single document. Fourth, the letter of credit provided by the franchisee was markedly different than the one described in the disclosure document. Fifth, there were no assumptions and information included as part of the financial projections forming part of the disclosure document. The motions judge held that the franchisee had clearly made an "informed decision." He received "extensive material." The judge was also clearly vexed by the franchisee's refusal to answer questions about any "misleading or deficient portions" of the disclosure document. Interest-

83. General Regulation 240/95, s. 2(4).
84. *See* Emerald Devs. Ltd. v. 768158 Alberta Ltd., 287 A.R. 151 (Q.B. 2001).
85. Hi Hotel Ltd. P'ship v. Holiday Hosp. Franchising Inc., (2007) 436 A.R. 185 (Q.B.), *aff'd*, (2008) 437 A.R. 225 (A.C.A.).
86. *Franchises Act*, C.C.S.M. c. F156, s. 5(10) (emphasis added).
87. *Franchises Act*, SBC 2015, c 35, s. 9.
88. 2016 ONSC 3009.

ingly, the judge used the Court of Appeal's decision in *Dollar It* to underpin his decision. He noted that in that case, the court conducted an analysis of what documents were provided to the prospect which led the court to conclude that "the stark and material deficiencies in the disclosure document in this case did not meet the requirements of the Act."[89] These deficiencies led the prospect in *Dollar It* to make an uninformed decision to enter into the franchise agreement.

In addition, the motions judge stated that "for me, an analysis of the nature and extent of the deficiencies is required as part of reaching a conclusion as to whether the disclosure document exists."[90] He concluded that the franchisor did provide sufficient documentation to the prospect to allow him to make an informed decision, even though the disclosure document was not in full compliance with the Act. The deficiencies were not significant or misleading.[91]

The Court of Appeal disagreed and permitted the franchisee to rescind.[92] The franchisor's failure to have the disclosure document signed by two officers or directors was a material deficiency. According to the court, this provision of the Ontario Act and Regulation gives the franchisee substantive rights against the signatories to the document and impresses upon those who sign the document the importance of ensuring that the document is complete and accurate.[93] The court also found that the franchisor's failure to produce current financial statements[94] amounted to no disclosure.[95] The court concluded by noting that: "If the franchisor cannot [provide the required information to prospective franchisees within the prescribed time] it cannot comply with the Act . . . [and] it cannot proceed to engage with prospective franchisee's or operate a franchise system as defined in the Act."[96] And so, at least for the time being, franchisors and their counsel cannot rely on a document that substantially complies: strict technical compliance is the applicable Canadian standard.

II. A Review of Norms of Judicial Construction

It has been interesting for the author to watch courts justify some interpretations of the Ontario Act. Many of the surprising judicial decisions have been justified by a "purposive" approach to the legislation. The purpose of franchise

89. *Id.* at ¶ 22.
90. *Id.* at ¶ 23.
91. *Id.* at ¶ 24.
92. 2017 ONCA 471.
93. *Id.* at ¶ 24.
94. The franchisor delivered financial statements twenty-eight weeks after the end of the franchisor's fiscal year end. The financial statements should have been delivered no later than twenty-six weeks after the franchisor's fiscal year end. *Id.* at ¶ 32.
95. *Id.* at ¶ 33 ("Financial statements are clearly an extremely significant component of the information a prospective franchisee requires in order to the viability of the franchisor's franchise operations and the safety and security of becoming a franchisee in that franchisor's system.").
96. *Id.* at ¶ 34.

disclosure laws, according to these judges, is to protect franchisees. The author believes this approach has only a marginal basis in fact. Nonetheless, it has been animated and re-animated by the Ontario Court of Appeal,[97] where it was expanded from decisions dealing with the duty of fair dealing—where the author believes it might have had some justification—and applied broad-brush to the disclosure provisions of the Ontario Act, where in the author's opinion it does not properly belong.[98] The purposive approach was first enunciated by the court in *Personal Services Coffee Corp. v. Beer*:

> It is clear, therefore, that *the focus of the Act is on protecting the interests of franchisees*. The mechanism for doing so is the imposition of rigorous disclosure requirements and strict penalties for non-compliance. For that reason, any suggestion that these disclosure requirements or the penalties imposed for non-disclosure should be narrowly construed, must be met with skepticism.[99]

Similarly, in *MDG Kingston Inc. v. MDG Computers Canada Inc.*, another justice of the Court of Appeal noted:

> Having specifically recognized that franchise agreements may contain arbitration agreements for dispute resolution, the Arthur Wishart Act does not address whether rescission of a franchise agreement for inadequate disclosure will also rescind either a disclosed or an undisclosed arbitration clause. *As the purpose of the Arthur Wishart Act is to protect franchisees*, one would have expected that had the legislature believed that rescission of the arbitration clause was necessary for that protection, it would have provided that consequence specifically in s. 6, in addition to the reference to penalties and obligations.[100]

The Court of Appeal has repeated this on several occasions, first in the *Dollar It* decision, a case dealing only with disclosure issues,[101] and again in the subsequent *405341 Ontario Ltd. v. Midas Canada Inc.* case, dealing with the franchisor's duty of good faith and fair dealing:

> *The purpose of the Act is to protect franchisees*. The provisions of the Act are to be interpreted in that light. Requiring franchisees to give up any claims they might have against a franchisor for purported breaches of the Act in order to renew their franchise agreement, unequivocally runs afoul of the Act.[102]

97. In addition to the cases cited later in this article, the purposive approach was most recently repeated by the Ontario Court of Appeal in two cases. 2130489 Ontario Inc. v. Philthy McNasty's (Enters.) Inc., 2012 ONCA 381; Addison Chevrolet Buick GMC Ltd. v. Gen. Motors of Canada Ltd., 2016 ONCA 324.

98. A relatively recent decision rendered by the court sounds to the author like a voice from the wilderness, given that it has been overshadowed by at least two more recent Court of Appeal decisions. In *4287975 Canada Inc. v. Imvescor Rests. Inc.*, 2009 ONCA 308, at ¶ 40, LaForme J.A. held that: "[a] fair interpretation of the Act is one that balances the rights of both franchisees and franchisors." Both the subsequent decisions of the *Dollar It* litigation (*see infra* note 101) and the *Midas* litigation (*see infra* note 102) have ignored the "balancing of rights" approach suggested by the court in the *Imvescor Restaurants Decision*.

99. Personal Serv. Coffee Corp. v. Beer, 2005 CanLII 25180 (ON CA), at ¶ 28 (emphasis added).

100. 2008 ONCA 656 (emphasis added).

101. 6792341 Can. Inc. v. Dollar It Ltd. 2009 ONCA 385 (CanLII), 2009 ONCA 385, 95 O.R. (3d) 291, at ¶ 72.

102. 2010 ONCA 478 (CanLII) (emphasis added).

The ambit of the purposive approach was widened by the Court of Appeal in the case of *Salah v. Timothy's Coffees of the World, Inc.*, when the court stated:

> The Wishart Act is sui generis remedial legislation. *It deserves a broad and generous interpretation*. The purpose of the statute is clear: *it is intended to redress the imbalance of power as between franchisor and franchisee;* it is also *intended to provide a remedy for abuses stemming from this imbalance.*[103]

Franchisees and their counsel contend that such a "broad and generous interpretation" is the most effective way to address their belief that the franchisor has significantly greater bargaining power But the author has not been able to find any basis for these judicial pronouncements of the purpose of the legislation. The only support for the interpretation first given life by the court in *Beer*, and consistently re-animated by a subsequent line of decisions, is the report of the Committee members who studied Bill 33 (the predecessor of the Ontario Act) at the committee stage.[104] The author believes the *stated* purpose of the Ontario Act has always been somewhat more prosaic.[105] Consider the statement of the Minister of Consumer Relations upon introduction of Bill 33 to the House:

> Franchising is important to the men and women who see a franchise as a way to achieve their dreams of a better tomorrow. This legislation is a result of extensive consultation and will at the end of the day help small business investors *make more informed decisions and encourage marketplace fairness*.[106]

Nowhere in the Explanatory Note to the Ontario Act does any such protective approach find expression.[107]

At best, the right of association found in Section 4 of the Ontario Act (and in all other provincial legislation except Alberta's) has the purpose of protecting franchisees. That section expressly grants a right of association and then goes on to prohibit franchisors from interfering with, prohibiting, or restricting the right of association. However, interference with the right of association is rarely pleaded in franchise cases.

Although some may argue that the obligation of fair dealing contained in the Canadian Acts has the purpose of protecting franchisees, the author disagrees because the duty of fair dealing is also owed by franchisees to franchisors. The purpose of the fair dealing provision is therefore intended to protect *both* parties to the franchise agreement. In fact, in reviewing the reported cases, it appears that fair dealing is pleaded just as frequently by franchisors

103. 2010 ONCA 673 (CanLII), 2010 ONCA 673, 268 O.A.C. 279, at ¶ 26 (emphasis added).

104. *Beer*, 2005 CanLII 25180, at ¶¶ 25–26.

105. The name of the Bill was itself somewhat instructive of its purpose: "Bill 33, An Act to require fair dealing between parties to franchise agreements, to ensure that franchisees have the right to associate and to impose disclosure obligations on franchisors."

106. Hon. Robert W. Runciman (Minister of Consumer and Commercial Relations), Ontario Legislature (Dec. 14, 1999) (emphasis added).

107. *Arthur Wishart Act (Franchise Disclosure)*, 2000 S.O. 2000, explanatory note *available at* http://www.e-laws.gov.on.ca/html/source/explanatorynotes/english/2000/elaws_src_exs00003_e.htm (last visited Sept. 12, 2017).

as it is by franchisees. For example, some franchisees "free ride" on the franchisor's brand and trademark while providing below standard quality products or services.[108]

In a previous *Journal* article, Bill Killion commented on the inappropriateness of the canon of liberal interpretation by the U.S. judiciary.[109] In his article, he quotes the dissenting opinion in the *Nagrampa v. Mailcoups, Inc.* as follows:

> . . . as with most paternalistic endeavors, the majority's opinion carries the seeds of great irony. By invoking the unconscionability doctrine to protect "the little guy" in this case [from an agreement to arbitrate] the majority has construed California franchise law in a way that will result in fewer opportunities for the "little guys" in the future because "the ever-growing cost of litigation is one of the most serious and uncontrollable risks faced by modern businesses.[110]

After summarizing the somewhat long and arduous history of the development of franchising and franchise legislation in the United States, Killion adroitly concludes that the resultant laws were the product of a careful balancing of all franchise stakeholders; namely, franchisors, franchisees, consumers, and others (including suppliers in the franchise goods and services chain).[111] In the face of such legislative balancing of interests, the author believes it is not proper for the courts to overlay any canon of interpretation that has the effect of favoring one side of the franchise relationship over the other. The author suggests that the same balancing of interests pertains to the Canadian situation, and that the interpretation of the Acts—especially in the context of defining the disclosure obligations of franchisors—that appear to have the sole objective to protect franchisees, are contrary to the purpose and intent of presale disclosure legislation.

This same kind of judicial activism is apparent in the trend by various courts to impose a duty of *utmost* good faith (i.e., a fiduciary standard) on franchisors.[112] That trend has now been mostly laid to rest. In the author's opinion, itis now time to end what appear to the author to be the protectionist proclivities of the Ontario Court of Appeal and approach the Acts in the balanced manner expressed by their clear wording—an approach that is necessary to ensure that the legitimate interests of all franchise stakeholders are protected.

108. James Brickley, Frederick Dark & Michael Weisbach, *The Economic Effects of Franchise Termination Laws*, 34 J.L. & ECON. 101 (1991); Angela L.M. Hurst, The Impact Of The Iowa Franchise Law On Restaurant Franchisor Expansion Strategy: An Exploratory Study (Apr. 1997) (Thesis submitted to the Faculty of the Virginia Polytechnic Institute and State University, Blacksburg, Virginia, in partial fulfillment of the requirements for the degree of Master of Science); Jonathan Klick, Bruce Kobayashi & Larry Ribstein, *The Effect Of Contract Regulation: The Case Of Franchising, George Mason Law & Economics Research Paper No. 07-03* (Jan. 6, 2008).

109. William L. Killion, *The Modern Myth of the Vulnerable Franchisee: The Case for More Balanced View of the Franchisor Franchisee Relationship*, 28 FRANCHISE L.J. 23 (2008).

110. 469 F.3d 1257 (9th Cir. 2006).

111. Killion, *supra* note 109, at 24.

112. Dillon, *supra* note 3, at 32.

III. Some Promising Judicial Trends

As disappointing as some of the decisions discussed previously may be to the author, there are recent judicial decisions that suggest that some judges subscribe to a more balanced approach in interpreting these statutes. For example, in *Spina v. Shoppers Drug Mart, Inc.*,[113] which was a class proceeding seeking up to $1 billion in compensatory damages, the judge took a very practical and contractually based approach to the various claims put forth by the representative plaintiff. In several instances, the judge unhesitatingly struck the plaintiff's claims when the contract in question clearly substantiated the franchisor's conduct.[114] This included the franchisor's contractual right to receive rebates. Similarly, the court struck the franchisees' claim for an alleged breach of fiduciary duty, on the basis that the contract made clear that no such duty existed.[115] The case makes clear that a clearly worded contract is essential to limiting the scope of judicial review to the four corners of the agreement.

In the much-anticipated "Tim Horton's" case,[116] the court dismissed the representative plaintiff's motion for class certification. The plaintiff alleged a variety of breaches of contract, breach of the duty of good faith and fair dealing, and unjust enrichment against the franchisor of the doughnut store giant. The court took a close look at the actual wording of the franchise agreement and concluded that the franchisor had acted appropriately. According to the contract, the franchisor had the right to receive rebates and to require that all franchisees sell specified items (and conversely that franchisees were not entitled to pick and choose among menu offerings and sell only the most profitable ones).[117] The case stands largely for the proposition that a franchisor has the overall responsibility to determine the design and content of the franchise system and concept and that franchisees must conform to those determinations. Like the *Spina* decision discussed previously, this case highlights the importance of a properly worded franchise agreement.[118]

Next, in *Caffé Demetre Franchising Corp. v. 2249027 Ontario Inc.*,[119] the court established some very helpful parameters for the interpretation of the definition of "material fact" under the Act.[120] In *Caffé Demetre*, the fran-

113. 2012 ONSC 5563.
114. *Id.* at ¶¶ 196, 202 & 220.
115. *Id.* ¶ 196,
116. Fairview Donut Inc. v. The TDL Grp. Corp. 2012 ONSC 1252, 2012 ONCA 867.
117. *Id.* at ¶ 136.
118. *Id.* at ¶ 30. It is also worth noting that the franchisor had established and made extensive use of an effective franchisee advisory council, which had been widely consulted on the issues litigated by the representative plaintiff.
119. 2015 ONCA 258.
120. *Id.* In addition, the case reinforced the distinction between disclosure for content deficiencies in the disclosure document that would permit rescission within sixty 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.

chisor commenced litigation against one of its former franchisees who had started a competing business under a different name about five miles away from a rescinding franchisee. The rescinding franchisee claimed that the franchisor failed to disclose that it was involved in litigation with the former franchisee and certain other alleged material facts, including a new "tipping out" policy that prevented franchisees from taking a portion of employees' tips, a new policy requiring principals of each franchise location to assume responsibility for making ice cream onsite, and certain remodeling and renovation obligations.[121] The court stated that the decision of the Superior Court in *Springdale Pizza*[122] *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.[123] 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][124] 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."[125] The court went on to state that given the protective nature of the litigation in question, i.e., that the franchisor was suing a former franchisee to enforce a non-compete covenant generally for the benefit of the remaining franchisees of the Caffé Demetre system, the case did not constitute a potential liability that might attach to the franchise system and would not financially impact the rescinding franchisee's location; therefore, the lawsuit did not constitute a material fact and hence its disclosure was not required. Moreover, the failure to disclose the litigation against the former franchisee did not effectively deprive the rescinding franchisee of the opportunity to make a properly informed decision to invest in the Caffé Demetre franchise system.

Finally, the decision of *Healy v. Canadian Tire Corp.*[126] is an appeal from a decision of an arbitrator dismissing a claim for damages for negligent misrepresentation while allowing a much diminished claim for damages for breach of the duty of fair dealing. This is one of the few decisions requiring a franchisee to undertake his or her own due diligence. The franchisee argued that he relied on projections given to him by the franchisor, which were inaccurate.[127] The projections showed declining sales, yet the evidence showed that the franchisee never made inquiries of the former owner as to

121. *Id.* at ¶ 20.
122. 2013 ONSC 7288.
123. *Caffe Demetre*, 2015 ONCA 258, at ¶ 57.
124. This section of the regulation requires inclusion of "[a] statement, including a description of details, including whether the franchisor, the franchisor's associate or a director, general partner or officer of the franchisor has been found liable in a civil action of misrepresentation, unfair or deceptive business practices or violating a law that regulates franchises or businesses, including a failure to provide proper disclosure to a franchisee, or civil action involving such allegations is pending against the person." General Regulation 581/00, made under the *Arthur Wishart Act*, 2000 S.O. 2000, c.3, Pt. III, s. 2.5.
125. *Caffe Demetre*, 2015 ONCA 258, at ¶ 59.
126. 2012 ONSC 77.
127. *Id.* at ¶ 6.

why sales were declining.[128] The arbitrator found that if the franchisee had wanted more information he could have asked for it, but did not.[129] The franchisee did not inquire into the basis for the franchisor's projections nor did he question any of the apparent discrepancies between the various reports provided to him.[130] The arbitrator found that it was not reasonable for the franchisee to rely upon the franchisor's projections where he was aware of declining sales at the store prior to deciding to taking it over.[131] As for the franchisee's allegations that the franchisor breached its duty of fair dealing, the arbitrator considered the franchisee's own breaches, stated that "fair dealing is a two-way street," and held that the franchisee's breaches had the effect of significantly reducing any remedy that might otherwise be granted as result of the franchisor's breaches.[132]

IV. Legislative Updating Required

The author suggests that the time is at hand for some statutory or regulatory updating of the various Acts and, in particular, the Ontario Act. Ideally from the author's viewpoint, such reform would occur on a cooperative basis, with all six regulating jurisdictions amending their acts together for consistency. Recently, the Ontario Business Law Advisory Council[133] and the Franchise Law Section of the Ontario Bar Association[134] recommended revisions and updates to the Ontario Act and Regulation that would address some of the current issues in the legislation highlighted in this article. However, it appears that the government of the day in Ontario is prepared only to make what amount, in the author's viewpoint, to cosmetic changes to the Ontario Act. The changes in Bill 154,[135] introduced on September 14, 2017, include: eliminating references to "service marks," which have no application to Canadian trademark law and were erroneously imported into the Act at its inception; clarifying in the definition of "franchise" that association with a trademark licensed to the franchisor will satisfy the trademark requirement; and clarifying that the under the fractional franchise exemption, the period of time to be used in assessing anticipated sales is one year. The Bill, if implemented, would introduce some helpful changes, including: the ability of a

128. *Id.* at ¶ 44.
129. *Id.* at ¶ 28.
130. *Id.*
131. *Id.*
132. *Id.* at ¶ 63.
133. Business Law Advisory Council, Report to Minister of Government and Consumer Services (Fall 2016), http://www.ontariocanada.com/registry/view.do?postingId=23184&language=en (last visited Sept. 12, 2017).
134. Ontario Bar Ass'n, Franchise Law Section, Updated Recommendations to Amend the *Arthur Wishart Act (Franchise Disclosure), 2000* (June 21, 2017), https://www.oba.org/CMSPages/GetFile.aspx?guid=4f8865ac-f439-479a-82d8-c42767bf5522 (last visited Sept. 12, 2017).
135. Bill 154, Cutting Unnecessary Red Tape Act, 2017, http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=5000 (last visited Oct. 4, 2017).

franchisor to enter into a confidentiality agreement or site selection agreement with a prospect without the need to provide disclosure beforehand, and the ability to require payment of a fully refundable deposit prior to disclosure. In the author's view, Ontario's proposed changes fall far short of beginning the process of swinging the pendulum toward what the author believes to be a more fair and balanced interpretation that considers the legitimate views and interests of all stakeholders: franchisees, franchisors, and consumers of the goods and services delivered via the franchise model.

V. Conclusion

The author suggests that Canadian franchise legislation and its judicial interpretation has led to a substantial increase in compliance costs to franchisors and a substantial risk of devastating damage awards, including personal liability to the principals of franchisors. These risks are often based on minor or technical failures in the franchisor's disclosure document or disclosure processes. In the author's experience, this has caused offshore systems to reconsider expansion into Canada or has motivated franchisors to choose methods other than franchising to expand. Given the widely perceived and generally accepted benefits of franchising for distributing goods and services, significant legislative or regulatory changes should be a priority. In the meantime, practitioners preparing disclosure documents for use in Canada should proceed with extreme caution, a sound knowledge of both the legislative and judicial requirements for compliant disclosure, and adequate errors and omissions insurance.

APPENDIX A

Franchisor's Associate Questionnaire

The *Dollar It* decision requires that certain information relative to a "Franchisor's Associate" be contained in a franchisor's disclosure document. For a more detailed discussion of the definition of Franchisor's Associate, and the scope and type of information required to be disclosed relative to a Franchisor's Associate, see the material contained in the body of this article.

The author believes that one can argue that the test used in the *Dollar It* decision to determine whether a person, corporation or other entity is a Franchisor's Associate is flawed and over-reaching. However, it is what it is until a change in the law says otherwise.

If your client has a person, corporation, or other entity for which the answer to each of the following questions is "yes," then the appropriate information about that individual or entity should be set out in the disclosure document and provided in the prescribed manner.

See the article above under the heading "What Needs to be Disclosed Relative to 'Franchisor's Associates'" for a discussion of possible additional required disclosure if you find that your system has one or more "Franchisor's Associates:"

	Question	No	Yes
1.	Does your client's organization have any other corporations (or other entity) involved in the operation of its franchise system? Examples include: supplier companies, entities providing financing, entities incorporated to hold real estate and sub-lease to franchisees, and holding companies for intellectual property and other assets	☐	☐
2.	Do franchisees pay money (any amount) to that corporation?	☐	☐
3.	Is there any kind of contract or any other form of agreement in place between your client's franchisees and the affiliate corporation? (Hint: If your answer to number 2 is "yes," then the answer to this question will almost of necessity be yes; why else would the franchisee be paying money to the affiliate?)	☐	☐

APPENDIX B

The *Dollar It* Disclosure Document Checklist

Here is a checklist of the issues that the Ontario Court of Appeal found fatal to an otherwise satisfactory disclosure document.

If the answer to any of these questions has an asterisk * in the answer box, your client's disclosure document and/or your compliance procedures need to be reviewed and updated.

Question	No	Yes
Are all Certificates of Disclosure attached to every Disclosure Document that your client provides to a prospect properly dated and signed by the appropriate person?	☐*	☐
Does your client's Disclosure Document include the franchisor's current *audited or review engagement* financial statements?	☐*	☐
If your client is providing "site-specific" disclosure, does your client's Disclosure Document include a copy of the offer to lease or lease between the franchisee and the sublandlord, or the head lease for the property? *Note: this obligation may also extend to other forms of agreements with affiliates of the franchisor, including supply agreements, intellectual property licensing, and financing.*	☐*	☐
Does an affiliate of the franchisor sublease the franchisee's business premises to franchisees, or supply goods and services, or provide financing?	☐	☐*
Is the disclosure in your client's Disclosure Document relative to your client's ad fund "detailed and specific" and does it clearly and concisely respond to all technical requirements of the Regulation, using negative disclosure where appropriate?	☐*	☐
Does your client's Disclosure Document include the description of *the actual* territory to be granted?	☐*	☐
Does your client's Disclosure Document include information on the franchisor's policy on the proximity between franchisees?	☐*	☐
Does your client's Disclosure Document include a description of the license, registration, authorization or other permissions required to be obtained to operate the franchise?	☐*	☐
Does your client's disclosure document contain a description of its policy, if any, regarding volume rebates, and whether or not your client or its associate receives a rebate, commission, payment or other benefit as a result of purchases of goods and services by a franchisee and, if so, whether rebates, commissions, payments or other benefits are shared with franchisees, either directly or indirectly.	☐*	☐

Note 1: This list of deficiencies should in no way be considered a complete checklist for the adequacy of your client's disclosure document. Our current checklist is eight single-spaced pages. This list of nine items was merely what counsel for the franchisee was able to identify

with hindsight. The Court of Appeal has suggested that the only kind of deficiency within a disclosure document that will not invalidate the document entirely is a "minor non-material detail." And, of course, an accumulation of such minor non-material details might in the aggregate result in a finding of "non-disclosure" and permit a franchisee to rescind at any time within two years of the date he received your disclosure document.

Note 2: The *Dollar It* decision repeatedly stresses that, even if your client does not have a policy or practice required to be disclosed, *the absence* of such a policy or practice is then required to be disclosed and discussed.

Appendix C

Suggested Retainer Wording

Almost invariably in any action in which lawyer's negligence is alleged, attention will turn to the scope—and any express or implied limitations—of the retainer. The author uses the wording below as a part of his firm's retainer letter to be provided by any franchise system.

> If we have prepared a franchise disclosure document for you, then we have relied entirely upon the information provided by you in the preparation of the document without independent investigation or verification. You agree to indemnify us in the event of any claim by your franchisees in the event that material facts were not disclosed by you, or in the event of other defects in your documentation not relating to our legal advice. PLEASE NOTE: franchise law in Canadian jurisdictions requires disclosure of all material facts, on an on-going basis. Accordingly, you must keep all such disclosure documents current at all times. In addition, you may be required to disclose additional information, or completely re-disclose with site-specific information, in some instances. The retainer created by this letter is strictly limited to providing advice and counsel to you in respect of matters about which our advice is sought. Advising you in respect of changes that you make to your documentation or disclosure practices, or with respect to changes in the law that occur after delivery of your disclosure documentation to you, are specifically excluded from the scope of this retainer.