

	<p>RESCISSION 101: AN INTRODUCTION TO THE STATUTORY RESCISSION REMEDY UNDER THE <i>ARTHUR WISHART ACT (FRANCHISE DISCLOSURE), 2000</i></p> <p>ONTARIO BAR ASSOCIATION INSTITUTE 2012 – FRANCHISE LAW FEBRUARY 9, 2012</p> <p>Sam Hall – Sotos LLP Derek Ronde – Cassels, Brock & Blackwell LLP</p>
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	<p>Rescission 101</p>
	<ol style="list-style-type: none">1. The Statutory Right to Rescind2. Initiating A Claim3. Common Defences To A Rescission Claim4. Losses Under Section 6(6)5. Responsibilities of Lawyers In Dealing With Rescission Claims (Best Practices)

	1. The Statutory Right To Rescind
	<ul style="list-style-type: none">- Section 6 of the <i>Wishart Act</i>.- The aim of statutory rescission is the compensate a franchisee who receives either defective or no disclosure by restoring the franchisee to its pre-contractual provision.- There are differences between rescission under s.6(1) and s.6(2).- Disclosure can be likened to a "strict liability" regime.

	2. Initiating A Claim For Statutory Rescission
	<ul style="list-style-type: none">■ A claim begins with the service of a notice of rescission.■ No prescribed form of notice, but must be in writing and delivered personally, by registered mail or by fax.■ Notice should detail why disclosure document is non-compliant.■ Records should be kept regarding the service of notice.

	2. Initiating A Claim For Statutory Rescission
	<ul style="list-style-type: none">▪ A rescission claim may be brought against a “franchisor’s associate”.▪ A notice of rescission can contain an estimate of franchisee losses under section 6(6).▪ The franchisor is required to pay the amounts owed within 60 days of the effective notice of rescission.▪ If the amount is not paid, a franchisee often brings a claim or application.▪ The parties may seek declaratory relief concerning whether there is an entitlement to rescission.

	3. Common Defences
	<ul style="list-style-type: none">■ The Disclosure Document meets the requirements of the <i>Wishart Act</i> and its regulation.■ Limitation periods under the <i>Wishart Act</i> (and the <i>Limitations Act</i>).■ Statutory exemptions under section 5(7) of the <i>Wishart Act</i>.<ul style="list-style-type: none">– Most commonly, the franchise resale exemption.

	4. Losses Under Section 6(6)
	<ul style="list-style-type: none">■ The four categories of damages are:<ul style="list-style-type: none">– Refund any money received (other than money for inventory, supplies and equipment);– Purchase inventory;– Purchase supplies and equipment;– Compensate for any losses incurred in acquiring, setting up and operating the franchise, minus the other amounts.■ This is a drastic remedy – “puts franchisee back in its pre-franchisee position.”

	4. Losses Under Section 6(6)
	<ul style="list-style-type: none">■ Very little guidance from courts on how section 6(6) damages are to be calculated.<ul style="list-style-type: none">• See <i>Payne Environmental</i> (2006, S.C.J.) to see court’s comments on preventing double counting.• <i>Melnychuk</i> (2010, S.C.J.) – How losses should be calculated.• <i>Grill It Up</i> (2011, S.C.J.) – Can individuals claim for personal losses?

	4. Losses Under Section 6(6)
	<ul style="list-style-type: none">■ Is there an obligation to mitigate?<ul style="list-style-type: none">– See <i>Dig This Garden</i> (Ont. C.A.).■ Are the losses being claimed that are not at “market rate”?■ Are there non-business-related expenses being run through the franchise business?

	5. Best Practices
	<ul style="list-style-type: none">■ Advise clients about the requirements of disclosure and the consequences for failing to disclose.■ Disclosure obligations may continue throughout the franchise relationship.■ Watch out for limitation periods, particularly with respect to sections 6(1) and 6(2).■ Address the steps involved in a rescission claim with clients. Costs may be significant.■ Realistically, most rescission claims are not directly paid – disputes over quantum, compliance, limitation periods, exemptions.

	5. Best Practices
	<ul style="list-style-type: none">■ Thoroughly analyze disclosure defects and potential damages before proceeding.■ Franchisors should shore up disclosure documents if problems are identified.■ Rescission claims may impact third parties – make sure this is considered.■ Ensure documents regarding disclosure are maintained.