

Fit for Life or Fit for Rescission? Ontario Superior Court Confirms that a Deficient Certificate in an FDD is a Fatal Flaw

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A recent decision of the Ontario Superior Court of Justice (the Court) highlights the risks for franchisors and principals of franchisors for failure to deliver a compliant certificate with a franchise disclosure document (FDD). In *2483038 Ontario Inc. v. 2082100 Ontario Inc.*, 2020 ONSC 475, the Court held that an unsigned certificate accompanying an FDD constitutes a fatal flaw entitling a franchisee to rescind a franchise agreement within two years from the execution of the franchise agreement, pursuant to section 6(2) of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (the Wishart Act). The Court further provided clarity on the liability of a “franchisor’s associate” as defined by the Wishart Act.

The defendant franchisor, Fit for Life, provided the franchisee plaintiffs with an FDD in respect of a restaurant in Oakville, Ontario. The sole officer and director of the franchisor, and co-defendant in the action, signed the FDD itself but did not sign and date the mandatory certificate that must accompany an FDD pursuant to section 7(2) of the General Regulation to the Wishart Act, O. Reg. 581/00. After operating the franchise for nearly two years, the franchisee delivered a notice of rescission which asserted that the franchisor’s failure to include a signed and dated certificate with the FDD amounted to effective non-disclosure. The franchisee argued that due to this deficiency, it was unable to make a meaningful investment decision.

In defence, the franchisor argued that a franchisee who claims that a disclosure deficiency amounts to effective non-disclosure must show an actual impact of that non-disclosure, citing the Ontario Court of Appeal’s decision in *Raibex Canada Ltd. v. ASWR Franchising Corp.*, 2018 ONCA 62 (*Raibex*).

The Court rejected the franchisor’s argument. It noted that the case law considering whether an FDD is so deficient as to constitute a complete lack of disclosure (thus giving rise to a two-year rescission period under section 6(2) of the Wishart Act) is informed by two different policy objectives:

1. the ability of a prospective franchisee to make an informed investment decision, which was at issue in *Raibex*; and
2. impressing upon those who sign a disclosure certificate the importance of ensuring the disclosure document is complete and accurate, which was at issue in this decision.

The Court held that, where a franchisee has rescinded a franchise agreement because of a deficient certificate, the franchisee is not required to demonstrate that it was unable to make an informed investment

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decision. Specifically, the Court held that the decision in *Raibex* did not import the requirement of an inability to make an informed investment, and the corresponding policy requiring full disclosure by a franchisor, into the defective certificate analysis, and the different underlying policy objectives that it serves.

The decision also clarifies the liability of “franchisor’s associates” under the Wishart Act. The Court found the sole officer and director of the franchisor to be a franchisor’s associate because he controlled the franchisor and personally made representations to prospective franchisees by signing certain pages of the FDD. The Court further confirmed and clarified that both the franchisor and franchisor’s associates are liable for damages flowing from s. 6(6) of the Wishart Act, rejecting the argument that a franchisor’s associate is only liable for amounts he or she personally received.

Key Takeaways

Franchisors should take care to ensure strict compliance with franchise legislation. Franchisors should keep in mind that, despite the decision of the Court of Appeal in *Raibex*, an unsigned and undated certificate in an FDD can potentially constitute a stand-alone, fatal flaw entitling a franchisee to rescind a franchise agreement.

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