

# Osler, Canadian Franchise Guide Release #2, 6/2022

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# Canadian Franchise Guide

Second Edition

Volume 1

**OSLER, HOSKIN & HARCOURT LLP**

*Managing Editors*

**Andraya Frith**  
*Osler, Hoskin & Harcourt LLP*

**Dominic Mochrie**  
*Osler, Hoskin & Harcourt LLP*

**Gillian Scott**  
*Osler, Hoskin & Harcourt LLP*



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**A cataloguing record for this publication is available from Library and Archives Canada**

ISSN 0-88820-139-7  
ISBN 978-0-7798-6422-5



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One Corporate Plaza  
2075 Kennedy Road  
Toronto, ON  
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### CANADIAN FRANCHISE GUIDE

Osler, Hoskin & Harcourt LLP

Release No. 2, June 2022

This work contains more than 2,000 pages from one of the country's leading franchise law firms. You will find reliable guidance to help your clients achieve their business goals, whether they intend to start a franchise, expand their franchise in Canada or internationally, bring or defend business critical franchise litigation or buy or sell an existing franchise system.

#### What's New in this Update:

This release features updates to the commentary in Chapter 2 (Key Elements of Franchise Laws in Canada), Chapter 18 (The Enforcement of Restrictive Covenants in Franchise Agreements), and Chapter 28 (Best Practices for Franchise Lawyers).

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## Highlights

**Chapter 28 — Best Practices for Franchise Lawyers — QR27: Leveling the Playing Field: The Benefits of Voluntary Franchise Disclosure —** Six Canadian provinces have legislation that regulate franchising. In those provinces, it is mandatory, with some limited exceptions, for a franchisor to provide a franchise disclosure document to a prospective franchisee before the franchisee enters into any agreements related to the franchise or receives consideration related to the franchise. This quick-reference guide looks at where a franchise disclosure document is required and the benefits of providing one in jurisdictions where they are not legally required. Topics covered in this section include: franchise agreements as contracts of adhesion in Quebec, exceptions in unregulated provinces, and Canadian Franchise Association membership.

**Chapter 28 — Best Practices for Franchise Lawyers — QR28: Site-specific disclosure is critical to mitigating risk in franchising —** Many franchisors may not be aware that there is a requirement to disclose certain information that is considered specific or unique to a particular franchise grant, resale, or renewal process if that information is material and is known by the franchisor at the time of disclosure. This is referred to as site-specific information. This section covers site-specific disclosure, including topics such as: which provinces regulate franchising in Canada, what site-specific information is and penalties for failing to disclose, and tips to make sure site-specific information is in a franchise disclosure document.

## **ProView Developments**

Your ProView edition of this product now has a new, modified layout:

- The opening page is now the title page of the book as you would see in the print work
- As with the print product, the front matter is in a different order than previously displayed
- The Table of Cases and Index are now in PDF with no searching and linking
- The Table of Contents now has internal links to every chapter and section of the book within ProView
- Images are generally greyscale and size is now adjustable
- Footnote text only appears in ProView-generated PDFs of entire sections and pages





## Osler, Hoskin & Harcourt LLP Contributing Partners

Andraya Frith  
afrith@osler.com  
**Franchise — Commercial**

Dominic Mochrie  
dmochrie@osler.com  
**Franchise — Commercial**

Gillian Scott  
gscott@osler.com  
**Franchise — Litigation**

Paul Morassutti  
pmorassutti@osler.com  
**Real Estate**

Shuli Rodal  
srodal@osler.com  
**Competition**

Peter Glossop  
pglossop@osler.com  
**Competition**

Richard Borins  
rborins@osler.com  
**Financial Services**

Dov Begun  
dbegun@osler.com  
**Tax**

Jennifer Dolman  
jdolman@osler.com  
**Franchise — Litigation**

D'Arcy Schieman  
dschieman@osler.com  
**Tax**

Adam Kardash  
akardash@osler.com  
**Privacy**

Joanna Fine  
jfine@osler.com  
**Privacy**

Donna White  
dwhite@osler.com  
**Intellectual Property**

## Contributors

Patti Hone, President  
phone@asyoulikeitmarketing.com  
**As You Like It Marketing and  
Communications**

Rick Chittley-Young, Partner  
rchittley@bdo.ca  
Patricia Gonsalves, Associate  
pgonsalves@bdo.ca  
**BDO Canada LLP**

Errol Soriano, Managing Director  
errol.soriano@duffandphelps.com  
Neil de Gray, Director

Joseph W. Sheyka, Partner  
joseph.sheyka@dlapiper.com  
**DLA Piper LLP**

neil.degray@duffandphelps.com  
**Duff and Phelps, LLC**

Wayne Maillet, President  
mailletw@shaw.ca  
Stephen Graf  
**Franchise Specialists**

Graeme Payne, Partner  
graeme.payne@twobirds.com  
**Bird & Bird LLP**

Jennifer Tyrwhitt-Gory  
President & CEO  
jennifert@insuranceportfolio.com  
**Insurance Portfolio Inc.**

Bob Gappa, CEO  
Pam Gappa, Vice President  
M2000@mgmt2000.com  
**Management 2000**

Andrew Loewinger, Partner  
aloewinger@nixonpeabody.com  
Keri McWilliams, Associate  
kmcwilliams@nixonpeabody.com  
**Nixon Peabody LLP**

Frank Zaid  
fzaid@frankzaid.com  
**FRANlegal Support Services**

Victoria Hobbs, Partner  
victoria.hobbs@twobirds.com  
**Bird & Bird LLP**

Lori Karpman  
lori@lorikarpman.com  
**Karpman & Company**

Michael Seid, Managing  
Director  
mseid@msaworldwide.com  
**MSA Worldwide**

**RBC Royal Bank**

**Original Managing Editor**

Frank Zaid  
fzaid@frankzaid.com

**Original Contributor**

Jerry S. White

## Foreword

Nearly thirty years ago, the First Edition of the Canadian Franchise Guide earned its place as the leading authority on the key legal and business issues affecting Canadian franchisors and franchisees. It described the franchising industry as “dynamic and energetic”, which is even more accurate today, and the related field of franchise law has continued to evolve in significant and meaningful ways over the years, necessitating this Second Edition.

The substantially revised Second Edition of the Canadian Franchise Guide by Osler introduces new resources, tools, topics and contributors to continue to guide franchisors and their legal and business advisors through the continually evolving and complex legal landscape that regulates franchising across Canada. In addition to needing a deep knowledge of the franchise legislation in force in five (and possibly soon six) provinces, as well as the unique requirements of the Quebec civil law, franchise practitioners must stay current on the fast-paced developments in the case law interpreting these statutes and emerging best practices when preparing franchise documents and advising franchisors and franchisees on the day-to-day relationship issues that inevitably arise in these long-term commercial arrangements.

Adding to this challenge is the fact that the nature of the franchise model requires franchisors and their advisors to have a solid understanding of an incredibly broad range of legal areas, including real estate, financial services, intellectual property, technology, consumer protection, privacy, trade practices, corporate, commercial, competition, tax, labour and employment and, increasingly important, litigation.

The Second Edition of the Canadian Franchise Guide by Osler is designed to be a comprehensive and timely resource that provides practical information on the myriad of legal and business issues affecting franchisors and franchisees. This publication has a renewed focus on providing readers with user-friendly content, tools and quick reference guides aimed at helping franchisors and their advisors adopt best practices within their franchise systems and mitigate risk. Easy-to-read and topical summaries of developments in the franchise case law, as well as targeted best practices tips, means that the Second Edition of the Canadian Franchise Guide will be the first reference tool franchisors and their legal advisors turn to when faced with a new issue or challenge.

The Managing Editors wish to thank Frank Zaid, the Original Managing Editor, for establishing the Canadian Franchise Guide as the leading authority on Canadian franchise law, for instilling in each of us his passion for franchising, and also for entrusting us with the responsibility of carrying forward this invaluable resource. We are also extremely grateful to the talented and dedicated team of Osler lawyers and third party legal and business experts who devoted many, many hours to helping us relaunch the Second Edition of the Canadian Franchise Guide by Osler. We wish to extend a special thank you to Eva Sommer-Ng, Knowledge Management Lawyer at Osler, whose tireless efforts and enthusiasm made this relaunch possible.

Andraya Frith

CANADIAN FRANCHISE GUIDE

Dominic Mochrie  
Gillian Scott  
Co-Managing Editors

September 2015

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that the statutory duty of fair dealing does little more than codify the common law duty of good faith.<sup>1</sup>

Under the Acts, a breach of the duty of good faith and fair dealing provides the franchisee with a statutory right of damages. Whether a franchisor breaches the duty of good faith will depend on all the circumstances of the case. Not every breach of contract will be a breach of the duty of good faith, and in fact, it is possible to find an absence of good faith despite strict compliance with the provisions of the franchise agreement.<sup>2</sup> The duty of good faith is limited to an analysis of whether the franchisor has acted in a fair manner according to the specific wording of the agreement. The Ontario courts have held that the typical franchise relationship is not one of utmost good faith but rather one of simple good faith. Further, the franchisor does not owe a fiduciary duty to the franchisee.<sup>3</sup> As such, a franchisor is permitted to act self-interestedly, so long as it deals with the franchisee promptly, honestly, fairly and reasonably and has regard to the legitimate interests of the franchisee in the outcome of the franchisor's decision and action.

The Ontario courts have held that a misrepresentation of material facts, whether expressly or by omission, the unilateral termination of a franchise agreement where there was no contractual right to do so, the deliberate withholding of critical information, and failure to respond promptly to a request from the other party and make a decision within a reasonable time<sup>4</sup> may give rise to a finding of bad faith.

For example, the Ontario Superior Court of Justice found that a franchisor breached its duty of good faith and fair dealing when it deliberately withheld critical information, and did not promptly respond-

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**[Section 2:8]**

<sup>1</sup>*Shelanu Inc. v. Print Three Franchising Corp.* [2000] O.J. No. 4129, 2000 CarswellOnt 4040 (Ont. S.C.J.), additional reasons [2000] O.J. No. 4481, 2000 CarswellOnt 4407 (Ont. S.C.J.), additional reasons [2001] O.J. No. 1750, 2001 CarswellOnt 1581 (Ont. S.C.J.), reversed in part (2003), 64 O.R. (3d) 533, 2003 CarswellOnt 2038 (Ont. C.A.), additional reasons 2006 CarswellOnt 2627 (Ont. C.A.); *Machias v. Mr. Submarine Ltd.*, [2002] O.J. No. 1261, 2002 CarswellOnt 1176 (Ont. S.C.J.).

<sup>2</sup>*Shelanu Inc. v. Print Three Franchising Corp.* [2000] O.J. No. 4129, 2000 CarswellOnt 4040 (Ont. S.C.J.), additional reasons [2000] O.J. No. 4481, 2000 CarswellOnt 4407 (Ont. S.C.J.), additional reasons [2001] O.J. No. 1750, 2001 CarswellOnt 1581 (Ont. S.C.J.), reversed in part (2003), 64 O.R. (3d) 533, 2003 CarswellOnt 2038 (Ont. C.A.), additional reasons 2006 CarswellOnt 2627 (Ont. C.A.).

<sup>3</sup>*Shelanu Inc. v. Print Three Franchising Corp.* [2000] O.J. No. 4129, 2000 CarswellOnt 4040 (Ont. S.C.J.), additional reasons [2000] O.J. No. 4481, 2000 CarswellOnt 4407 (Ont. S.C.J.), additional reasons [2001] O.J. No. 1750, 2001 CarswellOnt 1581 (Ont. S.C.J.), reversed in part (2003), 64 O.R. (3d) 533, 2003 CarswellOnt 2038 (Ont. C.A.), additional reasons 2006 CarswellOnt 2627 (Ont. C.A.).

<sup>4</sup>*Salah v. Timothy's Coffees of the World Inc.*, 2009 CarswellOnt 6470 (Ont. S.C.J.), additional reasons 2010 CarswellOnt 268 (Ont. S.C.J.), affirmed 2010 CarswellOnt 7643 (Ont. C.A.).

ing to inquiries, from a franchisee who was in the process of exercising its renewal option under the franchise agreement.<sup>5</sup>

However, courts have consistently held that the duty of good faith and fair dealing cannot be used to re-write a franchise agreement, or to introduce terms not expressly included in the agreement. For example, where the franchise agreement is for a set term, without any right or option to renew, the duty of good faith and fair dealing cannot be used to read any such renewal rights into the agreement.<sup>6</sup>

*Section References: Manitoba Act, Section 3(3); New Brunswick Act, Section 3(3); Ontario Act, Section 3(3); PEI Act, Section 3(3); ULCC Act, Section 3(1); British Columbia Act, Section 3(3).*

#### IV. FRANCHISEES' RIGHT TO ASSOCIATE

##### § 2:9 Generally

Under the Acts, franchisees have the right to associate with other franchisees and to form or join an organization of franchisees. A franchisor is prohibited from interfering with, prohibiting or restricting (by contract or otherwise) this right. Further, a franchisor must not directly or indirectly penalize a franchisee for associating with other franchisees (i.e., forming a franchise association or sending communications to other franchisees). Any provision in a franchise agreement which purports to interfere with the right to associate will be void. If a franchisor does interfere with franchisees' right to associate, the franchisees have a statutory right of action for damages. In a number of recent class actions the plaintiffs have claimed a breach of this right to associate.

While the Acts do not expressly require a franchisor to recognize, acknowledge or negotiate with a franchisee association (although an association can provide the franchisor with an efficient means of dealing with systemic issues), recently, franchisees have been attempting to expand the scope of the right to associate by claiming, in particular, that the right includes a positive obligation on the franchisor to acknowledge and deal with franchisee groups. In particular, franchisees are arguing that franchisors are interfering with their right to associate by not providing financial and other information to franchisee groups. This line of argument has yet to be judicially considered, but will be considered in relation to current class actions forwarding this claim, provided those cases go to trial.

*Section References: Manitoba Act, Section 4(1); New Brunswick Act, Section 4(1); Ontario Act, Section 3(3); PEI Act, Section 4(1); ULCC Act, Section 4(1); British Columbia Act, Section 4(1).*

<sup>5</sup>*Salah v. Timothy's Coffees of the World Inc.*, 2009 CarswellOnt 6470, 65 B.L.R. (4th) 235, [2009] O.J. No. 4444 (Ont. S.C.J.), additional reasons, 2010 ONSC 516, 2010 CarswellOnt 268 (Ont. S.C.J.), affirmed (2010), 2010 ONCA 673, 2010 CarswellOnt 7643, 74 B.L.R. (4th) 161, 268 O.A.C. 279, [2010] O.J. No. 4336 (Ont. C.A.).

<sup>6</sup>*Pointts Advisory Ltd. v. 754974 Ontario Inc.* (2006), 2006 CarswellOnt 5293, [2006] O.J. No. 3504 (Ont. S.C.J.); *TDL Group Ltd. v. 1060284 Ontario Ltd.* (2000), 2000 CarswellOnt 1210, 6 B.L.R. (3d) 54, [2000] O.T.C. 238, [2000] O.J. No. 1239 (Ont. S.C.J.).

## V. FRANCHISORS' DISCLOSURE OBLIGATIONS

### § 2:10 Introduction

Perhaps the most significant and onerous obligation in the Acts is the requirement for a franchisor to prepare and provide a franchise disclosure document to prospective franchisees.

*Section References: Alberta Act, Section 4(1); Manitoba Act, Section 5(1); New Brunswick Act, Section 5(1); Ontario Act, Section 5(1); PEI Act, Section 5(1); ULCC Act, Section 5(1); British Columbia Act, Section 5(1).*

### § 2:11 Timing of the Disclosure Document

The Franchisor must provide a prospective franchisee with the Disclosure Document (with all required information contained in one document and delivered at one time) at least 14 days before the earlier of:

- (i) the signing by the franchisee of the franchise agreement or (subject to certain exceptions in Alberta, PEI, New Brunswick,



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# Canadian Franchise Guide

Second Edition

Volume 2

**OSLER, HOSKIN & HARCOURT LLP**

*Managing Editors*

**Andraya Frith**  
*Osler, Hoskin & Harcourt LLP*

**Dominic Mochrie**  
*Osler, Hoskin & Harcourt LLP*

**Gillian Scott**  
*Osler, Hoskin & Harcourt LLP*



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**A cataloguing record for this publication is available from Library and Archives Canada**

ISSN 0-88820-139-7  
ISBN 978-0-7798-6422-5



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was . . . an innocent purchaser leads to no possible inference other than that the [third party] was well aware that his co-defendants would bring to their new association information about the plaintiffs' trade secret extracted from the plaintiff....

There is a proper case for restraining not only the [ex-employees] . . . but also the [third party].<sup>5</sup>

The Manitoba Court of Appeal has similarly held that wilful blindness on the part of the third party, in the sense of failing to make inquiries as to the source of trade secrets or confidential information, may allow for injunctive relief against them.<sup>6</sup> This approach (examining closely the subjective state of mind of the third party) is the dominant approach for courts across Canada when deciding whether to issue injunctions against contractual third parties,<sup>7</sup> although on a few occasions the courts appear to have been prepared to enjoin third parties even without a finding that they had passive or active knowledge of the breach.<sup>8</sup>

In the franchise context, consistent with these principles, the courts have in recent years been prepared to enjoin third parties and non-signatories where there is evidence that they effectively conspired with the franchisee to avoid the application of the restrictive covenant:

- (a) In *Bulk Barn Foods Ltd. v. Faber* (“*Bulk Barn*”),<sup>9</sup> the franchise-owner's wife was enjoined from continuing to operate a business

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<sup>5</sup>*International Tools Ltd. v. Kollar*, 1968 CarswellOnt 32, [1968] 1 O.R. 669, 67 D.L.R. (2d) 386 (Ont. C.A.) at paras. 11-13.

<sup>6</sup>*Apotex Fermentation Inc. v. Novopharm Ltd.*, 1998 CarswellMan 318, 80 C.P.R. (3d) 449, 162 D.L.R. (4th) 111 (Man. C.A.) at paras. 107-109 and 118. For a similar expression of the test for a good faith purchaser in Ontario, see *Assaad v. Economical Insurance Group*, 2002 CarswellOnt 1980, 59 O.R. (3d) 641, 214 D.L.R. (4th) 655, [2002] O.J. No. 2356 (Ont. C.A.) at para. 19.

<sup>7</sup>*AC Tire v. Honeywood Tire Ltd.*, 1999 CarswellOnt 3444, [1999] O.J. No. 4055 (Ont. S.C.J.) at para. 25 (refusing to grant an injunction against a third party who was found to have acted in “good faith”); *1323257 Ontario Ltd. v. Hyundai Auto Canada Corp.*, 2009 CarswellOnt 88, 55 B.L.R. (4th) 265, [2009] O.J. No. 95 (Ont. S.C.J.) (“Hyundai”) at para. 125, a decision in which McCarthy was counsel for the franchisor (declining to find third-party dealer “innocent” as it knew that the former dealer contested the loss of its market area and the third party obtained an indemnity from the franchisor); *Kent Building Supplies v. Magasin du Ridge Ltée*, 2004 NBQB 152, 2004 CarswellNB 165, 275 N.B.R. (2d) 64, [2004] N.B.J. No. 142 (N.B. Q.B.) at para. 31 (finding that the third party's “passive knowledge” was sufficient for it to be enjoined); *North West Co. v. Delcon Property Co.*, 2008 ABQB 342, 2008 CarswellAlta 2214, 456 A.R. 20, [2008] A.J. No. 1548 (Alta. Q.B.) at para. 69 (finding that the third party lacked knowledge given that it received a legal opinion from the defendant suggesting there was no issue); *Good Life Corp. v. Hazeldean Properties Inc.*, 2007 CarswellOnt 8099, 63 R.P.R. (4th) 267, [2007] O.J. No. 4918 (Ont. S.C.J.) at para. 32, reversed in part 2008 ONCA 742, 2008 CarswellOnt 6392, 73 R.P.R. (4th) 1, [2008] O.J. No. 4269 (Ont. C.A.); *Bau-Und Forschungsgesellschaft Thermoform AG v. Paszner*, 1991 CarswellBC 241, 60 B.C.L.R. (2d) 90, [1991] B.C.J. No. 2422 (B.C. C.A.).

<sup>8</sup>*MDS Health Group Ltd. v. King Street Medical Arts Centre Ltd.*, 1994 CarswellOnt 229, 55 C.P.R. (3d) 360, [1994] O.J. No. 630 (Ont. Gen. Div. [Commercial List]) at paras. 35-36; *Polyresins Ltd. v. Stein-Hall Ltd.*, 1971 CarswellOnt 302, 25 D.L.R. (3d) 152, [1971] O.J. No. 1887 (Ont. H.C.); *Indal Ltd. v. Halko*, 1976 CarswellOnt 273, 28 C.P.R. (2d) 230, [1976] O.J. No. 1412 (Ont. H.C.) at para. 28.

<sup>9</sup>*Bulk Barn Foods Ltd. v. Faber*, (November 17, 2003), Doc. 03-CV-256773 CM3,

that competed with the franchisor on the basis that she knew she was indirectly circumventing the restrictive covenant signed by her husband.

- (b) In *Ontario Duct Cleaning Ltd. v. Wiles*,<sup>10</sup> the franchisee-owner's wife and son incorporated a new company for the sole purpose of avoiding the franchisee's non-compete obligations. The court enjoined the third-party corporation.
- (c) In *Pet Valu*,<sup>11</sup> the franchisee-owner's husband, a non-signatory to the franchise agreement, opened a competing business in a "transparent effort" to assist the franchisee avoid the effect of the restrictive covenants. The court enjoined the third party.
- (d) In *Garcha Bros Meat Shop Ltd. v. Singh et al.*,<sup>11.50</sup> upon the termination of a meat-shop franchise, the franchisee assigned the lease to a corporation whose owners included a relative of the individual franchisee and who were not parties to the franchise agreement. The assignee (defendants) operated a meat shop in the same location, selling similar products. On an application for an interim injunction, the chambers judge found that there was a strong *prima facie* case that the franchisee and the assignee engaged in a civil conspiracy to avoid application of the non-competition covenant in the franchise agreement. After considering the reasonableness of the restrictive covenant, irreparable harm and the balance of convenience, the judge bound the defendants to the restrictive covenant. The decision was affirmed by the province's court of appeal.

However, in *Saint Cinnamon* the court refused to extend the injunction to the third party, a previous employee and the father of the franchisee-owner, on the basis that the non-compete clause did not expressly prevent previous employees or other entities from working at a similar business.<sup>12</sup>

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[2003] O.J. No. 5553 (Ont. S.C.J.), a decision in which Osler was counsel for the franchisor, cited by Edward Levitt and Chad Finkelstein, "Non-Competition Covenants in a Canadian Context" (2011), 9 Int'l J. Franch. L. 30 (noting that in this case, the wife was supposed to have signed the covenant but did not).

<sup>10</sup>*Ontario Duct Cleaning Ltd. v. Wiles*, 2001 CarswellOnt 6190, [2001] O.J. No. 5150 (Ont. S.C.J.), a decision in which Osler was counsel for the franchisor, cited by Edward Levitt and Chad Finkelstein, "Non-Competition Covenants in a Canadian Context" (2011), 9 Int'l. J. Franch. L. 28 at p. 30.

<sup>11</sup>*Pet Valu Canada Inc. v. 1381114 Ontario Ltd.*, 2013 ONSC 5361, 2013 CarswellOnt 11616 (Ont. S.C.J.).

<sup>11.50</sup>*Garcha Bros Meat Shop Ltd. v. Singh* (2022), 2022 BCCA 36, 2022 CarswellBC 211 (B.C. C.A.). Appeal from an order of the Supreme Court of British Columbia (*Garcha Bros Meat Shop Ltd. v. SJP Enterprises Ltd.* (October 19, 2021), Doc. New Westminster S232568 (B.C. S.C.)). Interestingly, the franchisee itself did not appeal the injunction.

<sup>12</sup>*Saint Cinnamon Bakery Ltd. v. Cimat Recycle Inc. / Recyclage Cimat Inc.*, 2006 NBQB 420, 2006 CarswellNB 700, 311 N.B.R. (2d) 99, [2006] N.B.J. No. 541 (N.B. Q.B.).

#### IV. RECENT THEMES AND TRENDS

##### § 18:4 Introduction

There are a number of interesting themes and trends that arise from a review of the last ten years' worth of non-competition covenant cases in the franchise context. Most of these trends are related to the procedural context in which these cases arise, namely, on a motion for an interim or interlocutory injunction to enforce the covenant. We discuss each of the trends below.

##### § 18:5 Injunctions

A few of these themes and trends relate to how our courts are applying the well-established three-part test for an interim or interlocutory injunction from the Supreme Court of Canada. The test established in *RJR-MacDonald Inc. v. Canada (Attorney General)*<sup>1</sup> (the “*RJR-MacDonald* test”) asks: Is there a serious issue to be tried? Will the

---

[Section 18:5]

<sup>1</sup>*RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120F, 1994 CarswellQue 120, [1994] 1 S.C.R. 311, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385 (S.C.C.).



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**A cataloguing record for this publication is available from Library and Archives Canada**

ISSN 0-88820-139-7  
ISBN 978-0-7798-6422-5



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The Quick Reference Guide is meant to provide the reader with practical information, tips and best practices relating to various issues facing franchisors. Additional topics will be added in future releases of the publication.

### **§ 28:1 QR1: Top 5 Best Practices for Delivering a Disclosure Document**

#### **1. Always include the prescribed form of franchisor's certificate.**

The Ontario, Alberta, PEI, New Brunswick, British Columbia and Manitoba franchise regulations require that every disclosure document delivered in Ontario, Alberta, PEI, New Brunswick, British Columbia and Manitoba contain a franchisor's certificate in the applicable province's prescribed form certifying that the disclosure document contains no untrue information, representations or statements, and includes every material fact, financial statement and other information required by the franchise legislation. If the franchisor is a corporate entity, the franchisor's certificate must be signed and dated by at least two officers or directors, or by the sole officer or director if the corporation has only one director or officer. If the franchisor is an unincorporated entity, the certificate must be signed and dated by the franchisor.

#### **2. Always obtain a signed and dated receipt.**

If the prospective franchisee is a corporate entity, ensure that the receipt is signed and dated by the corporate entity; or, if the corporate entity is not yet incorporated, ensure that the receipt is signed and dated by an individual on behalf of the corporation to be incorporated. Although not specifically required by the legislation, as a best practice, the receipt should also be signed by any authorized signing officer that will sign the franchise agreement or any agreement relating to the franchise and any shareholder or other individual that will, directly or indirectly, guarantee the obligations of the prospective corporate franchisee. If the prospective franchisee is an individual, ensure that the receipt is signed and dated by such individual in his or her personal capacity.

#### **3. Always use a specific form of receipt.**

Although there is no prescribed form of receipt for the disclosure doc-

ument, it is good practice to develop and use a specific form of receipt. The receipt should evidence when and what was disclosed to the prospective franchisee. As a best practice, the receipt should include an itemized list of all of the attachments to the disclosure document, including the signed franchisor's certificate, and reference the date and version of the disclosure document that was received by the prospective franchisee.

**4. Always archive a copy of the delivered disclosure document.**

In the event of a dispute or litigation about the contents of the





case, can give rise to the two-year rescission remedy under section 6(2) of the AWA.

However, where Freshly Squeezed could be seen as breaking new ground is the Court's findings of deficiencies with respect to negative disclosure as it relates to location-specific disclosure. Specifically, the Court faulted the franchisor for not disclosing negative information (i.e., "there is no head lease" or "we have never granted a franchise outside of a mall location"). The scope of the definition of a "material fact", which is already open ended, could be troublingly expanded if a franchisor is now required to express, location-specific negative disclosure. However, in our view, this is not a foregone conclusion arising out of Freshly Squeezed.

The Court also implies, citing Raibex, that even where location-specific lease related disclosure is materially deficient, it can be saved by providing a franchisee with an "opt-out" clause or some other form of contractual protection to enable the franchisee to back out of the franchise agreement in the event the franchisee disagrees with the terms of the final head lease. Query whether it is consistent with the spirit and intent of the disclosure obligations in the AWA – with its no-waiver provision – that certain of these obligations can be avoided simply by including an opt-out provision in the underlying franchise agreement. It will be interesting to see how this analysis is applied in practice or considered by future courts as it suggests that a court may be required to examine the commercial deal between the franchisor and the franchisee when determining the adequacy of disclosure, which we do not believe was the legislature's intention. Many US states have provisions that affect the ability of the franchisor and franchisee to freely enter into whatever commercial arrangements they choose, such as importing "good cause" termination requirements. The AWA does not do so. As the name of the Ontario statute strongly implies, the focus is on unilateral disclosure from the franchisor to the franchisee, not on contractual protections for the franchisee.

The Freshly Squeezed decision, unfortunately, created some uncertainty for franchisors about the required standard of disclosure related to leasing and other site specific information if the commercial deal does not grant a franchisee with an opt-out. Surely we cannot be back in world of disclosure defined by the first instance decision of the Ontario Superior Court in Raibex (which was unwieldy in its broad scope before being refined on appeal), meaning that a disclosure document cannot be provided unless the location is known and the head lease is finalized prior to initial disclosure. In good news for franchisors, recently following Freshly Squeezed, the Ontario Superior Court in Yogurtworld resolves some of this uncertainty. Yogurtworld has already proven that having a location identified and a head lease finalized at the time of disclosure is not a definitive requirement. Raibex, Freshly Squeezed and Yogurtworld all show that the disclosure options will depend on the facts and circumstances of each case, including who is responsible for locating and securing a site, so there will be paths forward for franchisors who use this common disclosure and post-agreement site-selection process.

While the jurisprudence may continue to find new “material facts” that must be included in a disclosure document based on the circumstances of a particular case, it seems inconsistent with the spirit and intent of the legislation that a new line of disclosure cases stand for the proposition that the commercial terms of the franchise agreement are subject to scrutiny. The franchisor for Freshly Squeezed has appealed the decision to the Ontario Court of Appeal so there may soon be further clarity on these important disclosure issues.

### **§ 28:28 QR27: Leveling the playing field: The benefits of voluntary franchise disclosure**

Six Canadian provinces have legislation that regulate franchising. In those provinces it is mandatory, with some limited exceptions, for a franchisor to provide a franchise disclosure document (FDD) to a prospective franchisee before the franchisee enters into any agreements related to the franchise or receives consideration related to the franchise.

This quick-reference guide looks at where an FDD is required and the benefits of providing one in jurisdictions where they are not legally required.

Franchising is regulated at the provincial level in Canada. To date, six provinces have enacted franchise legislation: Alberta, British Columbia, Manitoba, New Brunswick, Ontario, and Prince Edward Island.

Although it is not a legislative requirement in the unregulated jurisdictions, it is still a recommended best practice to provide franchise disclosure in all 13 provinces and territories in Canada.

#### **The benefits of a franchise disclosure document**

Providing disclosure promotes consistency in the sales process and can level the playing field in terms of information provided to franchisee candidates and can help avoid common law misrepresentation claims.

An FDD can serve as a guide for your franchise sales teams by setting out the information that can and should be highlighted to prospective franchisees during the sales process. This can help alleviate potential problems and confusion later in your franchise relationship that may otherwise be caused by conversations that take place during the sales process.

By having material information set out in writing in an FDD that has been vetted by senior management and legal counsel, you reduce the risk of sales representatives “going off script” with a potential franchisee. The FDD also provides a written medium for setting out the underlying assumptions and bases for the information that is being provided to the franchisee candidate, which serves the dual purpose of ensuring the franchisee candidate is making an “informed investment decision” and of protecting the franchisor from common-law misrepresentation claims.

#### **Quebec: Franchise agreements as contracts of adhesion**

The Civil Code of Quebec, which has been in force since January 1994, contains a number of provisions aimed at protecting parties to consumer

contracts or contracts of adhesion (a contract where essential stipulations were imposed by one of the parties and not negotiable).

In Quebec, the courts consistently consider franchise agreements to be contracts of adhesion and the Civil Code of Quebec will affect franchises located in the province and those whose franchise agreements are governed by the laws in Quebec.

Unlike the common law provinces, the general obligation under the Civil Code of Quebec to act in good faith also applies at the pre-contractual phase, which has been interpreted to include a positive obligation to inform (which is effectively the equivalent to a duty to disclose). Although there is no franchise legislation specifying what must be disclosed, franchisors are required to disclose material facts about the franchise. This obligation can be met by providing Quebec candidates with a slightly modified version of the FDD that is provided in the regulated provinces.

### **Exceptions in unregulated provinces**

Certain customizations should be made to an FDD before it is used in the unregulated provinces, including:

- removing the franchisor's certificates to avoid any unnecessary personal liability for the officers/directors that would otherwise be signing the certificates in the event of a misrepresentation claim;
- removing individual franchisee information due to potential privacy law concerns; and
- removing financial statements to avoid disclosing confidential financial information (particularly where the franchisor is a privately held company).

### **Canadian Franchise Association membership**

If you're a current or prospective member of the Canadian Franchise Association, it is a condition of membership that you provide franchisees with a disclosure document.

Whether you're in the process of updating your disclosure practices or looking for ways to streamline and standardize processes and information sharing within your organization, it is important that your FDD is complete, accurate and delivered efficiently.

### **§ 28:29 QR28: Site-specific disclosure is critical to mitigating risk in franchising**

Many franchisors may not be aware that there is a requirement to disclose certain information that is considered specific or unique to a particular franchise grant, resale, or renewal process if that information is material and is known by the franchisor at the time of disclosure. This is referred to as site-specific information (SSI).

While the nature and level of detail of the SSI that must be included in a franchise disclosure document (FDD) may vary, it is likely that at least some basic site-specific information should be disclosed in all FDDs issued in a province where franchising is regulated in Canada.

**Which provinces regulate franchising in Canada?**

There are six Canadian provinces that have enacted legislation that regulates franchising: British Columbia, Alberta, Manitoba, Ontario, New Brunswick, and Prince Edward Island. In these provinces, the franchisor must disclose certain information to its franchisees and prospective franchisees in a FDD that is provided to the franchisee candidate before they enter into the franchise agreement or pay any consideration related to the franchise.

The FDD must follow a certain format and include prescribed information in addition to all “material facts” that would reasonably be expected to have a significant impact on the value or price of the franchise to be granted, acquired or renewed, or the decision to acquire the franchise and therefore, would impact a prospective or existing franchisee’s investment decision in respect of entering or remaining in the franchise network for the upcoming renewal term.

**What is site-specific information and what’s the penalty for failing to disclose?**

The exact nature and detail of SSI that must be disclosed will depend on the information that the franchisor is aware of at the time of disclosure. Examples of SSI that should be included are leasing information, location of the franchise, protected territory, key performance requirements and candidate-specific fees.

The internal process required to coordinate, approve and disclose SSI can often discourage franchisors and lead to non-compliant disclosure practices, which may expose franchisors to significant liability. Recent case law on this topic suggests failure to disclose certain material SSI may indeed give rise to the full two-year rescission remedy even if the balance of the FDD is compliant with disclosure requirements.

As a matter of best practices, include an SSI exhibit in all FDDs and to set up standardized processes within your organization for customizing each FDD for each prospective/existing franchisee with all SSI that is a material fact and is known by the franchisor at the time of disclosure and prior to execution of the franchise agreement. Completing information with standardized SSI is easier than revising the body of the document, or risking inconsistent disclosure if the scope of the SSI is determined by whoever is compiling the FDD.

**Tips to make sure SSI is included in your FDD:**

- Coordinate with your sales team members, operations and, if applicable, legal teams to determine known SSI at the time of disclosure.
- Streamline processes for franchisee data retention, update for upcoming term, and internal approvals.
- Establish a templated SSI exhibit and automate population of the SSI exhibit using simple mail merge or document automation software.
- Consider a franchise disclosure and contracting automation solution, such as Osler Dash.

Whether you're in the process of updating your disclosure practices or looking for ways to streamline and standardize processes and information sharing within your organization, it is important that your FDDs are complete, accurate and delivered efficiently.

### § 28:30 QR29: Automation can help track key dates for franchise disclosure and contracting

Staying on top of important dates in franchise documents can be a challenge but using automated processes can make this task easier to manage.

You can automate tracking and reminders for key dates including agreement expiry, renewal, and any applicable cooling off periods between disclosure and execution of the franchise agreement and related agreements.

#### **Mandatory cooling off period**

Six Canadian provinces have provincial legislation that regulate franchising: British Columbia, Alberta, Manitoba, Ontario, New Brunswick, and Prince Edward Island. In those regulated provinces, the franchisor needs to disclose certain information to its franchisees and prospective franchisees in a franchise disclosure document (FDD) at least 14 days before entering into any agreements with them or before the franchisee pays any consideration relating to the franchise.

To avoid exposure to significant risk, franchisors should avoid sending any franchisee or prospective franchisee an execution copy of any franchise agreement at the same time as the FDD. This allows the franchisor to maintain control over the timing issue and prevents the franchisee from signing the agreement before the expiry of the 14-day cooling off period.

#### **Agreement expiry/renewal**

Depending on your agreement terms, franchisees in your system may come up for renewal more or less frequently, and at different times. Depending on your team structure, you also likely need to collect site-specific or contractual data from different people or departments to prepare your franchise documents.

In order to renew agreements on schedule and ensure your key documents are ready on time, it may be helpful to start your data collection and validation process well in advance. The best approach to meeting these deadlines is to find an automated system to store and track key dates.

Options to consider include:

- a franchise disclosure and contracting automation solution such as Osler Dash™.
- a Customer Relationships Management (CRM) or other comparable software tool.
- an internally developed database tool such as Excel report, SharePoint, access, etc.

- Outlook or other comparable calendar tool to enter the dates into an outlook calendar.

Ideally, your chosen solution should have workflow capabilities that allow you to program reminders to automate tracking dates for renewals and cooling off periods. It's even better if the tools you use can generate forward-looking reports to keep you on top of things!

Most franchisors manually track and manage reports. Having an integrated franchisee tracking system will minimize the amount of effort spent on tracking and reporting within your team and will ensure you don't lose time, duplicate efforts or miss opportunities.

CARSWELL

# Canadian Franchise Guide

Second Edition

Volume 4

**OSLER, HOSKIN & HARCOURT LLP**

*Managing Editors*

**Andraya Frith**  
*Osler, Hoskin & Harcourt LLP*

**Dominic Mochrie**  
*Osler, Hoskin & Harcourt LLP*

**Gillian Scott**  
*Osler, Hoskin & Harcourt LLP*



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**A cataloguing record for this publication is available from Library and Archives Canada**

ISSN 0-88820-139-7  
ISBN 978-0-7798-6422-5



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2075 Kennedy Road  
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