

# The Devil Is in the Details: How Canadian and U.S. Franchise Legislation Differs

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For many U.S. franchisors, Canada is an obvious choice for international expansion. In addition to being America's largest trading partner and neighbor, Canada has a stable and reliable economy, as well as a consumer base that demands many of the same goods and services that are predominant in the United States. Canada follows the same rule of law, and commercial disputes are heard before an independent and balanced judiciary. A preliminary question confronting U.S. franchisors interested in such an expansion is: to what extent must the franchisor adjust its franchise documents and practices to conform to Canadian law?

Canadian franchise legislation has been heavily influenced by the development of franchise regulation in the United States. Not coincidentally, an increasing number of U.S.-licensed attorneys are producing Canadian disclosure documents for their U.S. franchisor clients. Leaving aside the question of unauthorized practice of law in Canada, this practice is fraught with peril for those U.S. practitioners who are not vested with detailed knowledge and experience with Canadian law generally and Canadian franchise law specifically. Important differences pose a serious risk of oversight for U.S. franchisors that are considering making the move into Canada.

This article focuses upon some—but not all—of the key differences between the two regimes, highlights relevant court decisions in both countries addressing franchise legislation, and examines the attitude of the Canadian judiciary toward franchise legislation. Whether this analysis will serve to dissuade U.S. practitioners from generating Canadian disclosure documents, or simply better inform them, remains to be seen.

## Historical Overview

It is useful to begin with a brief look at the history of Canadian franchise legislation. The Canadian franchise legislation landscape is notably sparser than in the United States. Constitutionally, the federal government of Canada does not have



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jurisdiction to legislate franchising, so this responsibility and authority lie entirely with the provinces. As such, there is no Canada-wide approach to franchise legislation. However, all five of the provinces that have enacted franchise legislation have created a remedial scheme that is designed to address the inequality of bargaining power typically found between franchisors and franchisees.

Alberta took the lead on this frontier in 1971, passing Canada's first provincial franchise-specific legislation, called the Franchises Act (Alberta Act).<sup>1</sup> This pioneering legislation followed U.S. precedent, requiring prospective franchisors to engage in a prospectus-like process, featuring both statutory disclosure and registration with governmental authorities. The Alberta Act was overhauled during the 1990s to make it more efficient and improve its overall benefits for potential franchisees. With the intent of striking a balance between protecting franchisees and promoting commerce in that province, Alberta passed its current Franchises Act in 1995. This updated Alberta Act did away with governmental oversight and focused instead upon presale disclosure. The Alberta Act also incorporated two franchise relationship provisions: the right of franchisees to associate and the implied covenant of fair dealing in all franchise agreements.

The Alberta Act remained Canada's only franchise statute until Ontario followed suit in 2001, passing the Arthur Wishart Act (Ontario Act).<sup>2</sup> The Ontario Act borrowed liberally from the Alberta Act. Ontario courts have held that the Ontario Act must be considered and interpreted liberally in light of its purpose, which is to protect franchisees by addressing the power and informational imbalance between franchisor and franchisee, so as to ensure that franchisees are able to make informed decisions about their investments.<sup>3</sup> Courts likewise have observed that the Ontario Act contains “rigorous” disclosure requirements and “strict” and “dramatic” penalties for noncompliance that apply to franchisors and their associates, sanctions that are “a strong incentive to franchisors to ensure that they comply with the letter, as well as the spirit, of the law.”<sup>4</sup>

In the years that have followed, Prince Edward Island (PEI),<sup>5</sup> New Brunswick,<sup>6</sup> and, most recently, Manitoba<sup>7</sup> have all passed franchise legislation that borrows heavily from the Ontario Act, thus leaving Canada with five provinces with franchise statutes that are relatively uniform. The remaining provinces—most notably, British Columbia<sup>8</sup> and Quebec<sup>9</sup>—and three territories continue to be devoid of any franchise legislation. It is likely that any of these provinces or territories that pass future legislation in the area of franchising will emulate the five existing provincial statutes, both to promote legislative consistency across the country and to avoid creating roadblocks to the economic growth that franchising would stimulate.

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The five existing Canadian franchise statutes focus almost exclusively on disclosure, the duty of fair dealing, and the rights of franchisees to associate.<sup>10</sup> There are no registration requirements. In the United States, franchise statutes require precontractual disclosure (the nonregistration states under the Federal Trade Commission Franchise Rule (FTC Rule) or pre-contractual registration and disclosure (the registration states) and regulate many more aspects of the franchise relationship, including termination.

For aggrieved franchisees, the remedies available in Canada are much narrower than those available to their U.S. counterparts. All available remedies for breaching the requirements under the provincial franchise statutes in Canada are civil in nature, with each statute providing a private right of action. By comparison, franchisors that commit violations in the United States may be subject to civil action, administrative remedies, and sanctions, and for willful violations, criminal fines and imprisonment, although notably there is no private right of action under the FTC Rule.<sup>11</sup>

Due to Canada's relatively short franchise law history, there is often very little or no judicial precedent interpreting the provincial legislation. Whereas U.S. franchisors enjoy the benefit of official explanatory publications such as the FTC Compliance Guide, the Statement of Basis and Purpose, and Frequently Asked Questions regarding the FTC Rule itself, there is no official government commentary or guidance regarding the interpretation of any franchise statutes in Canada.

## **Disclosure**

The focus of Canadian franchise legislation is presale disclosure, the most notable aspects of which are as follows.

### **Obligation to Disclose**

Each provincial statute<sup>12</sup> requires that a written disclosure document must be provided to a prospective franchisee by the franchisor not less than fourteen days before the earlier of (1) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise or (2) the payment of any consideration by or on behalf of the prospective franchisee relating to the franchise. This disclosure trigger will be familiar to American franchisors. With the exception of New York and Rhode Island, where the first face-to-face meeting of the parties still triggers the need for disclosure, all U.S. jurisdictions have this same disclosure trigger, although the advance disclosure period in Michigan, Oregon, and Washington is ten business days.

### **Single Disclosure Document**

Most American franchisors use the same franchise disclosure document (FDD) in every state, attaching state addenda and franchise agreement amendments as exhibits thereto to address state-specific issues. Beyond the minor differences among the five Canadian franchise statutes, there exist enough similarities to allow franchisors to take a similar approach in Canada. This conclusion is made with the caveat that there has been no judicial consideration of this issue in the Canadian courts, which is a recurring theme in Canadian franchise law.

In contrast to the U.S. practice, however, a single Canadian FDD may be created by complying with the most stringent requirement of each of the particular statutes. For example, the Alberta Act requires disclosure of information about only those officers and directors "who have management responsibilities relating to the franchise,"<sup>13</sup> whereas the Ontario Act requires disclosure of information about all of the officers and directors of the franchisor.<sup>14</sup> Any FDD that satisfies the more comprehensive requirement of the Ontario Act would also meet the requirement of the Alberta Act.

### **Delivery Methods**

Many U.S. franchisors have been delivering the FDD electronically for years. The FTC Rule permits franchisors to deliver the FDD in either paper or electronic form, including through an Internet website, by e-mail in pdf format, on a computer disk or CD-ROM, or by facsimile.<sup>15</sup> Unfortunately, electronic delivery is not uniformly permitted in Canada,<sup>16</sup> although some of the provincial statutes do allow for electronic delivery of the FDD under certain conditions.<sup>17</sup> Ontario does not explicitly permit delivery of the FDD by electronic means, but a recent Ontario Superior Court of Justice case held that where an FDD is compliant in substance, and delivered in its entirety electronically, the time period during which the franchisee can rescind the franchise agreement is limited to sixty days (applicable to more minor infractions) rather than two years (applicable to egregious deficiencies).<sup>18</sup> This decision reflects the judicial attitudes to this type of legislation apparent in prior cases such as *Hi Hotel Limited Partnership v Holiday Hospitality Franchising Inc.*,<sup>19</sup> where even the simple absence of a signature and date on a certificate was enough to permit the franchisee a time period of two years during which to rescind the franchise agreement.

As in the United States, a Canadian FDD must be a single document delivered at one time, with the exception of Manitoba, which allows for delivery of the FDD in parts.<sup>20</sup> The fourteen-day franchisee review period in Manitoba does not begin to run until all parts of the FDD have been delivered to the prospective franchisee.

### **Scope of Disclosure**

Franchisors must tread very carefully concerning the scope of their disclosures to prospective Canadian franchisees. An example of the potential pitfalls awaiting franchisors can be found in the Ontario Act, which sets out the requisite elements of disclosure as follows:

1. all material facts, including material facts as prescribed;
2. financial statements as prescribed;
3. copies of all proposed franchise agreements and other agreements relating to the franchise to be signed by the prospective franchisee;
4. statements as prescribed for the purposes of assisting the prospective franchisee in making informed investment decisions; and
5. other information and copies of documents as prescribed.<sup>21</sup>

These requirements cast a wide net around required disclosures in an FDD, primarily because of the requirement to include all material facts, in addition to all prescribed items. Materiality thus is the benchmark that determines whether such information must be included in an FDD under the Ontario Act. Unfortunately, materiality is a most ambiguous concept that has not yet been legislatively or judicially refined.

The Ontario Act broadly defines a material fact as including

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.<sup>22</sup>

Like Ontario, PEI, New Brunswick, and Manitoba each requires franchisors to disclose all material facts in addition to all prescribed information. Accordingly, franchisors in these provinces must conduct a broad and comprehensive audit of their franchise systems to ensure that all material facts are disclosed in the FDD. It should be noted, however, that Alberta only requires disclosure of certain information as prescribed in the regulations.

There are no Canadian cases that provide any real guidance as to what constitutes a material fact in any given situation. In *6792341 Canada Inc. v Dollar It Ltd.*, the Ontario Superior Court of Justice acknowledged that the question of whether or not an FDD is deficient in disclosing material facts is largely fact-specific.<sup>23</sup>

Essentially, the determination of whether or not something is a material fact for Canadian franchise disclosure purposes will be greatly impacted by circumstances such as the subject industry, the size and structure of the franchisor, and the experience of the franchisee. The perspective of the prospective franchisee must always be kept in mind.

Given the murky waters of what constitutes a material fact, and considering the dire consequences associated with deficient disclosure (as discussed below), it is prudent for any franchisor to include in its FDD any fact that could possibly be construed as material. At common law, the failure to disclose material facts may be viewed by a court in the same light as a deliberate misrepresentation of a material fact. Notably, the *Dollar It* Court remarked that franchisors have a duty to protect franchisees from entering into agreements without having all relevant information.<sup>24</sup>

The definition of materiality is arguably narrower under U.S. franchise law.<sup>25</sup> Although the FTC Rule no longer includes a definition of material, the FTC stated in the Statement of Basis of Purpose to the FTC Rule that it will rely on the jurisprudence developed around § 5 of the FTC Act to determine whether information is material.<sup>26</sup> Under this jurisprudence, material in the franchise disclosure context means information that is likely to affect a reasonable prospective franchisee's investment decision. Unlike in the definition of material fact under the Ontario Act, there is no reference to the value or price of the franchise.

The general approach taken in the United States as to the

requisite scope of an FDD also differs from that in Canada in that the United States historically has favored an exclusive—rather than inclusive—approach. Specifically, the FTC Rule prescribes certain information that must be included in the FDD (all of which the FTC considers material) and explicitly prohibits the inclusion of “any materials or information other than those required or permitted by part 436 or by state law not preempted by part 436.”<sup>27</sup> The stated reason for this prohibition is to prevent franchisors from including information that is immaterial, confusing, or distracting from the core disclosures.<sup>28</sup>

A recent U.S. case has created some uncertainty as to whether franchisors may in fact have an affirmative general obligation to disclose all information that is material to a prospective franchisee. In *Colorado Coffee Bean, LLC v. Peaberry Coffee, Inc.*,<sup>29</sup> it was held that a franchisor should have separately disclosed information that the corporate stores owned and operated by its parent company were unprofitable, notwithstanding that this information fell outside the scope of the prescribed disclosures. In so holding, the court rejected the franchisor's arguments that (1) because its parent did not guaranty its performance under the franchise agreement, disclosure of the parent's financial statements in its FDD was not prescribed under the FTC Rule, and (2) it was prohibited by § 436.6(d) of the FTC Rule from including this additional information. The court noted that § 436.1(a)(21) provides that franchisors are not precluded “from giving other non-deceptive information orally, visually or in separate literature so long as such information is not contradictory to the information” in the FDD. Although that section appears to be an exception for information provided in franchise sales materials and is permissive in nature, the court used this language to create a positive disclosure obligation.<sup>30</sup>

## Financial Statements

American franchisors will be glad to learn that the Canadian requirements for financial statements are less onerous than those imposed in the United States. Under the provincial franchise regulations, franchisors must include in the FDD financial statements for the franchisor's most recently completed fiscal year that are prepared to at least the standards applicable to review engagements as set forth in the Canadian Institute of Chartered Accountants (CICA) handbook.<sup>31</sup> This is a step down from the FTC Rule and state laws that generally require financial statements to be prepared under U.S. generally accepted accounting principles (GAAP) and audited under U.S. generally accepted auditing standards.<sup>32</sup>

U.S. franchisors should note, however, that internally prepared financial statements or financial statements prepared in another jurisdiction whose standards are not equivalent to the CICA standards are not sufficient under Canadian franchise statutes. In practice, financial statements of a U.S. franchisor prepared under GAAP would likely suffice in Canada, if they are reviewed by a qualified individual (such as a Canadian chartered accountant) and if notes are added to the financial statements incorporating any information necessary to render the financial statements at least equivalent to the CICA standards.

If a franchisor does not include financial statements in its FDD, the FDD will not comply with any of the Canadian franchise statutes. In *Sovereignty Investment Holdings, Inc. v 9127-6907 Quebec Inc.*,<sup>33</sup> the Ontario Superior Court of Justice held that the failure to provide financial statements as required under the Regulation<sup>34</sup> was a fundamental deficiency sufficient to invalidate the FDD, entitling the franchisee to the two-year statutory rescission remedy under the Ontario Act.

U.S. franchisors often provide a parent company's consolidated financial statements to their Canadian franchise counsel for inclusion with their Canadian FDD. This practice may stem from two factors. First, the consolidation of tax returns for related entities is permitted in the United States so that the use of, and preparation of combined statements for, consolidated groups of companies may be more prevalent there. Second, because they are permitted to use consolidated financial statements in their FDD so long as the parent guarantees the obligations of the franchising entity under the franchise agreement, some U.S. franchisors elect to do this because they feel that disclosing their overall corporate financial strength to new franchisees outweighs the downside of exposing the parent to liability.<sup>35</sup> U.S. franchisors should know, however, that under the Canadian Income Tax Act,<sup>36</sup> every corporation is taxed as a separate legal entity and consolidation of the financial statements of a corporate group is not allowed. Moreover, each member of the corporate group must determine its tax liabilities and file its tax return separately with the Canada Revenue Agency.<sup>37</sup>

It is reasonable to conclude that the financial statements provided to prospective franchisees as part of a Canadian FDD should be specific to the franchisor entity and not consolidated with related entities. The financial statements of a larger corporate group may not be compliant with the financial statement requirements under Canadian franchise legislation, which require that the financial statements be those of the franchisor.<sup>38</sup> Although there has been no judicial consideration of this issue, the logic is consistent with the judicial interpretation and application of the provincial statutes, as discussed in this article.

### Material Change

Along with the broad notion of material facts, franchisors are also required under the Canadian franchise statutes<sup>39</sup> to provide a prospective franchisee with a written statement of material change if, during the time from the date of disclosure to the date of signing the franchise agreement or the payment of consideration, any change occurs that would reasonably be expected to have a significant adverse effect on the value or price of the franchise to be granted or the franchisee's decision to acquire the franchise.

It should be emphasized that a change is not material unless it may reasonably be expected to have a *significant adverse* effect on the value or decision, whereas a *material fact* includes any fact whether positive or negative. Although material changes that may benefit a franchisee do not require disclosure, in practice, a franchisor certainly may want to notify a prospective franchisee of any positive change.

By comparison, the FTC Rule does not require U.S. franchisors to redisclose upon amending the FDD for material change. Upon the prospect's reasonable request, however, a U.S. franchisor must redisclose using its most current FDD.<sup>40</sup> In contrast, registration states do require that the FDD be redisclosed to prospective franchisees upon the occurrence of a material change. Unlike the Canadian franchise statutes, there is no distinction made in the FTC Rule between adverse and beneficial changes.<sup>41</sup>

The PEI, NB, and Manitoba franchise statutes prescribe a form and technical requirement for a notice of change. Neither Alberta nor Ontario mandates a standard form that the statement of material change must adopt, but like all documents under Canadian franchise statutes, the statement must meet the requirement of being accurate, clear, and concise, as described below. Note that the requirements for the signatories to the statement

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### [F]inancial statements provided to prospective franchisees as part of a Canadian FDD should be specific to the franchisor entity ...

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of material change in New Brunswick and the certificate in Manitoba and PEI are the same as the requirements for FDDs: two signatures are required if the franchisor has more than one officer or director. Best practices dictate that franchisors obtain a written receipt of any notice of material change.

### Clear and Concise

With the exception of the Alberta Act, every Canadian franchise statute requires that all information in an FDD and a statement of a material change be "accurately, clearly and concisely" set forth.<sup>42</sup> The legislation thus would appear to impose contradictory requirements upon franchisors: full disclosure of all material facts, leaving out nothing that could potentially be deemed as such, while at the same time keeping such information "clear and concise."

There is a dearth of Canadian case law as to the meaning of the term "clear and concise." By comparison, § 436.1(d) of the FTC Rule offers some guidance to U.S. franchisors in this regard, stating that to "disclose, state, describe, and list" each means to present all material facts accurately, clearly, concisely, and legibly in plain English. Section 436.1(o) of the FTC Rule provides that "plain English" means "the organization of information and language usage understandable by a person unfamiliar with the franchise business. It incorporates short sentences; definite, concrete, everyday language; active voice; and tabular presentation of information, where possible. It avoids legal jargon, highly technical business terms, and multiple negatives." Franchisors would be wise to keep these terms in mind when drafting an FDD for use in Canada. Essentially,

a Canadian recipient of an FDD has a legitimate statutory expectation that the FDD will be drafted in clear and plain language, to the full extent that is possible. Of course, drafting FDDs in a clear and concise manner can be beneficial to franchisors as well as franchisees. A user-friendly FDD can serve as an effective marketing tool in and of itself.

A potential hazard for U.S. franchisors expanding into Canada is ensuring that any wrap-around disclosure meets this clear and concise requirement. Other than in the Ontario Act, the use of U.S. FDDs is specifically permitted under all Canadian franchise statutes.<sup>43</sup> A U.S. FDD must be accompanied by an addendum that adds any information required under the relevant provincial statute that is missing.

Particularly in Ontario, however, franchisors should be cautious about simply adding the additional provincial statutory requirements to their U.S. FDD. Proper time and care should be taken to ensure that the information required under the statute is not merely disclosed, but that it is disclosed both clearly and concisely. Canadian judges likely will not look favorably upon an FDD that was thrown together in haste and tweaked solely in an effort to meet the black-letter disclosure requirements of the applicable province.

### **Financial Performance Representations**

There is nothing more relevant or influential to prospective franchisees when choosing a franchise than historical and expected franchise performance. American franchisors currently have the option to provide financial performance representations (FPRs) in their FDDs. If a franchisor wishes to make FPRs orally or otherwise outside the FDD, however, the FPR must appear in Item 19 of the FDD. In light of the great weight that FPRs carry with prospective franchisees, it has been argued that at least certain types of FPRs should be mandatory in the United States.

North of the border, little jurisprudence concerns whether earnings projections are an essential component of Canadian FDDs, although it is easy to imagine a scenario where earnings projections or the historical performance of franchisees might rise to the level of a material fact, such as where a significant number of franchisees in a given system are struggling financially. However, although no Canadian franchise statute expressly requires the inclusion of an earnings projection or FPR in an FDD, if such information is included, an accompanying statement must also be included that specifies the reasonable basis for the projections and identifies all of the underlying assumptions.<sup>44</sup> Information that substantiates the claim must also be made available for inspection.<sup>45</sup> The legislation is silent on whether earnings projections need to be in writing to fall under the ambit of the franchise statutes, so oral statements made during the course of franchise negotiations could potentially trigger the above-referenced disclosure obligations in an FDD.

### **Substantial Compliance**

Every Canadian franchise statute renders void any attempt by either franchisors or franchisees to waive their rights under the applicable franchise legislation.<sup>46</sup> Therefore, a prospective

franchisee cannot waive its right to receive a fully compliant FDD. The same can be said for most, if not all, U.S. franchise statutes.<sup>47</sup> However, the Alberta regulations do allow some leeway, providing that if an FDD is somewhat deficient yet substantially complete, a franchisee may be barred from exercising its right of rescission.<sup>48</sup>

The regulations fail, however, to specify what would be considered to be a "substantially complete" FDD. In *Hi Hotel*,<sup>49</sup> where the franchisor failed to include a signed certificate of disclosure (as required under the Alberta Act), the Alberta Court of Appeal ruled that the substantial compliance defense was not available. The Court opined that the lack of a signature on the certificate of disclosure rendered it deficient to the point where the substantial compliance defense could not be pleaded successfully.<sup>50</sup>

### **Burden of Proof**

As previously noted, a franchisor's failure to comply with the disclosure requirements of any applicable provincial franchise statute may entitle a franchisee to rescind the franchise agreement.<sup>51</sup> When a Canadian franchisee desires rescission, the onus is on the franchisor to demonstrate that it has complied with the applicable franchise statute.<sup>52</sup> By contrast, under U.S. law, the franchisor has a burden of proof to show that it complied with the FTC Rule's obligation to furnish disclosures,<sup>53</sup> but not that the disclosures provided were sufficient or not misleading.<sup>54</sup> The latter burden of proof falls to the franchisee or administrative body.

### **Consequences of Noncompliance**

As noted above, the remedies available in Canada for noncompliance with an applicable franchise statute are not as broad as in the United States. In Canada, if a franchisor fails to provide an FDD as required by statute, or if the FDD is materially deficient in some way, this triggers various rights of rescission upon which a franchisee may act to terminate the franchise relationship.<sup>55</sup> By comparison, U.S. franchisors that breach franchise laws may be subject to civil and even criminal liability and imprisonment (for willful violations), as well as administrative penalties, sanctions, and fines, although notably there is no private right of action under the FTC Rule.

The critical points of departure between the two regimes with respect to potential consequences for noncompliance are that (1) the United States does not statutorily distinguish between inadequate disclosure and no disclosure but focuses instead upon whether noncompliance was willful or not, and (2) the Canadian statutes offer two categories of rescission rights to aggrieved franchisees.

In cases where a Canadian franchisee does not receive an FDD at all, it is entitled to a two-year period during which it may exercise the statutory rescission remedy. In cases where the FDD was delivered late, or where its contents did not meet the statutory requirements, that franchisee would be entitled to a sixty-day right of rescission.

In *Sovereignty Investment Holdings*,<sup>56</sup> the Ontario Superior Court of Justice distinguished between the sixty-day right of rescission under section 6(1) of the Ontario *Arthur Wishart*

*Act* and the two-year right of rescission under section 6(2) of the Ontario *Arthur Wishart Act*. Distinguishing the circumstances that trigger these two remedies under the Ontario *Act*, the Ontario Superior Court of Justice has explained that the sixty-day right of rescission “. . . is directed to the situation in which the franchisee was unable to make a fully informed decision as a result of inadequate time for consideration of such decision or inadequate disclosure of the material facts,” whereas the two-year right of rescission applies where “. . . the franchisee is unable to make an informed decision at all because of fundamental deficiencies in the disclosure provided to it.”<sup>57</sup>

An example of the invocation of the latter remedy can be found in *1518628 Ontario Inc. v. Tutor Time Learning Centres LLC*,<sup>58</sup> in which a U.S. franchisor offered its Uniform Franchise Offering Circular (UFOC) to a prospective Canadian franchisee in Ontario without making any effort to conform to the requirements of the Ontario *Act*. The Ontario Superior Court of Justice held that the UFOC was not a disclosure document at all because it was missing material facts and failed to meet the Ontario disclosure obligations. The Court concluded that the franchisee was entitled to a full two-year period during which it could rescind the franchise agreement.<sup>59</sup>

Although whether a franchisor’s inadequate disclosure entitles a franchisee to the sixty-day or two-year rescission period is always a question of fact, U.S. franchisors would be well served to take the time to prepare proper and compliant FDDs for use in Canada. The consequences of noncompliance under the Canadian franchise statutes can be extremely severe.

## Reliance

Significantly, a Canadian franchisee’s reliance upon an FDD is statutorily deemed under each of the provincial statutes.<sup>60</sup> This is an important distinction for U.S. franchisors. Although a few state “Little FTC Acts” (state consumer protections laws) do not require proof of reliance, most claims brought by U.S. franchisees under state franchise investment laws or Little FTC Acts require some level of reliance.<sup>61</sup> Accordingly, it not only is far easier for Canadian franchisees to pursue a cause of action for misrepresentation than their U.S. counterparts, this cause of action can be advanced against the franchisor, its agents, brokers and associates, and every person who signed the certificate of disclosure.

## Exemptions to Disclosure

Notwithstanding the high threshold for disclosure that is required of franchisors in Canadian jurisdictions, the provincial statutes do contain some franchisor-friendly disclosure exemptions. Each Canadian franchise statute identifies a list of circumstances that are exempt from the mandatory disclosure requirements.<sup>62</sup> The following are some examples.

### Sales by Franchisees<sup>63</sup>

Canada has created a specific exemption to the disclosure requirements where a franchisee sells the franchise to a third party. The exemption applies to such a sale unless the sale was effected “by or through” the franchisor, and even if the

franchisor has the right to approve or disapprove the grant, or if a transfer fee is required under the franchise agreement to process the grant. The phrase “by or through” the franchisor is not defined under the provincial statutes and has received only a modest amount of judicial attention.<sup>64</sup> There is no comparable exemption under the FTC Rule. The FTC takes the position that such an exemption is not required because a franchisee is not creating a franchise relationship with the transferee and the transferee is not entitled to disclosure unless the franchisor plays a “significant role” in the sale, such as providing financial performance information to the prospective transferee.<sup>65</sup>

### Grant of an Additional Franchise to an Existing Franchisee<sup>66</sup>

If an additional franchise is substantially the same as the franchise that the franchisee is currently operating, and there has been no material change since the existing franchise agreement was entered into, renewed, or extended, no additional disclosure is required. There is no comparable FTC Rule exemption, but some state franchise laws contain a similar exemption.<sup>67</sup> Without an applicable exemption under the FTC Rule, disclosure is still required.

### Fractional Franchise<sup>68</sup>

The grant of a franchise to sell goods or services within a business in which that person has an interest is also exempt from the Canadian disclosure requirements, so long as the parties do not anticipate that the franchise’s sales will exceed 20 percent of the total sales of the existing business.

The FTC offers some guidance that might be useful to Canadian franchisors regarding how certain elements of this exemption should be interpreted in the United States, including that the 20 percent calculation applies to the entire business of the franchisee and is not limited to the specific location where the franchised products are to be sold.<sup>69</sup> Although the FTC Rule also contains a fractional franchise exemption that includes a similar 20 percent threshold,<sup>70</sup> the similarities between the respective fractional franchise exemptions of the two regimes end there. Among the differences, in order to qualify for the fractional franchise exemption in the United States, the franchisee (or any of the franchisee’s current directors or officers, or any current directors or officers of a parent or affiliate) must have operated a business in the same line of business as the type of products or services to be sold by the franchise for a period of at least two years prior to the grant of the franchise.<sup>71</sup>

### Renewal or Extension<sup>72</sup>

As long as there has been no material change, no additional disclosure is required upon renewal or extension of a franchise agreement in Ontario, PEI, New Brunswick, or Manitoba. The Alberta exemption is not dependent on the occurrence of material change. There is no comparable FTC Rule exemption, but some state franchise laws contain a similar exemption.<sup>73</sup> Again, without an applicable exemption under the FTC Rule, disclosure is still required.

## **One Year, No Payment<sup>74</sup>**

If the franchise agreement is not valid for more than a year, and there is no nonrefundable franchise fee, an exemption is available in Ontario. In PEI, New Brunswick, and Manitoba, this exemption applies if, in addition to the above requirements, the franchisor or its associate provides location assistance. There is no comparable U.S. exemption.

## **Large Franchisee Investor Exemption<sup>75</sup>**

In Ontario, if the franchisee will invest more than \$5 million (CAD) in one year in the acquisition and operation of the franchise, the franchisor will be exempt from the obligation to disclose. The FTC Rule has a similar exemption, but it refers to “initial investment” rather than payments over a one-year period. The FTC Compliance Guide indicates that initial investment means the expenses paid through opening and the first three months of operations.<sup>76</sup> It excludes expenses such as rent, royalties, and advertising costs that are paid outside the initial investment time period.<sup>77</sup> Additionally, initial investment excludes the costs associated with franchisor-provided financing and undeveloped land costs.<sup>78</sup> The FTC Compliance Guide makes it clear that at least one individual in an investor group must invest at the \$1 million level because the exemption is premised on the assumption that a franchisee’s ability to pay \$1 million equates with sophistication.<sup>79</sup>

## **Judicial Attitudes**

The Canadian judiciary issued two franchise decisions of note during 2012: the *Tim Horton’s* case<sup>80</sup> and the *Dunkin’ Donuts* case.<sup>81</sup>

### ***Tim Horton’s***

Prior to 2012, Canadian courts had held that franchisors owe franchisees a duty of fair dealing (and vice versa), and if this duty is breached, courts will take this into account when interpreting franchise agreements.<sup>82</sup> In 2012, Justice Strathy of the Ontario Superior Court altered this landscape by taking a franchisor-friendly approach to the duty of good faith and fair dealing in the *Tim Horton’s* case,<sup>83</sup> one that U.S. franchisors are apt to view as being consistent with U.S. jurisprudence.

In this case, a group of franchisees took issue with system changes that their franchisor was imposing, including a requirement that they use frozen donuts. The Court awarded summary judgment to the franchisor, holding that the duty of fair dealing does not give franchisees the power to attack each aspect of the franchise relationship. In so holding, the Court looked at the overall relationship and the benefits accruing to both parties.

The Court also devoted a lengthy portion of its judgment to the meaning of good faith and fair dealing under the Ontario Act, which provides in pertinent part that (1) every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement;<sup>84</sup> (2) each party has a right to recover damages against the other party for the breach of the duty of fair dealing in the performance and enforcement of the agreement;<sup>85</sup> and (3) the duty of fair dealing includes the

duty to act in good faith and in accordance with reasonable commercial standards.<sup>86</sup>

Justice Strathy opined:

The duty of good faith and fair dealing and the duty to act in accordance with reasonable commercial standards, as expressed in the *Arthur Wishart Act*, relate to the *performance* and *enforcement* of the franchise agreement. The duty is imposed in order to secure the performance of the contract the parties have made. It is not intended to replace that contract with another contract or to amend the contract by altering the express terms of the franchise contract. It follows from this that in assessing whether a party has demonstrated good faith and fair dealing in the performance and enforcement of the agreement, the party’s conduct must be considered in the context of and in conjunction with the contract that the parties have made. It is not a stand-alone duty that trumps all other contractual provisions.<sup>87</sup>

In summary, Justice Strathy held that the duty of good faith and fair dealing is the lens through which the terms of a franchise agreement will be interpreted; it is not a replacement for the words of the agreement. Ontario franchisees thus cannot use the duty as a tool to pick and choose whether to comply with a particular program of the franchisor; the Court will analyze such claims by considering the franchise relationship as a whole.

Justice Strathy’s interpretation is similar to those of U.S. courts considering the application of the implied covenants of good faith and fair dealing arising under the Uniform Commercial Code<sup>88</sup> and under common law as stated in the Restatement (Second) of Contracts<sup>89</sup> to franchise relationships. The general rule in most U.S. jurisdictions is that if an agreement vests a party with discretion, that party may not exercise that discretion in bad faith, unreasonably, or in a manner that is inconsistent with the reasonable expectations of the parties, but the implied covenants do not create an independent legal duty.<sup>90</sup> For example, in 2010, a group of Burger King franchisees claimed, among other things, that Burger King’s requirement that they sell certain burgers below cost breached the implied duty of good faith and fair dealing.<sup>91</sup> The U.S. District Court for the Southern District of Florida dismissed this claim and a related claim stating that the franchisees did not establish bad faith because they could not show how Burger King would benefit from harming a significant number of its franchisees. The Court was not inclined to second-guess Burger King’s business judgment. Like the *Tim Horton’s* decision, *Burger King* can be interpreted to mean that U.S. franchisees cannot use the implied duty of fair dealing as a tool to pick and choose among the franchisor’s programs.

### ***Dunkin’ Donuts***

In contrast, a Quebec court was much more “franchisee-friendly” in the *Dunkin’ Donuts* case,<sup>92</sup> another 2012 decision. The unique facts of this case involved a contractual provision that required the franchisor to protect its brand and enhance

the demand for its products in relevant markets.

The franchisor did not respond to increased market competition, and instead suggested that the franchisees should shoulder the costs associated with a remodeling program that was not well researched. This was interpreted by the Quebec court as being not only a breach of an express provision of the franchise agreement, but also a breach of the franchisor's duty of good faith and loyalty.

While some in the Canadian franchise community view the *Dunkin' Donuts* decision as precedent for the notion that franchisors have a fundamental, ongoing duty to support their brands, others caution that this case turned upon a very particular fact scenario, and that its precedential value may, accordingly, be limited.

## Conclusion

Whether entering Canada directly or through a subsidiary, U.S. franchisors must recognize that for all of the similarities between the two countries, Canada has its own distinct set of franchising laws, which vary subtly among provinces. American-style disclosure documents, standard form agreements, and manuals must be carefully examined and modified to ensure conformity with the relevant Canada franchise legislation. The cost of noncompliance can be heavy, including generous rescission rights for franchisees, as well as the potential for personal liability for misrepresentation. U.S. franchisors should not be lulled into a false sense of security with respect to presale disclosure obligations when considering expansion north of the border.

## Endnotes

1. R.S.A. 2000, c. F-23 [Alberta Act].
2. (Franchise Disclosure), S.O. 2000, c. 3 [Ontario Act].
3. See, e.g., *Spina v Shoppers Drug Mart Inc.*, 2012 ONSC 5563, [2012] O.J. No. 4659 at para. 145 (interpreting the Ontario Act); *6792341 Canada Inc. v Dollar It Ltd.*, 2009 ONCA 385, 95 O.R. 3d 291 (C.A.) at para. 72 (Ontario Act) [*Dollar It*]; *779975 Ontario Ltd. v Mmmuffins Canada Corp.*, [2009] O.J. No. 2357, 62 B.L.R. (4th) 137 at para. 30 (Ontario Act) [*Mmmuffins Canada*]; *Trillium Motor World Ltd. v General Motors of Canada Ltd.*, 2011 ONSC 1300, [2011] O.J. No. 889 at para. 69 (Ontario Act).
4. *Dollar It*, *supra* note 3, at para. 72; *Mmmuffins Canada*, *supra* note 3, at para. 30.
5. *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1 [PEI Act].
6. *Franchises Act*, S.N.B. 2007, c. F-23.5 [NB Act].
7. *Franchises Act*, C.C.S.M. c. F156 [Manitoba Act].
8. The absence of any franchise-specific legislation in British Columbia is particularly remarkable given its thriving franchise market and plethora of homegrown franchises. However, the British Columbia branch of the Canadian Bar Association recently released an "Agenda for Justice," which calls upon the Government of British Columbia to enact franchise legislation in order to provide protection to small business franchisees. In response, the British Columbia Law Institute has issued a consultation paper to obtain input from franchisors, franchisees, business, and consumer organizations as well the general public on the proposed legislation to govern franchising.
9. Some aspects of franchise regulation in Quebec, Canada's

only civil law jurisdiction, are addressed through its Civil Code and language laws.

10. The right to associate is contained within each of the Canadian franchise statutes; it can briefly be summarized as a right of franchisees to associate and form franchisee associations, free from interference, penalties, or threats from the franchisor. Ontario Act, *supra* note 2, s. 4; Alberta Act, *supra* note 1, s. 8; PEI Act, *supra* note 5, s. 4; NB Act, *supra* note 6, s. 4; Manitoba Act, *supra* note 7, s. 4.

11. 16 C.F.R. § 436 [FTC Rule].
12. Ontario Act, *supra* note 2, s. 5; Alberta Act, *supra* note 1, s. 4; PEI Act, *supra* note 5, s. 5; NB Act, *supra* note 6, s. 5; Manitoba Act, *supra* note 7, s. 5.
13. Alberta Regulation 240/95 [Alta. Reg], s. 1, Schedule 1.
14. Ontario Regulation 199/05 [Ont. Reg], s. 2(2), Part II.
15. FTC Rule, *supra* note 11, § 436.2.
16. All of the Canadian statutes, except for the Alberta Franchises Act, specify the permitted methods of delivery of the FDD to the potential franchisee. Ontario Act, *supra* note 2, s. 5(2); PEI Act, *supra* note 5, s. 5(2); NB Act, *supra* note 6, s. 5(2); Manitoba Act, *supra* note 7, s. 5(4).
17. PEI Regulation EC232/06 [PEI Reg], s. 2(b); New Brunswick Regulation 2010-92 [NB Reg], s. 3(1)(b); Manitoba Regulation 29/2012 [Man. Reg], s. 5(1)(b).
18. *Vijh et al v Mediterranean Franchise Inc. et al*, 2012 ONSC 3845.
19. 2008 ABCA 276, aff'd 2007 ABQB 686 [*Hi Hotel*].
20. Manitoba Act, *supra* note 7, s. 5(3).
21. Ontario Act, *supra* note 2, s. 5(4).
22. *Id.* s. 1(1).
23. *Dollar It*, at para. 78.
24. *Id.* at para. 72.
25. For a detailed discussion of this topic, see Joseph Y. Adler & Michael R. Laidhold, *Assessing Materiality in Franchise Disclosure Documents: A Canada-U.S. Analysis*, 30:4 Franchise 1.J. 245 (2011).
26. Fed. Trade Comm'n, Disclosure Requirements and Prohibitions Concerning Franchising, 72 Fed. Reg. 15,444, 15,455 (Mar. 30, 2007) [Disclosure Requirements].
27. FTC Rule, *supra* note 11, § 436.6(d).
28. This concept of prescribed disclosure was reinforced in the Statement of Basis of Purpose in a discussion concerning the definition of "disclose, state, describe and list." Disclosure Requirements, *supra* note 26, at 15,455. The FTC Rule defines these terms to mean "to present all material facts accurately, clearly, concisely and legibly in plain English." During the request for comments phase of rulemaking, it was pointed out that this definition was confusing and could be interpreted to mean that the FDD must include all material information and not just that prescribed by the FTC Rule. The FTC staff rejected this notion, stating that a similar definition in the old UFOC guidelines did not create confusion. The Statement of Basis and Purpose does point out that the prohibition on adding to the FDD should be read narrowly and that franchisors are permitted to add footnotes and other clarifications to the FDD to ensure that the prescribed disclosures are complete and not misleading. *Id.* at 15,516. Similarly, most state franchise laws contain antifraud provisions that prohibit making an untrue statement of material fact

or omitting to state a material fact necessary to make a statement not misleading. Although this type of antifraud provision does not create a general requirement to state all material facts, it does qualify how a franchisor is to make the prescribed disclosures.

29. 2010 Colo. App. LEXIS 210 (Feb. 18, 2010).

30. It is interesting to note that this provision, which existed at the time of the relevant Colorado Coffee Bean franchise sale, was deleted when the FTC Rule was amended in 2007. Apparently overlooking this fact, the FTC, in the Statement of Basis and Purpose to the amended FTC Rule, still advocates the application of § 436.1(a) (21) and makes reference to it as though it continues to appear in the amended FTC Rule. It will be interesting to see what effect, if any, both the *Colorado Coffee Bean* case and the deletion of § 436.1(a) (21) from the FTC Rule will have in practice.

31. Ont. Reg, *supra* note 14, s. 3; Alta. Reg, *supra* note 13, s. 3; PEI Reg, *supra* note 17, s. 5; NB Reg, *supra* note 17, s. 7; Man. Reg, *supra* note 17, s. 7.

32. FTC Rule, *supra* note 11, § 436.5 (Disclosure Item (u)(1)). There is a narrow exemption under the amended FTC Rule for statements prepared under foreign GAAP.

33. [2008] O.J. No. 4450 (S.C.J.) [*Sovereignty Investment Holdings*].

34. Ont. Reg, *supra* note 14, s. 3.

35. FTC Rule, *supra* note 11, § 436.5(4)(l)(iii).

36. RSC 1985, c. 1 (5th Supp.).

37. *Id.*

38. Alta. Reg, *supra* note 13, s.3(1); Man. Reg, *supra* note 17, s. 7(2); Ont. Reg, *supra* note 14, s. 3(1); P.E.I. Reg, *supra* note 17, s. 5(1); NB Reg, *supra* note 17, s. 7(1). Under the FTC Rule, the FDD must contain separate financial statements for the franchisor, any subfranchisor, and any parent that commits to perform post-sale obligations for the franchisor or guarantees the franchisor's obligations. 16 C.F.R. § 436.5 (Disclosure Item (u)(1)(v)). In its response to Frequently Asked Questions, FTC staff elaborated on the scope of a parent's commitment to perform post-sale obligations and set out two distinct elements: (1) an obligation to provide a good or service to the franchisee must exist, and (2) the parent must commit to perform the obligation. The parent commits if either it assumes the obligation or the franchisor arranges for the parent to provide the good or service on its behalf. See FAQ #4, at <http://www.ftc.gov/bcp/franchise/amended-rule-faqs.shtml>.

39. Ontario Act, *supra* note 2, s. 5(5); Alberta Act, *supra* note 1, s. 4(4); PEI Act, *supra* note 5, s. 5(5); NB Act, *supra* note 6, s. 5(6); Manitoba Act, *supra* note 7, s. 5(7).

40. FTC Rule, *supra* note 11, § 436.9(f).

41. E.g., N.Y. Gen. Bus. Code § 683 9(a); N.Y. Regs. 200.5.

42. Ontario Act, *supra* note 2, s. 5(6); PEI Act, *supra* note 5, s. 5(6); NB Act, *supra* note 6, s. 5(7); Manitoba Act, *supra* note 7, s. 5(9).

43. Alta. Reg, *supra* note 13, s. 2(2); PEI Reg, *supra* note 17, s. 3(2); NB Reg, *supra* note 17, s. 4; Man. Reg, *supra* note 17, s. 2(2).

44. Ont. Reg, *supra* note 14, s. 6.3; Alta. Reg, *supra* note 13, Sch 1, s. 16; PEI Reg, *supra* note 17, Sch I, Part 3, s. 5; NB Reg, *supra* note 17, Sch A, Part 3, s 5(1); Man. Reg, *supra* note 17, Sch. A, Part 2, s. 11.

45. Ont. Reg, *supra* note 14, s. 6.3; Alta. Reg, *supra* note 13, Sch 1, s. 16; PEI Reg, *supra* note 17, Sch I, Part 3, s. 5; NB Reg, *supra* note 17, Sch A, Part 3, s 5(1); Man. Reg, *supra* note 17, Sch. A, Part 2, s. 11.

46. Ontario Act, *supra* note 2, s. 11; Alberta Act, *supra* note 1, s. 18; PEI Act, *supra* note 5, s. 12; NB Act, *supra* note 17, s. 12; Manitoba Act, *supra* note 7, s. 11.

47. FTC Rule, *supra* note 11, § 426.9(h); see also the waiver provisions under the Federal Trade Commission Act, 15 U.S.C. §§ 41–58, as amended; Cal. Corp. Code § 31512.

48. Alta. Reg, *supra* note 13, s. 2(4).

49. *Hi Hotel*, *supra* note 19.

50. Alta. Reg, *supra* note 13, s. 2(4). Note that the only other Canadian Franchise Regulation containing a "substantial compliance" defense is the PEI Reg, *supra* note 17, s. 3(3).

51. 1490664 Ontario Ltd. v Dig This Garden Retailers Ltd., [2005] O.J. No. 3040, 7 B.L.R. (4th) 1 (C.A.).

52. Rocha v Panda Flowers (1999) Ltd., [2005] A.J. No. 1098, 2005 ABQB 640.

53. Disclosure Requirements, *supra* note 26, at 15,471 n. 280.

54. Feeley v. Whitman Corp., 65 F. Supp. 2d 164, 172 (S.D.N.Y. 1999); G&R Moojestic Treats Inc. v. MaggieMoo's Int'l, LLC, 2004 U.S. Dist. LEXIS 8806, at \*25–27 (S.D.N.Y. 2004); Sherman v. Ben & Jerry's Franchising, Inc., 2009 U.S. Dist. LEXIS 72663, at \*6–7 (D. Vt. 2009).

55. Ontario Act, *supra* note 2, s. 6; Alberta Act, *supra* note 1, s. 13; PEI Act, *supra* note 5, s. 6; NB Act, *supra* note 6, s. 6; Manitoba Act, *supra* note 7, s. 6.

56. *Sovereignty Investment Holdings*, *supra* note 33.

57. *Id.* at para. 25.

58. [2006] O.J. No. 3011, 150 ACWS (3d) [*Tutor Time*].

59. *Id.* at paras. 71–73.

60. Ontario Act, *supra* note 2, s. 7; Alberta Act, *supra* note 1, s. 9; PEI Act, *supra* note 5, s. 7; NB Act, *supra* note 6, s. 7; Manitoba Act, *supra* note 7, s. 7.

61. See Dennis R. LaFiura, Peter Lagarias & Victor Vital, *Comparison of the Trilogy: Common Law Fraud, Franchise Investment Laws, and Little FTC Laws Remedies for Misrepresentations and Omissions in the Offer and Sale of Franchises*, ABA Forum on Franchising, Oct. 19–21, 2011, at 16–20.

62. Ontario Act, *supra* note 2, s. 5(7); Alberta Act, *supra* note 1, s. 5(1); PEI Act, *supra* note 5, s. 5(7); NB Act, *supra* note 6, s. 5(8); Manitoba Act, *supra* note 7, s. 5(11).

63. Ontario Act, *supra* note 2, s. 5(7)(a)(iv); Alberta Act, *supra* note 1, s. 5(1)(a)(iv); PEI Act, *supra* note 5, s. 5(7)(a)(iv); NB Act, *supra* note 6, s. 5(8)(a)(iv); Manitoba Act, *supra* note 7, s. 5(11)(a)(iv).

64. This exception to disclosure has generally been interpreted narrowly by Canadian courts. In 2189205 Ontario Inc. v Springdale Pizza Depot Ltd., 2011 ONCA 467, the Court looked at a number of facts to conclude that the sale of a franchise was caused to happen by or through the franchisor: (1) the franchisor directed the franchisee to a particular purchaser; (2) the franchisor negotiated together with the vendor and the purchaser to bring about the sale of the business and the assignment of the franchise; (3) under the agreement the onus was on the purchaser to obtain the consent of the franchisor; and (4) the franchisor required execution of documents that the vendor had not originally been required to sign, including the specific acknowledgment that there was no reliance by the purchaser on any financial representations made by the franchisor.

65. Fed. Trade Comm'n, Franchise Rule, 16 C.F.R. pt. 436, Compliance Guide, <http://www.ftc.gov/bcp/edu/pubs/business/fran>

- chise/bus70.pdf (May 2008), at 18 [*Compliance Guide*].
66. Ontario Act, *supra* note 2, s. 5(7)(c); Alberta Act, *supra* note 1, s. 5(1)(c); PEI Act, *supra* note 5, s. 5(7)(c); NB Act, *supra* note 6, s. 5(8)(c); Manitoba Act, *supra* note 7, s. 5(11)(c).
  67. E.g., *Ca1. Corp. Code* § 31106 (exemption from disclosure); R.C.W. § 19.100.030(6) (exemption from registration).
  68. Ontario Act, *supra* note 2, s. 5(7)(e); Alberta Act, *supra* note 1, s. 5(1)(g); PEI Act, *supra* note 5, s. 5(7)(e); NB Act, *supra* note 6, s. 5(8)(e); Manitoba Act, *supra* note 7, s. 5(11)(e).
  69. *Compliance Guide*, *supra* note 65, at 8.
  70. FTC Rule, *supra* note 11, § 436.8(a)(2).
  71. *Id.* § 426.1(g).
  72. Ontario Act, *supra* note 2, s. 5(7)(f); Alberta Act, *supra* note 1, s. 5(1)(d); PEI Act, *supra* note 5, s. 5(7)(f); NB Act, *supra* note 6, s. 5(8)(f); Manitoba Act, *supra* note 7, s. 5(11)(f).
  73. E.g., 815 Ill. Comp. Stat. § 705/6 (exemption from disclosure and registration); R.I. Gen. Laws § 19-28.1-6 (6), (8) (exemption from registration).
  74. Ontario Act, *supra* note 2, s. 5(7)(g)(ii); PEI Act, *supra* note 5, s. 5(7)(h); NB Act, *supra* note 6, s. 5(8)(h); Manitoba Act, *supra* note 7, s. 5(11)(h).
  75. Ontario Act, *supra* note 2, s. 5(7)(h).
  76. *Compliance Guide*, *supra* note 65, at 10.
  77. *Id.*
  78. *Id.*
  79. *Id.* at 12.
  80. *Fairview Donut Inc. v The TDL Group Corp.*, 2012 ONSC 1252 [Tim Horton's].
  81. *Bertico Inc. v Dunkin' Brands Canada Ltd.*, 2012 QCCS 2809 [Dunkin' Donuts].
  82. *1230995 Ontario Inc. v Badger Daylighting Inc.*, 2010 ONSC 1587, [2010] O.J. No. 2166.
  83. *Tim Horton's*, *supra* note 80.
  84. Ontario Act, *supra* note 2, s. 3(1).
  85. *Id.* at s. 3(2).
  86. *Id.* at s. 3(3).
  87. *Tim Horton's*, *supra* note 80, at paras. 500–501.
  88. U.C.C. § 1-203.
  89. *Restatement (Second) of Contracts* § 205.
  90. *Breland v. McDonald's Corp.*, No. 1:09-CV-0523-RWS, 2010 WL 4683925 (N.D. Ga. Nov. 10, 2010); Hardee's Food Systems, Inc. v. Hallbeck, No. 4:09CV00664 AGF, 2011 WL 830549 (E.D. Mo. Mar. 3, 2011). For a more detailed summary of these and other recent good faith and fair dealing cases, see Lee J. Plave and Stuart Herschman, *Annual Franchise and Distribution Law Developments 2011* (ABA Forum on Franchising).
  91. *Nat'l Franchise Ass'n v. Burger King Corp.*, No. 09-23435-CIV, 2010 WL 4811912 (S.D. Fla. Nov. 19, 2010).
  92. *Dunkin' Donuts*, *supra* note 81.