

Franchising - Canada

Court Confirms that Disclosure Documentation Deficiencies Amount to Non-disclosure

December 08 2009

[Facts](#)
[Issues](#)
[Decision](#)
[Comment](#)

In *6792341 Canada Inc v Dollar It Ltd* the Ontario Court of Appeal overturned the trial judge's decision and adopted a similar reasoning to that adopted by the Alberta Court of Appeal in *Hi Hotel Limited Partnership v Holiday Hospitality Franchising Inc* (for further details please see "[Failure to Comply with Disclosure Requirements Leads to Rescission](#)"). The Alberta Court of Appeal had held that material deficiencies in disclosure documentation amount to non-disclosure, thus permitting the franchisee to exercise its right of rescission of the franchisee agreement, without penalty or obligation, within two years (rather than 60 days) of its execution.

Facts

In *Dollar It* the franchisee entered into a franchise agreement and several related agreements with the franchisor and its affiliates for the operation of a retail business. Before entering into the franchise agreement, the franchisor provided the franchisee with a disclosure document in purported compliance with the Arthur Wishart Act (Franchise Disclosure) 2000 (Ontario).

The franchised business was unsuccessful and more than eight months after the execution of the franchise agreement, the franchisee served the franchisor with a notice of rescission pursuant to the Ontario act. The franchisee claimed that the disclosure document was so deficient that it amounted to non-disclosure, thereby entitling the franchisee to rescind the franchise agreement, without penalty or obligation, within two years of its execution. The franchisor argued that although the disclosure documentation was deficient, these deficiencies did not amount to non-disclosure, and the franchisee could exercise the statutory right of rescission for failure to provide a disclosure document only within 60 days of the franchise agreement's execution.

The trial judge ruled in favour of the franchisor, holding that although the disclosure document was deficient, it could not be qualified as void from the outset. Accordingly, the franchisee was barred from rescinding without penalty or obligation and could claim damages only as a result of any incompleteness or misrepresentations contained in the disclosure documentation.

Issues

The key issue before the court of appeal was whether the missing and incomplete information alleged by the franchisee constituted non-disclosure, thus giving rise to a right of rescission exercisable within a two-year period after the execution of the franchise agreement under the Ontario act. The alleged deficiencies included:

- an unsigned and undated certificate;
- failure to provide the required financial statements relating to the franchisor;
- failure to provide a copy of the head lease; and
- failure to provide information in connection with the franchisor's associate, the advertisement fund, the actual territorial grant, the franchisor's policy on proximity of franchised locations and other requirements necessary to operate the franchised business and information regarding volume rebates.

Decision

The court of appeal overturned the trial judge's decision and observed that if the trial judge's decision were to stand, "it would defeat the entire purpose of the Act which is to protect the interests of franchisees". The court of appeal noted that in the *Hi Hotel Case*

Authors

Bruno Floriani



Samara Sekouti



the mere absence of a signed and dated certificate was sufficient for the Alberta Court of Appeal to permit the franchisee to rescind the franchise agreement within two years of its execution, rather than restrict the franchisee to exercising the rescission remedy within 60 days for failure to provide a disclosure document. The court of appeal also indicated that missing financial statements was a "complete failure" on the franchisor's part to fulfil its disclosure obligations under the Ontario act. The franchisor's omission to provide the franchisee with a copy of the head lease was also considered fatal, insofar as the franchisee was required contractually to accept and agree to be bound by all the terms and conditions of the head lease. This finding will lead many to wonder whether other documents or agreements referenced in the franchise agreement may be construed as being sufficiently material to warrant specific disclosure of their terms and conditions in the disclosure document.

Given the circumstances, the court of appeal held that nearly every category of information that had not been addressed in the disclosure documentation was sufficiently material, on its own, to constitute non-disclosure under the Ontario act.

The court of appeal also noted that the same conclusion had been reached by the Ontario Superior Court of Justice in *6862829 Canada Ltd v Dollar It Ltd* against the same franchisor and involving the same disclosure documentation (for further details please see "[Material Deficiencies in Disclosure Documentation Amount to Non-disclosure](#)").

Comment

This Ontario Court of Appeal decision emphasizes the importance for franchisors to ensure that disclosure documentation scrupulously meets all requirements under applicable franchise legislation in Canada. Franchisors should also ensure that they attach as schedules to the disclosure document a copy of all related documentation and agreements, such as financial statements and the head lease agreement (if any). It is also imperative that the disclosure documentation be supported by a signed and dated certificate of the franchisor, certifying the accuracy and completeness of the information provided to the franchisee.

For further information on this topic please contact [Bruno Floriani](#) or [Samara Sekouti](#) at Lapointe Rosenstein LLP by telephone (+1 514 925 6300), fax (+1 514 925 9001) or email (bruno.floriani@lapointeroseinstein.com or samara.sekouti@lapointeroseinstein.com).

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.



Official Online Media Partner to the International Bar Association
An International Online Media Partner to the Association of Corporate Counsel
European Online Media Partner to the European Company Lawyers Association

© Copyright 1997-2009 Globe Business Publishing Ltd