

## Fit For Rescission?

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In January 2018, the Ontario Court of Appeal released its decision in *Raibex Canada Ltd. v. ASWR Franchising Corp.*, 2018 ONCA 62 (“*Raibex*”). In *Raibex*, the Court of Appeal narrowed the availability of rescission for franchisees, stating that the availability of rescission under s. 6(2) of the *Arthur Wishart Act (Franchise Disclosure)* (the “Act”) was dependent on whether the franchisee was effectively deprived of the opportunity to make an “informed investment decision”.

Franchise litigation lawyers have been seeking further guidance about the application of *Raibex* since it was released, and in the recent decision of *2483038 Ontario Inc. v. 2082100 Ontario Inc.*, 2020 ONSC 475 (“*Fit For Life*”), the Ontario Superior Court of Justice provided clarification on this issue and provided further clarity on what constitutes a *franchisor’s associate* (a defined term) pursuant to the Act.

### Facts

In *Fit For Life*, the plaintiffs (the “Franchisees”) were provided with a Franchise Disclosure Document (the “FDD”) when deciding whether to purchase a “Fit For Life” franchise (the “Franchise”). The first four pages of the FDD contained some prescribed information about the “franchise system, such as its corporate name, affiliates, business experience, etc. Following this information, there was a signature block which was signed by Samuel Davis (“Davis”), the sole director and officer of the franchisor, 2082100 Ontario Inc. (the “Franchisor”). This signature block was not a part of any certificate, and the actual certificate contained later on in the FDD did not contain a signature block and was not endorsed by Davis.

The parties entered into a franchise agreement and its ancillary agreements for the operation of the Franchise in September 2015. In August 2017, the Franchisees issued a notice of rescission of the franchise agreement pursuant to their rights under subsection 6(2) of the Act, alleging that there had been no disclosure at all, primarily because the FDD did not contain a certificate signed by the Franchisor’s directors. The Franchisees then brought this action claiming rescission damages. Davis was alleged to be a *franchisor’s associate*.

### Issues

The primary contentious issues in this case were:

1. Were the Franchisees entitled to rescind the franchise agreement under the Act?
2. Was Davis personally liable by virtue of him being a “*franchisor’s associate*”?

## Analysis

In addressing the first issue about whether the failure to include a certificate constituted a fatal flaw, the court followed the decision in *Hi Hotel Limited Partnership v. Holiday Hospitality Franchising Inc.*, 2008 ABCA 276, stating that “there can be no disclosure unless a signed and dated certificate is included in the FDD.” In other words, delivery of a FDD without a properly signed certificate is tantamount to a complete lack of disclosure.

The court stated that franchise disclosure documents serve two policy objectives, namely:

- (i) informed investment decision making; and
- (ii) impressing upon those who sign a disclosure certificate the importance of ensuring the disclosure document is complete and accurate.

The court further stated that the purpose of a certificate is to address the second policy objective, and as such, the absence of a signed and dated disclosure certificate is a fatal flaw in the disclosure provided to the franchisee. It did not matter that the decision of the Franchisees to invest in the Franchise was not affected by any defect or untrue, inaccurate or misleading statement in the disclosure contained in the FDD.

On the second issue of whether Davis was a *franchisor’s associate*, the court applied the two-part test for a *franchisor’s associate* found in the Act. Based upon the facts of this case, the court held that Davis, due to his position as the sole director and officer of the Franchisor, directly controlled the Franchisor. Further, the Court found that Davis, by signing page 4 of the FDD, made statements that were intended to promote the franchise system and therefore made representations to the Franchisees for the purpose of granting the Franchise, marketing the Franchise or otherwise offering to grant the Franchise.

*Fit for Life* reiterates the importance of strict compliance with franchise legislation and the requirements prescribed by the various regulations and the Act. This case further reiterates that the holding in *Raibex* does not change the fundamental obligations of a franchisor, or the rights of a franchisee to rescind in the face of improper disclosure (see for instances: *6792341 Canada Inc. v. Dollar It Ltd.*, 95 O.R. (3d) 291; *Mendoza v. Active Tire & Auto Inc.*, 414 D.L.R. (4th) 676; *2240802 Ontario Inc. v. Springdale Pizza Depot Ltd.*, 331 O.A.C. 282; *2212886 Ontario Inc. v. Obsidian Group Inc.*, 67 B.L.R. (5th) 103).