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Coronavirus Emergency Response: Risk Assessment and Risk Management

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The global spread of coronavirus is the one of this century's greatest threats. In North America, people have to reach back to the 9/11 attacks on the United States and the Second World War to draw useful comparisons. The United States Democratic candidate Bernie Sanders stated that "[t]he crisis we face from the coronavirus is on a scale of a major war, and we must act accordingly," he said. "The number of casualties may actually be even higher than what the armed forces experienced in World War II. In other words, we have a major, major crisis and we must act accordingly."[1]

Prime Minister Trudeau has asked the country to stay at home to the extent possible: "As much as possible, stay home. Don't go out unless you have to, work remotely if you can. Let the kids run around a bit in the house."[2] The government has stepped up with financial relief on various levels.[3] Prime Minister Trudeau holds a daily update on the coronavirus crisis each day in front of his home in Ottawa. The Government of Ontario announced that it is taking decisive action by making an order declaring an emergency under s. 7.0.1(1) of the *Emergency Management and Civil Protection Act*. This will legally require the closing of entities such as all bars and restaurants, except to the extent that such facilities provide takeout food and delivery.[4] Premier Doug Ford announced the shutdown of all non-essential services across the province in an effort to slow the spread of COVID-19.[5]

Governments, corporations and organizations must implement risk assessment and risk management policies to combat coronavirus in the short term, but also in the long term.[6] The flow of information on coronavirus that appears each day may be overwhelming to process. As the co-author of a book titled *Profiting From Risk Management and Compliance,*[7] I have spent the last 15 years providing risk strategies to help organizations and governments to think about

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[1] https://www.politico.com/news/2020/03/12/bernie-sadners-coronavirus-127514
[2] (https://www.macleans.ca/news/canada/trudeau-announces-latest-measures-to-fight-covid-19-full-transcript/
[3] The Federal government announced that it would cover 10 per cent of wages. On March 27, 2020, Prime Minister Trudeau announced that "it's becoming clear that we need to do much more, so we're bringing that percentage up to 75 per cent for qualifying businesses. This means that people will continue to be paid, even though their employer has had to slow down or stop its operations because COVID-19." https://www.macleans.ca/news/canada/trudeau-coronavirus-update-march-27-transcript/
[4] https://news.ontario.ca/opo/en/2020/03/ontario-enacts-declaration-of-emergency-to-protect-the-public.html
[5] https://toronto.ctvnews.ca/ford-says-list-of-essential-businesses-amid-covid-19-pandemic-is-adjustable-1.4865528
[6] "Coronavirus will linger after the pandemic ends. But it won't be as bad." By **Justin Lessler** associate professor of epidemiology at the Johns Hopkins University Bloomberg School of Public Health., March 13, 2020 at 6:00 a.m. EDT. https://www.washingtonpost.com/outlook/coronavirus-pandemic-immunity-vaccine/2020/03/12/bbf10996-6485-11ea-acca-80c22bbee96f_story.html
[7] Archibald and Jull, *Profiting From Risk Management and Compliance* (Thomson Reuters 2019).

risk in both the short term and long term. This short article offers an outline of risk techniques that will be needed in the coming weeks and months.

Before turning to the dire realties of risk assessment and risk management, I want to offer a hint of optimism. While it is hard to imagine that there is any potential "profit" arising from the extreme risk measures that are and will be required to combat COVID-19, there may be some beneficial side effects of a general business shutdown in the short term. As the coronavirus spreads, so do startling satellite images showing a dramatic decrease in air pollution over quarantined areas. Satellite data shared in early March showed a steep decline in nitrogen dioxide levels over China between January and February as the epidemic's epicenter of Wuhan went into lockdown. Now, images shared by the European Space Agency (ESA) suggest that a similar thing happened in Italy, which had reported the second highest number of cases after China.[8] Apart from systemic side effects, there are personal anecdotes of beneficial side effects. A physician who completed two weeks in self-isolation noted that he experienced initial depression related to not being able to work and serve his patients. But in his basement he made a plan that allowed him to use the isolation as a rare opportunity to "get the upper hand on many projects" that he hadn't had time for.[9] And we are spending more time with our families at home, which we have been told for years is something that we should have been doing all along.[10]

RISK ASSESSMENT

The basic and generally accepted model of risk assessment is divided into four activities:

(i) identifying the potential hazard;
(ii) drawing a dose/response curve;
(iii) estimating the amount of human exposure; and
(iv) categorizing the result.[11]

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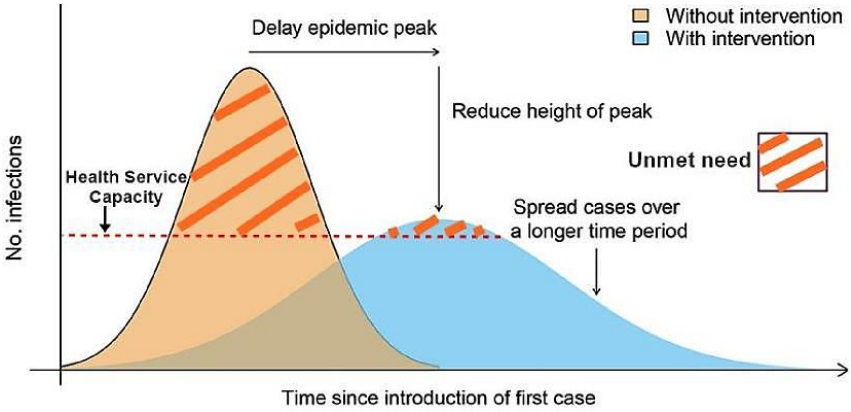
[8] https://www.ecowatch.com/coronavirus-italy-air-pollution-2645508891.html?rebelltitem=3#rebelltitem3. The United States has now surpassed both countries with the number of coronavirus cases. In the United States, as of March 28, 2020, there were at least 102,702 cases of the novel coronavirus, according to CNN Health's tally of US cases that are detected and tested in the country through public health systems. So far, 1,590 people have died in total in the US from coronavirus.

[9] Michael Wansbrough, "Physician, Quarantine Thyself" The Globe and Mail March 19, 2020.

[10] https://www.dailymail.co.uk/news/article-2363193/No-time-family-You-Parents-children-spend-hour-day-modern-demands.html

[11] S. Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Cambridge: Harvard University Press, 1993), at p. 9, citing the Committee on the Institutional Means for Assessment of Risks to Public Health, *Risk Assessment in the Federal Government: Managing the Process* (1983), at pp. 18-19; M. Russell and M. Gruber, "Risk Assessment in Environmental Policy Making" (1987), 236 *Science* 286 ("Risk assessment at EPA proceeds in four steps: (i) hazard assessment, (ii) dose-response assessment, (iii) exposure assessment, and (iv) risk characterization").

In the context of coronavirus, risk assessment attempts to flatten the curve as illustrated in the following Figure 1.[12]



The essential idea of flattening the curve is to delay the epidemic peak in a way that permits the health system to deal with patients over time in the best way, without being overwhelmed. The consequences of an overwhelmed health system are horrifying, requiring physicians to make decisions about who lives and who dies with limited access to equipment such as ventilators.[13] The flattening of the curve is achieved by mechanisms such as remote work, social distancing, cancellation of events where there are gatherings of people and the closing of non-essential businesses.

The predicted length of measures such as social distancing and the shutdown of non-essential businesses is itself a risk assessment. Outbreak modelling shows that four weeks of intensive social distancing interventions will be insufficient to suppress a sharp rise in new cases, hospitalizations, and critically ill patients in intensive care. According to one model, the disruptive measures must continue for more than six months to slash the size of the epidemic peak by more than half and delay it long enough that a vaccine might become available.[14]

Risk assessment itself will be the source of debate between epidemiologists.[15] While infectious disease experts say it is believed Canada had community transmission as early as March 1, 2020, governments did not bring in “physical” or “social” distancing guidelines until the middle of March, and emergency orders to close businesses until the tail end of March.[16] The touchstone is the precautionary principle, clearly articulated in the 2006 investigation into Canada's

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[12] Dalton CB, Corbett SJ, Katelaris AL “Pre-emptive low cost social distancing and enhanced hygiene implemented before local COVID-19 transmission could decrease the number and severity of cases.” https://ssrn.com/abstract=3549276

[13] Canadian doctors will soon be faced with the moral dilemma of deciding who lives and who dies by Gary Mason, The Globe and Mail (Ontario Edition) Mar 20, 2020

[14] “Months of school closures, social distancing needed to fight pandemic: U of T research” by Kate Allen, Science and Technology Reporter, Wed., March 18, 2020 https://www.thestar.com/news/gta/2020/03/18/months-of-school-closures-social-distancing-needed-to-fight-pandemic-u-of-t-research.html

[15] “Prominent scientist dares to ask: Has the COVID-19 response gone too far?” https://www.cbc.ca/news/health/coronavirus-covid-pandemic-response-scientists-1.5502423

[16] https://www.toronto.com/news-story/9915856-was-canada-quick-enough-to-curb-coronavirus-experts-say-there-was-community-spread-as-early-as-march-1/

response to the SARS epidemic, written by Justice Archie Campbell of the Ontario Superior Court. "Where there is reasonable evidence of an impending threat to public health, it is inappropriate to require proof of causation beyond a reasonable doubt before taking steps to avert the threat," Campbell wrote in a chapter called "Spring of Fear,"[17] citing Justice Horace Krever, who presided over Canada's tainted blood inquiry. It is worth re-reading that report now.

Transparency of data is essential for proper risk assessment. Singapore, along with Taiwan and Hong Kong, offers successful approaches, at least so far, in battling a pandemic that has infected more than 600,000 people and caused at least 28,000 deaths worldwide, according to Johns Hopkins University.[18] Despite being hit months ago by the virus, these three Asian societies have recorded only a handful of deaths and relatively few cases, although they continue to face risks as people from emerging hot spots in the United States, Europe and elsewhere carry the virus with them.[19] In Singapore, the details of where patients live, work and play are released quickly online, allowing others to protect themselves. Close contacts of patients are quarantined to limit the spread. South Korea took rapid, intrusive measures against COVID-19 — and they worked.[20]

Disease control infringes on individual liberties,[21] and raises novel privacy law issues.[22] An excellent example of the novel use of technology is from Taiwan. When coronavirus cases were discovered on the Diamond Princess cruise ship after a stop in Taiwan, text messages were sent to every mobile phone on the island, listing each restaurant, tourist site and destination that the ship's passengers had visited during their shore leave. Taiwanese officials say that they are tracking individuals only during the period of mandatory quarantine. "We are not using any advanced surveillance technology. It's simply tracking based on their phone's sim cards and their nearby base stations."[23]

Risk assessment will produce two competing calculations:

- Risk to health and safety from the virus; and

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[17] http://www.archives.gov.on.ca/en/e_records/sars/report/v1.html

[18] https://www.washingtonpost.com/world/2020/03/28/coronavirus-latest-news/. These figures were calculated as of March 28 2020 and will regrettably increase.

[19] https://www.nytimes.com/2020/03/17/world/asia/coronavirus-singapore-hong-kong-taiwan.html

[20] https://www.theguardian.com/commentisfree/2020/mar/20/south-korea-rapid-intrusive-measures-covid-19?CMP=Share_AndroidApp_Email

[21] Fazal Khan, "Ensuring Government Accountability During Public Health Emergencies".

[22] During the polio epidemic in the US, health departments used to publish the names of people with confirmed cases of the illness in the newspapers — a practice that would be far out of bounds today. But that didn't stop people in the US from trying to find out information about the few cases of Ebola in the country during the 2014 outbreak. See https://www.theverge.com/2020/3/12/21177129/personal-privacy-pandemic-ethics-public-health-coronavirus

[23] https://www.theguardian.com/world/2020/mar/13/how-taiwan-is-containing-coronavirus-despite-diplomatic-isolation-by-china

- Risk to the economy from the cancellation of events, remote work, and impacts on the stock market and banking.[24]

This is where the problem starts. In the early stages, governments and organizations will identify both risks to both health and the economy, but may lack direction on how to prioritize these two sectors, which may in fact compete. As a recent editorial in the Globe and Mail stated, the war against COVID-19 is a war on two fronts-health and economics. This is where risk management steps in.

RISK MANAGEMENT

Risk management is the process of weighing policy alternatives in light of the results of risk assessment, and selecting appropriate control options, including regulatory measures.[25]The use of matrix analysis is a core concept of risk management. The matrix is a mathematical model that was first applied in engineering. Rao Kolluru was a pioneer in the development of a matrix approach to risk management.[26] A key insight from this work is that a risk matrix provides priorities for action. The matrix identifies the issue that requires immediate action, and then sequentially identifies those issues with lesser priorities.

An example of a matrix derived from the work of Kolluru is shown in the next figure. This analysis was used in the Deloro Mine site case.[27]

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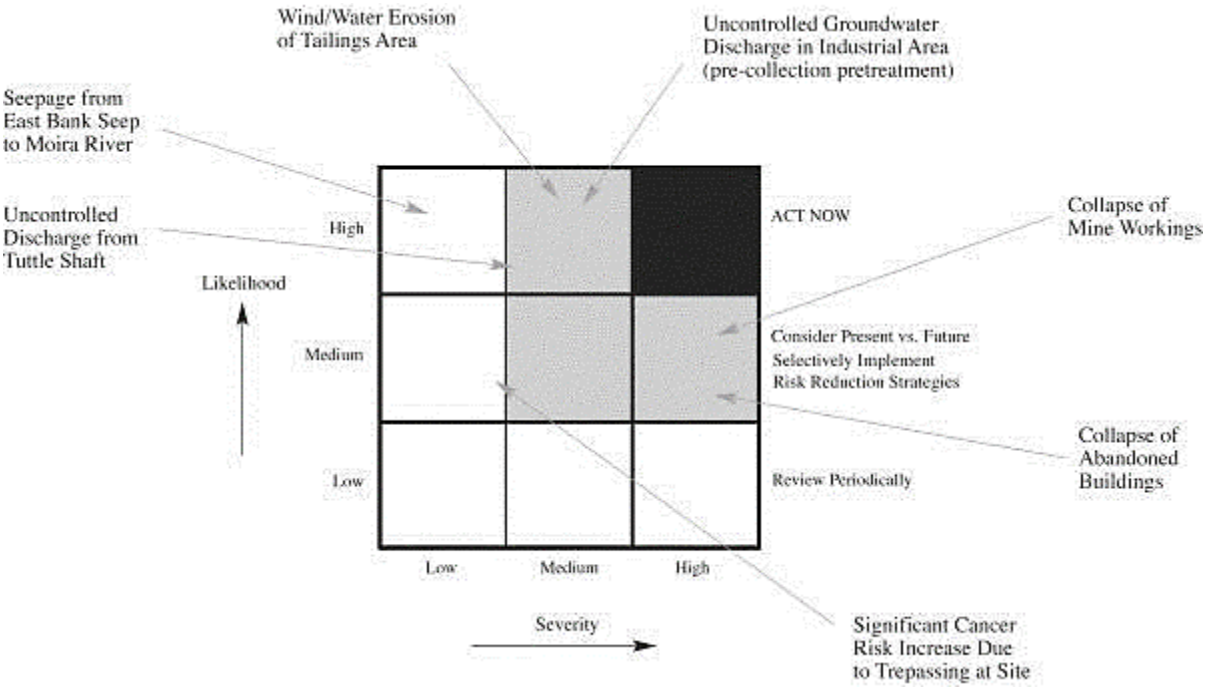
[24] "Pricing the Economic Risk of Coronavirus: a Delay in Consumption or a Recession?" Yosef Bonaparte University of Colorado at Denver March 5rd, 2020 https://ssrn.com/abstract=3549597

[25] D. Powell, "Risk-Based Regulatory Responses in Global Food Trade: A Case Study of Guatemalan Raspberry Imports into the United States and Canada, 1996-1998", in G.B. Doern et al., eds., Risky Business: Canada's Changing Science-Based Policy and Regulatory Regime (Toronto: University of Toronto Press, 2000), at p. 138.

[26] *Risk Assessment and Management Handbook: For Environmental, Health, and Safety Professionals*, Rao Kolluru, Editor in Chief (McGraw-Hill, Inc. New York, Toronto, 1996);

[27] Archibald and Jull, *Profiting From Risk Management and Compliance* (Thomson Reuters 2019), Int: 10:40: Risk Matrix: Basic Principles



In this example, there is a high likelihood (and foreseeability) of some discharges that cause relatively minimal harm, such as the "East Bank Seep" (which contained relatively small loadings of arsenic discharged into the river). The "act now" box directs which activities should receive priority. This permits a court to find that an entity has acted with due diligence, even where a small matter such as a seep has not been fully remediated at that time. This does not justify the discharge of arsenic or mean that the seep can be ignored. Rather, it recognizes that preventive efforts need to be in proportion to the potential gravity of the adverse effects that may occur. In this example the issue with the highest priority was the collapse of mine workings. Abandoned mine shafts posed a danger of a worker falling to his or her death, and the likelihood of such an event was moderate. Coupled with the most severe result of loss of human life, this put the remediation of the collapsed mine workings as the number one priority. In this case the defendant had acted to remediate the collapsed mine shafts as a number one priority and had acted in accordance with sound risk management.

The risk management matrix measures "precautions taken to avoid the event" versus "systems to measure potential gravity of impact". The matrix is grounded in the concepts of negligence law that form the basis of due diligence. The equation of PL=OC, is a type of basic risk management. It premises that some losses will not attract liability. If the probability multiplied by the loss is less than the object times the cost, the conduct is blameless.

In the context of coronavirus, Health Canada has utilized a risk matrix to assist organizations to determine whether they should cancel mass gatherings and implementing the two metre distance rule between persons if the events go forward.[28]

LEGAL DUTIES AND RISK MANAGEMENT

Section 217.1 of the *Criminal Code* requires that organizations take reasonable steps to prevent harm to workers and consumers arising from work:

> 217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work.

Similar protective legislation exists in provincial occupational and health legislation. Legislation such as section 217.1 recognizes a threshold analysis in risk management. Threshold analysis was applied in the tragic case of *R. v. The Royal Canadian Mounted Police.*[29] On June 4, 2014 an assailant armed with an M305 semi-automatic .308 Winchester rifle and at least 60 rounds of ammunition murdered three general duty Royal Canadian Mounted Police members and wounded two others in Moncton, New Brunswick. The RCMP was charged with four offences pursuant to s. 124 of the *Canada Labour Code* alleging a failure to ensure the health and safety of every person employed by it by failing to provide appropriate use of force equipment, training and adequate supervision.

With respect to the defence of due diligence, the RCMP suggested that the magnitude of the risk must be measured alongside its frequency. The court was not attracted to that argument. Each business must examine the circumstances of risk that are particular to that business, unless there is a direct government order requiring a shutdown of that type of business (such as the Government of Ontario order that legally requires the closing of restaurants, except to the extent that such facilities provide takeout food and delivery).[30] The problem with government recommendations (that are not orders) to "work remotely if you can" is that it downloads risk management to organizations.

The type of matrix provided by Health Canada may be of assistance. There are some mitigation measures that may be taken that would be factored into what is reasonable. For example, a store that must sell essential food supplies might consider the following steps:

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[28] https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/health-professionals/mass-gatherings-risk-assesment.html

[29] *R. v. The Royal Canadian Mounted Police*[29] (2017 CarswellNB 577, 2017 NBPC 6 (N.B. Prov.).

[30] https://news.ontario.ca/opo/en/2020/03/ontario-enacts-declaration-of-emergency-to-protect-the-public.html

- Limit the number of people in stores at any given time as well as asking customers to keep a certain distance from each other while shopping to reduce the risk of making one another sick;[31]
- Rotate employees for shorter shifts;
- Consider health vulnerability of classes of employees based on age and other health demographics.

At a higher level of exposure, the risk measures must increase proportionately. For example, protective suits and goggles are now required equipment for crew on Ukraine International Airlines, a measure of how far some in the airline industry are going to protect workers during the global emergency.[32]

Toronto Law Journal readers must conduct their own risk assessment, given that the Government of Ontario has deemed law offices and paralegal offices as essential workplaces. As such, law offices and paralegal offices are permitted to remain open, to address instances when remote business practices are not feasible. The Law Society of Ontario, which successfully implemented a work at home plan for its own employees effective March 16, 2020, encourages all law offices and paralegal offices to do the same by operating remotely and virtually wherever feasible.[33]

Creative thought is called for. For example, if a law office has to access physical files, this can be coordinated after hours or at times when people will not be in close proximity to each other.

EMERGENCY LEGISLATION

The Federal government has indicated that the *Emergencies Act* is only a last resort.[34] Under the Federal *Emergencies Act*,[35] once a public welfare emergency is declared, the following orders can be made, which would give more guidance and direction for both non-essential and essential industries:

> 8 (1) While a declaration of a public welfare emergency is in effect, the Governor in Council may make such orders or regulations with respect to the following matters as the Governor in Council believes, on reasonable grounds, are necessary for dealing with the emergency:
>
> (a) the regulation or prohibition of travel to, from or within any specified area, where necessary for the protection of the health or safety of individuals;

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[31] Loblaws is doing this, see https://s1.q4cdn.com/326961052/files/doc_news/2020/03/C19-V2.pdf
[32] https://www.cbc.ca/news/health/flight-attendants-protective-suits-1.5513439
[33] https://lso.ca/news-events/news/corporate-statement-re-covid-19
[34] https://www.iheartradio.ca/am-1150/pm-trudeau-says-emergency-measures-are-under-consideration-1.10856298
[35] https://laws-lois.justice.gc.ca/eng/acts/e-4.5/index.html. And see How Canada's lockdown powers work, The Globe and Mail (Ontario Edition) Mar 17, 2020.

(b) the evacuation of persons and the removal of personal property from any specified area and the making of arrangements for the adequate care and protection of the persons and property;

(c) the requisition, use or disposition of property;

(d) the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered;

(e) the regulation of the distribution and availability of essential goods, services and resources;

(f) the authorization and making of emergency payments;

(g) the establishment of emergency shelters and hospitals;

(h) the assessment of damage to any works or undertakings and the repair, replacement or restoration thereof;

(i) the assessment of damage to the environment and the elimination or alleviation of the damage; and

(j) the imposition

(i) on summary conviction, of a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both that fine and imprisonment, or

(ii) on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment,

for contravention of any order or regulation made under this section.

The declaration of an emergency raises many constitutional issues beyond this short paper. It is worthy of note that some legal academics have considered these implications in the context of a pandemic and some model statutes offer guidance.[36] There is a delicate balance between orders such as quarantine and individual liberties. Moreover, the most vulnerable citizens may

[36] Preventing National Vulnerability: How a Connecticut Constitutional Amendment Will Balance Individual Liberty And Allocate State Power During a Public Health Emergency By Katherine G. Lovallo Https://Ssrn.Com/Abstract=3427430, 5/22/2019

be impacted by pandemics.[37] Any decision to declare a public welfare emergency[38] should be science based, and not based on political considerations.

Some physicians are arguing that all governments should act now and shut down all non-essential business.[39] Some States in the United States have issued shut down orders.[40] The Canadian government is presently using fiscal and economic incentives to encourage companies to transition to manufacturing medical products in the battle against COVID-19. Prime Minister Trudeau said the industrial strategy will allow companies already making sanitizers, masks and other equipment to scale up quickly, while mobilizing others to shift production to items that are in high demand.[41] Canada is making unprecedented use of the federal *Quarantine Act* in a bid to curb the spread of the COVID-19 pandemic. All travellers returning to Canada are now legally required to go into self-isolation for 14 days rather than simply urged to do so.[42]

INFRASTRUCTURE AND LONG TERM PLANNING

The coronavirus has larger implications for our infrastructure going forward, and government policy with respect to that infrastructure. In this short paper, I will use the telecommunications sector as an example.

Telecommunication infrastructure will be a vital part of the network to allow people to stay connected. Telecommunications is essential in times of emergency. In the Second World War, Canadian signals units operated wireless and telephone equipment to allow the various parts of the army to communicate with each other in the field.[43] Telecom is essential to security networks, demonstrated by events such as the attack on Pearl Harbour[44] and the 9/11 attack.[45]

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[37] Improving Outcomes for Vulnerable Populations During Adverse Events *By Laura Taylor* https://ssrn.com/abstract=3532787

[38] "Coronavirus: How the Emergencies Act could help Canada's struggling economy" by Emerald Bensadoun Global News, posted March 17, 2020 5:51 pm.

[39] https://twitter.com/dockaurg/status/1239540961409216514?s=11

[40] Gov. Gavin Newsom on Thursday ordered Californians to stay at home, marking the first mandatory restrictions placed on the lives of all 40 million residents in the state's fight against the novel coronavirus. The mandatory order allows Californians to continue to visit gas stations, pharmacies, grocery stores, farmers markets, food banks, convenience stores, takeout and delivery restaurants, banks and laundromats. People can leave their homes to care for a relative or a friend or seek healthcare services. https://www.latimes.com/california/story/2020-03-19/gavin-newsom-california-1-billion-federal-aid-coronavirus

[41] https://www.cbc.ca/news/politics/trudeau-covid19-coronavirus-medical-equipment-1.5504149

[42] https://nationalpost.com/pmn/news-pmn/canada-news-pmn/what-you-need-to-know-about-the-quarantine-act-as-isolation-becomes-mandatory-for-returning-travellers

[43] https://www.junobeach.org/canada-in-wwii/articles/radio-communications/

[44] The evidence suggests that better and quicker communication between various elements of the U.S. intelligence apparatus could have saved lives by providing warning of the impending attack. See North Carolina Journal of Law & Technology, Volume 18, Issue 2: December 2016; "Is Cyberattack the Next Pearl Harbor?" by Lawrence J. Trautman at page 250.

[45] The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States 155 (2004), http://www.9-11commission.gov/report/911Report.pdf

Now with the coronavirus pandemic, telecommunications companies are thrust back into a central role. As people work from home, some are asking whether the internet can handle it?[46] For example, Telus Corp. has waived data caps, and the company announced that it will be using "flexible payment options" for customers who can't pay their bills due to a disruption in income. "We don't want anyone to worry about not being able to pay their bill on time if they have been financially affected by the crisis," a Telus spokesperson said. Telus is also waiving roaming charges in China and Italy, and other countries particularly hard hit by the virus, because Canadians in those places may not be able to get home.[47]

The coronavirus pandemic and centrality of telecommunications puts a spotlight on the regulation of the internet and the "net neutrality" debate.[48] One debate in this context is whether a "pay for priority" for internet "fast lanes" ought to be permitted and/or regulated.[49]

I advance three tenets of risk management and justice to guide government policy:

1. Government regulation should ensure that there is the equivalent of an "emergency lane" on broadband networks, for health, safety and security-related traffic;

The focus of any governmental authority will be on ensuring that there is the equivalent of an "emergency lane" on broadband networks, for health, safety and security-related traffic. This emergency lane is more critical than ever in the coronavirus pandemic. As more people work from home and use the internet for recreation, it is essential that health and safety providers not be slowed down in emergency situations.[50]

2. Government policy should attract investment in the market that will maintain and enhance the infrastructure for the "emergency lane" in the future;

Present government policy has been oriented to lowering cell phone costs to consumers. While this may be a laudable goal, it ignores the necessity to attract capital to the industry to build the infrastructure of the future that can be used in pandemics. For example, 5G technology can be used to facilitate some remote surgeries.

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[46] *So We're Working From Home. Can the Internet Handle It?* https://www.nytimes.com/2020/03/16/technology/coronavirus-working-from-home-internet.html

[47] https://business.financialpost.com/telecom/canadian-telecoms-waive-roaming-and-long-distance-fees-suspend-data-caps-in-response-to-coronavirus

[48] Jull and Schmidt, "From the Slow Lane to the Fast Lane of Broadband: Application of a Theory of Justice" 19th Biennial Conference of the International Telecommunications Society (Budapest, Hungary, September 18-21, 2011).

[49] The United States Subcommittee on Communications and Technology, chaired by Rep. Marsha Blackburn (R-TN), held a hearing on April 17, 2018 examining data prioritization and how it is critical to the internet's function and growth. In her opening remarks, Chairman Blackburn stated: "It may be an uphill climb, but what we are trying to do with this hearing is to *leave aside the simplistic 'fast lane'* talking points and kick off a more realistic discussion on the subject." See https://energycommerce.house.gov/news/press-release/subcommtech-examines-current-and-future-use-of-data-prioritization ; Blevins, "The Use and Abuse of light touch internet regulation" (2019), 99 Boston Univ. L. Rev. 177.

[50] See https://theconversation.com/creating-a-high-speed-internet-lane-for-emergency-situations-79151

Through 5G, surgeons can use specialised haptic feedback gloves to operate on a patient via a robotic intermediary, potentially from thousands of miles away. The gloves are able to give a surgeon the same sense of touch as if they were standing over the patient, while video from the operating theatre is streamed directly to them in real-time.[51]

A leading CEO of a Canadian telecom company stressed the need to enhance competition: "If we want to evolve the regulatory model, let's build on facilities-based competition and liberalise our foreign ownership rules. Let's open the market to foreign investment and allow market forces to continue to drive the best consumer outcomes."[52]

One commentator has made the following prediction: "As the pandemic keeps Canadians glued to their smartphones at home and abroad, Ottawa's decision earlier this month to ask the Big Three wireless carriers to reduce prices on mid-tier service (unlimited talk-and-text plans that offer two, four or six gigabytes of data) by 25 per cent over the next two years appears increasingly out of step with our growing data dependence and the coming 5G reality."[53]

3. Social and economic inequalities in any "pay for priority" internet fast lanes are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.[54]

It is possible that the coronavirus may mean that we will be working at home for many months.[55] If this is the case, new and innovative markets for internet access need to be considered. Applied to the pay for priority debate, this principle would sanction the existence of inequalities created by pay for priority in the internet, so long as the inequalities make the worst-off members of society as well off as possible. Provided that the competitive struggle yields outcomes (in terms of innovation, diffusion of services, pricing) that benefit the least advantaged, then competition will be unexceptionable. Using the fast lane toll road analogy, this pay for priority road has the effect of diverting traffic away from the (non-toll) highways, thus reducing traffic congestion and improving the conditions of those who cannot afford to regularly travel on the toll road.

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[51] https://www.medicaldevice-network.com/features/5g-remote-surgery/

[52] Darren Entwistle, President and CEO of TELUS, remarks to CRTC: https://crtc.gc.ca/eng/transcripts/2020/tt0220.htm at 3630.

[53] "Coronavirus crisis highlighting Ottawa's misguided approach to reducing wireless prices" Rita Trichur https://www.theglobeandmail.com/business/commentary/article-coronavirus-crisis-highlighting-ottawas-misguided-approach-to/

[54] John Rawls in *A Theory of Justice (*Cambridge, Mass.: Harvard University Press, 1971, Jull and Schmidt, "From the Slow Lane to the Fast Lane of Broadband: Application of a Theory of Justice" 19th Biennial Conference of the International Telecommunications and Society (Budapest, Hungary, September 18-21, 2011) and more generally see Archibald and Jull, *Profiting From Risk Management and Compliance* (Thomson Reuters, 2019) at INT:10:130 — Application of Justice as Fairness to Matrix Thresholds and Priorities

[55] It is possible, even most likely, that after U.S. cases peak, Americans will still have to maintain some measures — such as isolating the infected, constant hand-washing, some degree of social distancing — until a viable vaccine is developed, which could take 12 to 18 months: https://www.washingtonpost.com/health/2020/03/16/social-distancing-coronavirus/

It may be appropriate, in the short term, to subsidize community-based groups so they can have some access to the fast lane. For example, libraries, schools and non-profit organizations that further the interests of disadvantaged groups might fall into this category within a "justice as fairness" framework.

RISK AND A THEORY OF JUSTICE

Risk is perceived differently depending on whether the lens used is personal versus a more general risk to society:

> Psychologists have long known that people tend to see their own lives through rose-colored glasses: they think they're less likely than the average person to become a victim of divorce, layoff, accident, illness, or crime. But change the question from the people's *lives* to their *society*, and they transform from Pollyanna to Eeyore. Public opinion researchers call it the Optimism Gap.[56]

To the extent that governments must prioritise health versus the economy, risk management requires an underlying theory of justice. John Rawls in *A Theory of Justice*,[57] constructed his theory of "justice as fairness" by utilizing an imaginary society that would be created by an original agreement where "no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like". Hence, the principles of justice are chosen behind a "veil of ignorance" by "free and rational persons concerned to further their own interests" and because they are in an initial position of equality, the final agreement reached will be "fair".

From behind the veil of ignorance what rules would you choose, not knowing whether or not you might fall into the class of persons more vulnerable to suffer serious consequences or even death from coronavirus?

The first rule that you would choose is that regulatory measures must promote human health and safety as a first priority. This rule also supports the trumping of the axis "systems to measure potential gravity of impact" over the axis "precautions taken to avoid the event".[58] In other words, the health of our citizens must take precedence over the economy in terms of priority ranking.

As lawyers we can help to combat COVID-19 by advising of the legal solutions to a wide array of problems. A guiding principle is that our advice should promote justice as fairness.

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[56] Stephen Pinker, *Enlightenment Now: The case for reason, science, humanism and progress*, (New York: Penguin, 2018),Chapter 4: Progressophobia, pp. 6-7.

[57] (Cambridge, Mass.: Harvard University Press, 1971).

[58] Archibald and Jull, Profiting From Risk Management and Compliance (Thomson Reuters 2019), INT:10:130 — Application of Justice as Fairness to Matrix Thresholds and Priorities

Toronto Law Journal

FlightHub Experiences Some Turbulence Courtesy of the Competition Bureau

James Musgrove, Dan Edmondstone and Joshua Chad, McMillan LLP[1]

On October 28, 2019, the Competition Bureau announced the registration of a "temporary consent agreement"[2] with the Competition Tribunal in order to protect consumers from what it views as false or misleading representations related to hidden fees for flights offered by the FlightHub Group Inc. ("**FlightHub**"). FlightHub is an online travel company that provides consumers with access to wholesalers, airlines and hotel suppliers in Canada. Using FlightHub's online interface, consumers can search for a variety of flight, hotel and cruise offers from a number of different providers, compare prices, and then book travel directly through the site.

The Bureau's press release notes that its investigation into FlightHub is ongoing, including a review of "FlightHub's representations for flight-related services, such as seat selection and flight cancellation", which are alleged to have resulted in hidden fees from which FlightHub generated millions of dollars in revenues. As well, the Bureau is investigating allegations that listed prices for flights increased after consumers selected their flights. While the Bureau notes that it has already reviewed "thousands of consumer complaints" about FlightHub's marketing practices, the Bureau's press release encourages consumers who believe they were misled while shopping for flights to submit additional complaints with the Bureau.

This development is notable for a number of reasons, including the use of a "temporary consent agreement" as an interim remedy and the use of search warrants to gain access to FlightHub's records. It also signals the Bureau's ongoing enforcement efforts in the digital economy. Each of these elements is discussed further below.

The Temporary Consent Agreement

To the best of these authors' knowledge, the Competition Bureau has never entered into a "temporary consent agreement" of this nature before.[3] As a "temporary consent agreement", the agreement is binding on FlightHub until the Commissioner of Competition's inquiry into FlightHub's practices is resolved either through (i) a final consent agreement, (ii) a decision of the Tribunal, or (iii) at such further time agreed to between FlightHub and the Commissioner. In the "temporary consent agreement", FlightHub agrees to refrain from engaging in a number

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[1] This paper is republished with the permission of McMillan LLP

[2] *The Commissioner of Competition and FlightHub Group Inc. / Groupe Flighthub Inc., formerly 7513283 Canada Inc.*, Consent Agreement (2019-10-28).

[3] The Commissioner has entered into "interim" consent orders and "interim" consent agreements in connection with proposed mergers that required parties involved in the proposed mergers to hold assets or information separate, to maintain the viability of possible divestiture businesses or to refrain from certain investments while the Bureau's merger review remained ongoing.

of practices that the Commissioner considers to be misleading in connection with consumers booking flights and related purchases through its website. This includes FlightHub committing to:

1. not make any representations giving a materially false or misleading general impression with respect to seat selection on flights, including making any false or misleading representation giving the impression that a consumer can select a specific seat or make a seat preference selection without having to pay additional fees or that FlightHub will be securing a specific seat or seat preference on a flight (when it will not be doing so); and

2. not making any representations giving a materially false or misleading general impression with respect to a consumers' cancellation or rebooking rights, including making any false or misleading representation giving the impression that consumers can cancel or rebook flights without paying additional fees or making any false or misleading representation that FlightHub is offering consumers extended or more flexible cancellation and/or rebooking rights on flights (when it will not be doing so).

There is, we submit, an open question as to whether the "temporary consent agreement", as drafted, is indeed a valid consent agreement, given that it does not contain a definitive statement that the Commissioner has concluded that the alleged inappropriate conduct has been engaged in.[4] However, given that it is unlikely that there is an impacted person likely to challenge the validity of a temporary consent agreement, that might explain why the Bureau and FlightHub would choose such a mechanism.

From the recitals in the temporary consent agreement, we learn that it appears to the Commissioner that FlightHub's alleged misleading conduct is causing serious harm and that such harm is likely to continue unless the Commissioner were to seek an injunction under section 74.11(1) the *Competition Act* or unless the temporary consent agreement in which FlightHub agrees to stop the offending conduct is registered. In other words, if not for the temporary

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[4] In the Competition Tribunal's September 2014 decision in Kobo Inc. v. the Commissioner of Competition, which we described in a previous bulletin, the Tribunal noted that it may review three items if a party were to challenge a consent agreement's validity. In connection with the FlightHub case, the most relevant of these required items is that the consent agreement must contain an explicit agreement between the Commissioner and the respondent(s) that each of the required elements of the reviewable conduct in issue has been met, or a statement by the Commissioner concluding that each of those elements have been met together with a statement that the respondent(s) do not contest the Commissioner's conclusion(s). In the recitals to the FlightHub temporary consent agreement, every one of the Commissioner's conclusions is preceded by the words "it appears to the Commissioner that…", rather than "the Commissioner has concluded that..." In fact, the recitals to the temporary consent agreement specifically provide that the Commissioner's review remains ongoing. This "it appears to the Commissioner" language seems to be taken from section 74.11(1) of the *Competition Act*. That is the specific injunction provision. The temporary consent agreement provides that the Commissioner would have sought an injunction under section 74.11(1) of the Act. In order to succeed on such an application for an injunction, the court must conclude that "it appears" that a person is engaging in reviewable conduct and the court must conclude that "it appears" that serious harm is likely to ensue and that the balance of convenience favours issuing the injunction. It is unclear if the Commissioner concluding that it met the standard for obtaining an injunction, with FlightHub not contesting this assertion for the purpose of entering into the temporary consent agreement, is sufficient to satisfy the Kobo requirements for a consent agreement.

consent agreement, the Commissioner would have sought a formal injunction under the Act, and the purpose of the consent agreement is to stand in for an injunction.

This action by the Bureau corresponds with recent statements of the Commissioner and senior Bureau leadership in which they have made clear that the Bureau has planned to increase its enforcement efforts and use of injunctions. In particular, in May 2019, the Commissioner indicated that "active enforcement will be an area of primary focus", that the Bureau will "use all of the tools at [its] disposal to address what [it] believe[s] to be problematic conduct … include[ing] increased consideration of the use of tools such as injunction applications…" and that the Bureau will "use these tools more frequently, as resources permit, to interrupt or halt the conduct in question, pending a full hearing."[5] Similarly, Josephine Palumbo, the Bureau's Deputy Commissioner in charge of the Deceptive Marketing Practices Directorate, noted in an October 2019 presentation that "[y]ou can expect to see more injunctions, rigorous enforcement action, and cases being taken to the courts in order to protect Canadian consumers and promote a competitive digital economy".[6] While the "temporary consent agreement" is not an injunction in name, it appears to have similar effects in practice and its use accords with the Commissioner's recent statements.

There are a number of benefits to the Bureau and the party being investigated in using a temporary consent agreement in place of an injunction. First, as a matter of tone, it signals a willingness on behalf of the Bureau and the investigated party to work together to achieve a mutually acceptable solution. In this case, in connection with the concept of mutual cooperation, FlightHub issued a press release noting that it is working with the Bureau and that it "take[s] pride in leading the way across the online travel industry in Canada." Correspondingly, the Bureau's press release noted that "FlightHub is cooperating with the Bureau's investigation". Second, the use of a temporary consent agreement allows the parties to express the precise terms that they are agreeing to as opposed to taking the chance that the Tribunal might modify the terms. An injunction motion (even on consent) would permit the Competition Tribunal the opportunity to modify the injunction order if it felt that to be appropriate, or refuse to issue the order which the parties proposed. Consent agreements, on the other hand, are simply registered with the Tribunal, and the Tribunal may make no modifications.

Going forward, parties should recognize that the Bureau appears intent to use injunctions or similar interim remedies.

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[5] Commissioner Matthew Boswell, "No River too Wide, No Mountain too High: Enforcing and Promoting Competition in the Digital Age" (Remarks delivered at the Canadian Bar Association Competition Law Spring Conference 2019, Toronto, 7 May 2019).
[6] Josephine Palumbo, "Update from the Competition Bureau" (Presentation given at the Ontario Bar Association Advertising and Marketing Law 2019, Toronto, 3 October 2019) at p 5.

Use of a Search Warrant

The Bureau's press release notes that "[e]arlier this year, the Bureau executed search warrants at [FlightHub's] headquarters and seized relevant records." Except in cases where the Bureau is alleging outright fraud or scams, Bureau investigations into misleading advertising conduct do not typically involve the use of search warrants as an investigative technique. Historically, in these types of cases, the Bureau reaches out to parties and uses requests for information or section 11 production orders as the primary means of obtaining relevant information and documents from the parties that it is investigating. It is unclear why search warrants were used in this case, or whether this signals an increased use of search warrants going forward. It is also not clear at this time what information the Bureau sought to seize from FlightHub under the search warrant. Regardless, businesses should take note that the Bureau is willing to utilize all of its investigative techniques when appropriate, and that parties that are alleged to have engaged in misleading conduct might be at risk of the Bureau arriving unannounced at their doors to seize relevant documents and records.

The Bureau's Commitment to Consumer Protection Efforts in the Digital Economy

This investigation parallels other recent Bureau investigations in the digital space, and its clear announcement that the digital economy will be an enforcement priority.[7] The Bureau's press release includes a quote from the Commissioner in which he notes that he "made a commitment that the Bureau would use all the tools at its disposal to address deceptive marketing practices in the online marketplace." As well, the Bureau's press release directly hyperlinks to a recent speech by the Commissioner titled "No river too wide, no mountain too high: enforcing and promoting competition in the digital age". In that speech, the Commissioner emphasized that the Bureau will "prioritize investigating misleading representations made online" and that it will "focus on improving trust in the digital economy". The Bureau's investigation into FlightHub appears to be, and be characterized as, evidence of the Bureau pursuing cases involving online and digital products.

Conclusion

The Bureau's investigation into FlightHub remains ongoing. It will be interesting to follow this case to see how it is ultimately resolved. In the meantime, businesses and consumers should take be aware that the Bureau is actively pursuing its mandate to protect consumers in the digital space and that it is open to using innovative investigative techniques and remedies in order to achieve its desired goals.

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[7] Competition Bureau, "2019-20 Annual Plan: Safeguarding the Future of Competition" (25 July 2019).

A cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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Toronto Law Journal

The Alberta Court of Appeal's Decision on the Federal Carbon Scheme

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On February 24, 2020, the Alberta Court of Appeal in *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 ruled that both the pricing charge on carbon-based fuels and the regulatory trading system applicable to large industrial emitters of greenhouse gasses were wholly unconstitutional. We now have courts of appeal in Ontario and Saskatchewan on the one hand, holding the federal government's carbon regulation scheme to be constitutional and the Alberta Court of Appeal on the other, holding the law unconstitutional. The Supreme Court of Canada will hear arguments in the spring to resolve this uncertainty. The issues will include the application and scope of matters of national concern, taxation, Canada's treaty obligations, and the scope of the province's jurisdiction over their natural resources, property and civil rights, proprietary rights, and the management of public lands.

The majority reasons of the Alberta Court of Appeal offer a strong case for provincial rights. Three issues which are of particular interest include those discussed below.

The National Concern Power

The majority reasons in the Alberta Court of Appeal set a more restrictive test for the federal government's ability to legislate in matters of national concern, thereby limiting the government's authority to legislate for the peace, order, and good government of Canada outside of a national emergency. The federal power is limited, according to the Court, to matters not specifically enumerated within the legislative heads of power of the Provinces, other than the Provinces' own residual authority to legislate in matters which are local and private within the province. As the majority held:

> [172] We have concluded that only when the "matter" would originally have fallen within the provinces' residuary power under s. 92(16) does the national concern doctrine have any potential application. Thus, we reject the proposition that the national concern doctrine opens the door to the federal government's appropriating every other head of provincial power under s. 92, s. 92A or under provincial proprietary rights under s. 109.

Subsidiarity

The Court of Appeal's underlying motivation for a more restrictive federal power can be found in the principle of subsidiarity which recognizes that law-making and its implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to

population diversity. The Court at paragraph 140 quotes the former Premier of Alberta, Peter Lougheed, as having said as follows:

> The only way that there can be a fair deal for the citizens of the outlying parts of Canada is for the elected provincial governments of these parts to be sufficiently strong to offset the political power in the House of Commons of the populated centres. That strength can only flow from the provinces' jurisdiction over the management of their own economic destinies and the development of the natural resources owned by the provinces.

Treaty Commitments

The Court agreed with the Saskatchewan Court of Appeal's reasons in *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] 9 W.W.R. 377 at paragraphs 174-177 as they relate to Canada's treaty obligations. Citing the Privy Council's 1937 decision in *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] AC 326 at 351, that Canada cannot "merely by making promises to foreign countries, clothe itself with legislative authority", the Alberta Court of Appeal stated that "Parliament only has authority to pass a statute which implements a treaty where the subject matter of the treaty itself otherwise falls within federal authority under s. 91" (at para. 259).

Toronto Law Journal

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.LR. (5th) 103).