



May 16, 2012

Mr. Joseph Fittante
Chair, American Bar Association Forum on Franchising
c/o American Bar Association
740 15th Street, N.W.
Washington, DC 20005
Facsimile: 202-662-1000

Via email to: jfittante@larkinhoffman.com

Dear Sir:

RE: US Attorneys Preparing Disclosure Documents and Franchise Documentation for Use in Canada

I am writing to you in your capacity as Chair of the ABA Forum on Franchising on behalf of the Executive of the Ontario Bar Association Franchise Law Section, of which I am the current Chair. Our Executive consists of 24 transactional lawyers and litigators who practice in varying degrees in the area of franchise law in the province of Ontario, Canada. Our Executive represents all of the members of this Section and this letter has been approved on behalf of the entire Association representing the interests of more than 17,000 Ontario lawyers.

For some time, we have been aware that a number of U.S. lawyers have been promoting the fact that they will and do prepare Canadian franchise agreements, ancillary documents and disclosure documents for their clients expanding to or already franchising in Canada. Occasionally, these lawyers may retain Canadian counsel to do a quick review of the documents in order to assure themselves or their clients that the documents have been reviewed by Canadian counsel, but in our collective experience this is not done in many cases.

We assume that most of the members of the ABA Forum on Franchising are aware of the growing complexity of preparing Canadian franchise documents, especially disclosure documents, as a result of various articles, papers, presentations at Forum programs, and messages on the list serve. Our courts are regularly interpreting the provisions of our franchise laws, more often than not in favour of franchisees, and making decisions that affect substantive provisions of franchise documents. In addition, as of the beginning of 2012, assuming that the province of Manitoba declares its franchise legislation in force, a majority of Canada's common law provinces will have enacted separate and distinct provincial legislation. With five such provincial franchise laws, the preparation of national Canadian disclosure documents has become extremely complicated and onerous. The statutory remedy of rescission for non disclosure or incomplete disclosure is among the harshest remedies in franchise legislation around the world, elevating potential risk to lawyers who are not qualified to undertake this work.

As a group, we have witnessed Canadian franchise agreements, ancillary documents and disclosure documents that have been prepared by U.S. lawyers, often highly qualified specialists in their own jurisdictions, which contain significant errors or omissions. These lawyers are not professionally qualified to prepare documents or give advice in respect of the laws of what is, to them, a foreign jurisdiction, and as a result these professionals should consider whether or not their insurance coverage in fact covers them for professional negligence in such a circumstance. We are also concerned about the potential impact on and risks to franchisors being advised on Canadian (and, in particular, Ontario) franchise matters exclusively by lawyers not trained or qualified to practice law in this jurisdiction. This impact and risk can extend to those who sign disclosure certificates and those involved in the sale and granting of franchises.

We are bringing this matter to your attention in the hope that the Governing Committee of the ABA Forum on Franchising will consider the matter and assist us in notifying or, on its own initiative, actually notify members of the ABA Forum on Franchising of the inadvisability and risk of this practice. Our preference, of course, would be for the Governing Committee to participate in discouraging a practice that is neither authorized under Canadian provincial legal professional regulatory rules, nor appropriate. If the Governing Committee wishes to remain silent on the issue, we would respectfully request permission to post a notice on the list serve.

We ask that you have this matter considered as soon as possible and reply with your suggestions or comments at your earliest convenience.

Please do not hesitate to contact me on behalf of our Executive if you would like to discuss this matter further. I have listed below the other members of our Executive. I can be reached at 416-977-0007 or adjdick@sotosllp.com.

Thank you for your consideration and assistance. Best regards.

Yours very truly,



Allan D.J. Dick

OBA Franchise Law Section Executive Members (2011-2012):

Dan Caldarone – Cara Operations Limited
Jennifer Dolman – Osler, Hoskin & Harcourt LLP
Jordan Druxerman – Garfinkle, Biderman LLP
Chad Finkelstein – Dale & Lessmann LLP
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