



## INTELLIGENT FRANCHISING™ - Spring 2010

Hoffer Adler LLP is pleased to launch our inaugural Intelligent Franchising™ newsletter. We hope that you and your colleagues will find the information interesting and useful.

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### From the Courts

#### When is a Disclosure Document Not a Disclosure Document?

[Joseph Adler](#)

Courts in Ontario and Alberta are increasingly ruling in favour of franchisees as they invalidate certain disclosure documents with serious and even less than serious deficiencies. For example, the Ontario Court of Appeal in *6792341 Canada Inc. v. Dollar It Ltd.* (2009) ruled that an unsigned and undated certificate can constitute enough of a deficiency on its own to invalidate the disclosure document in its entirety.

In *Sovereignty Investment Holdings Inc. v. 9127-6907 Quebec Inc.* (2008), the Ontario Superior Court held that each of the following deficiencies on its own similarly invalidates a disclosure document, the franchisor's failure to: (a) include its financial statements, (b) include a statement specifying the basis for the earnings projections, (c) provide the disclosure document as a single document and at one time; and (d) include its signed certificate of disclosure.

#### When is a Release Not a Release?

[Joseph Adler](#)

A recent ruling by the Ontario Superior Court of Justice in *405341 Ontario Limited v. Midas Canada Inc.* ruled that a release demanded by a franchisor in a renewal or assignment scenario will not be enforceable when not in contemplation of a settlement of an outstanding claim. In light of this decision, franchisors should review their franchise agreements and consider ways of redrafting their releases so that they may be enforceable and not struck down on the grounds that they contravene the non-waiver provisions of the *Arthur Wishart Act (Franchise Disclosure)*, 2000.

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### On the Legislative Front

#### New Brunswick Regulations to the Franchises Act (New Brunswick)

New Brunswick Regulations to the *Franchises Act (New Brunswick)* are expected to be released by the Spring of 2010. **Follow us on Twitter** so that we may provide you with up-to-date information in this regard.

#### New Ontario Workplace Violence and Harassment Laws

[Cynthia Yang](#)

Bill 168, *An Act to amend the Occupational Health and Safety Act with respect to violence and harassment*

*in the workplace and other matters* was enacted on December 15, 2009. The bill amends the *Occupational Health and Safety Act* (OHSA) and introduces a new legal scheme which governs workplace violence and harassment.

Bill 168 provides definitions for the terms “workplace violence” and “workplace harassment”, and also imposes a number of obligations on employers. Of note, employers are now required to:

- Prepare and post written policies with respect to workplace violence and harassment, and review these policies at least annually;
- Develop and maintain programs which implement these policies;
- Assess the risk of workplace violence which takes into account certain specific considerations, and engage in reassessments as often as is necessary;
- Take reasonable precautions to protect workers from domestic violence; and
- Provide (under certain circumstances) information, including personal information, about persons with “a history of violent behaviour”.

Employers need to take prompt action to comply with these new legal requirements. Failure to comply with the OHSA is an offence, which may be punishable in fines of up to \$1 million, and/or imprisonment.

## Accessibility for Ontarians with Disabilities Act, 2005

[Cynthia Yang](#)

The government of Ontario enacted the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA) in June, 2005, and in doing so, Ontario became the first Canadian jurisdiction to implement and enforce mandatory accessibility standards. The AODA calls for the development of “accessibility standards”, which will seek to identify and break down barriers for people with disabilities in various key areas of daily living.

The first such accessibility standard currently in effect is the Accessibility Standards for Customer Service, and Ontarians can also look forward to further accessibility standards in areas of communications, built environment, employment and transportation.

The Accessibility Standards for Customer Service applies to the public, private and non-profit sectors and includes every person or organization that provides goods or services to members of the public or other third parties and that has at least 1 employee. Under this standard, service providers must abide by a number of obligations, including the establishment of policies and practices, effective communication with people with disabilities, training of staff, and development of feedback processes. For service providers with more than 20 employees, there are additional documenting and reporting responsibilities. The deadline to comply with these obligations is January 1, 2012 for private sector organizations. Failure to comply with these obligations may result in administrative orders and/or penalties.

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## Protecting Your Brand

### Canadian Trade-mark Applications: New Practice on Extensions of Time

[Lorraine Fleck](#)

The Canadian Trade-marks Office (TMO) is changing its practice on granting extensions of time to respond to examination reports. Currently, multiple extensions of time are available if sufficient reasons justifying each extension are provided.

Starting March 11, 2010, TMO will generally grant only one six month extension of time to respond to an examination report. If a further extension is required, the applicant must demonstrate “exceptional circumstances” justifying the extension. There are very limited scenarios which TMO may consider exceptional. If the applicant does not satisfy TMO in this regard, the application will default and subsequently become abandoned if the default is not cured within the allotted time. If the application becomes abandoned, the applicant will have to re-file, thereby incurring additional costs and delays.

In light of this upcoming change, applicants should be prepared to address examination reports in a timely

manner, otherwise their applications may become abandoned.

## Social Media Health Check-up

[Lorraine Fleck](#)

Social media websites, such as Facebook™, LinkedIn™, MySpace™ and Twitter™, are forums to answer the question “what are you doing?” Increasingly, the question that brand owners should be asking themselves is “what should you be doing?” to protect your brands, intellectual property and businesses. For example, are there ways brand owners can try to protect their brands and intellectual property on social media websites? Is there a way to facilitate brand awareness in social media without losing control over your business’ trade-marks and other IP? Is it possible to protect your trade-marks and IP in “social media” without being anti-social?

Some common IP and brand protection strategies include:

- Developing a social media username registration strategy to protect brands. For example, Facebook has an online form that allows registered trade-mark owners to notify Facebook of their trade-mark registrations to prevent third parties from registering those trade-marks as Facebook usernames. Some social media sites, such as Twitter, now have “verified” accounts for celebrities and brands, similar to eBay’s™ Vero program designed to thwart counterfeit merchandise.
- Policing your trade-marks on social media websites, particularly the manner in which your brands are being portrayed to the public.
- Addressing the use of social media in franchise agreements and operations manuals.
- If you run a social media website, developing terms of use that are visible whenever a user uploads content and which makes it clear that the user will indemnify those running the social media website against the user’s upload of infringing content.

These strategies are merely some of the various approaches we recommend you adopt to address this relatively new medium.

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## Firm News

**Joseph Adler** and **Lorraine Fleck** just returned from the International Franchise Association’s Annual Convention in San Antonio. Joseph co-facilitated a roundtable discussion on “Best Practices on Franchising in Canada” and our firm was one of the sponsors of the Taste of Franchising.

**Joseph Adler** was awarded a CFE designation (Certified Franchise Executive) (bestowed by the Institute of Certified Franchise Executives of the International Franchise Association) on February 7, 2010

**Lorraine Fleck** will be attending the International Trademark Association’s (INTA) 132nd Annual Meeting in Boston on May 22 – 26, 2010.

Our firm just “refreshed” our websites. Please visit each of our sites and tell us what you think of our new look.

