The Mediation of Construction Disputes & Win-Win Solutions

In the Dark Ages (that is, 30 years ago) litigation was the preferred method for resolving construction disputes that the parties themselves could not resolve—an expensive and drawn-out process. In the Age of Enlightenment (today), litigation is fast being replaced by mediation and, in some cases, arbitration.

This article explains why litigation has fallen out of favour and identifies the benefits of this paradigm shift in preference to alternative processes, specifically to mediation, for resolving construction disputes. It also provides an overview of the mediation process and how its benefits can be realized efficiently and cost-effectively.

Given the high costs, complexity and delays in fully litigating construction disputes, often mediation—a structured negotiation between the parties to such disputes facilitated by a neutral person—is the only practical method for resolving them.

Most contracts for design and construction services incorporate dispute resolution procedures that provide for mediation. The advantages of such an approach are self-evident: In mediation, the parties themselves engage in finding their own solutions—sometimes creative ones—rather than gamble on the uncertainties of a “winner-take-all” adjudication imposed by the courts. The benefits of mediation include:

- general efficiency and process control by the parties
- privacy and confidentiality
- enhanced control over costs and results
- the preservation of relationships
- the effective use of the expertise of neutral persons in assisting the parties find their own settlements.

Anyone familiar with commercial litigation knows that court procedures are cumbersome, and that compliance with them can be disproportionately expensive when compared with the amounts in dispute. Too often litigants end up exhausted and concerned with the time and expense of the trial process.

In fact, the costs associated with trials actually limit the access that construction industry participants and owners have to the courts and to justice. Voltaire summed up his experiences with the costs of litigation: “I was never ruined but twice—once when I lost a lawsuit and once when I won one.”

(Continues on page 2)
Why is mediation less costly than litigation? Simply, it focuses on finding solutions, not merely “winning”. To gain the advantages it offers, there are a number of things that are useful to know about it, and how to implement them in the mediation process. To begin with, you should first know whether a particular construction dispute is ready for mediating.

Construction claims are largely fact-based. Without an investigation and understanding of the facts underlying the dispute, a realistic assessment of the strengths and weaknesses of a party’s position in the dispute cannot usually be made. It is only when the factual framework of the dispute is sufficiently understood that construction mediation should be considered.

The dispute has to be “ripe” for informed negotiations to occur. When that stage is reached, and the parties are informed of the legal landscape for the dispute, the decision to mediate should be taken. That decision triggers the next step—picking the mediator.

Selecting the Right Mediator

Selecting the right mediator for a particular dispute is extremely important.

Although there are exceptions, it is generally the case that the parties involved prefer a mediator with knowledge in construction and construction law. A mediator with subject matter expertise will be able to identify underlying issues and ask probing questions to assist the parties and their lawyers focus on the routes and impediments to settlement. Such a mediator is equipped to recognize the issues in disputes and assist the parties realistically assess their positions and underlying interests in order to effectively negotiate a durable settlement.

A construction mediator should be able to appreciate the technical and contractual issues engaged by the dispute and to actively assist the parties in understanding the strengths and weaknesses of their competing negotiation positions and the underlying human dynamics in play during negotiations. A knowledgeable construction mediator can usually impress upon the parties the importance of doing “reality checks” of their positions and underlying interests.

Mediation is a voluntary process in which the mediator assists the parties make their own decisions on whether to settle and on what terms. The mediator is not a “judge” or arbitrator and does not impose settlements or binding decisions upon the parties. Also, the mediator does not take sides, or show favour or bias to a party. He or she acts throughout as an impartial “neutral”. Nor does a mediator selected for subject matter expertise ignore the factual and legal framework within which the dispute and the interests of the parties should find resolution, either by the parties or, failing that, through a decision imposed upon them by a court or an arbitrator.

Mediators have different styles and approaches. An “evaluative” mediator is someone who, with the parties’ consent, will act as a “devil’s advocate” in private caucuses, tactfully encouraging the parties to realistically assess the strength and weaknesses of their respective bargaining positions.

In many instances a construction mediator selected for their subject matter knowledge will be invited by the parties to use an “evaluative” approach in the negotiation process in which the mediator may selectively:

- offer an assessment of the apparent strengths and weaknesses of positions advanced by the parties during the negotiations
- suggest possible approaches and even make “mediator proposals” for settling the dispute
- offer predictions as to possible outcomes should settlement not be achieved and the dispute is decided by a court or arbitrator.

Alternatively, the parties may select a mediator who adopts a “facilitative” model in which the role taken by the mediator is non-evaluative and is directed more to the process of negotiation. In adopting this model, the mediator may suggest that the parties remain together, rather than be separated in separate caucus rooms, and that they negotiate face-to-face with procedural guidance of the mediator. Here, the facilitative mediator will not offer an evaluation of

The courtroom is not always the best place to resolve disputes. It takes time and the costs can be significant, sometimes approaching or exceeding the amount in dispute. Construction claims in particular, because of their complexity and technical issues, can be unwieldy in the courtroom.

Mediation, which involves the use of a neutral third party to facilitate negotiations, is one form of alternative dispute resolution now widely used by the construction industry to resolve disputes that arise both during and after a project. It can provide a speedy, inexpensive means to achieve a resolution using terms the parties accept rather than ones that would otherwise be imposed by a judge.

Our cover story this issue provides an in-depth look at the mediation process and why it is the “go-to” choice of the construction industry.

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Misrepresentations by Other Directors Can Be Costly

Directors who sit on the board of a company may not realize it, but they can be liable for statements made by fellow directors who are found to have misrepresented the company’s state of affairs to an investor.

The so-called “indoor management rule” allows outsiders, including investors, to rely on statements made by qualified persons, including directors, even if they are acting outside their authority. A director speaks for the company, so the company will be liable for any misrepresentation made by a careless director. But what about the other directors—are they also liable for misrepresentations made by their fellow directors?

The general rule is that a director will not be found personally liable for the wrongfull acts of the company or fellow directors. As Lord Reid put it in Tesco Supermarkets Ltd. v. Nattrass, a director’s mind “is the mind of the company. If it is a guilty mind, then that guilt is the guilt of the company.” As a matter of policy, courts have recognized that businesses cannot function effectively when directors are driven away by potential exposure to ill-founded litigation.

Generally speaking, corporate directors are usually shielded from personal liability when aggrieved shareholders or customers bring lawsuits. But there are, of course, exceptions. Fraud, deceit, or negligence on the part of the director can implicate them personally.

In Peracomo Inc. v. TELUS Communications Co., for example, a fisherman who was the sole shareholder and “directing mind” of his company intentionally cut a fibre-optic cable that was entangled with his anchor because he mistakenly believed the cable to have been abandoned. The result was almost $1 million in damage. The Supreme Court of Canada considered the fisherman to be “a good man who did a very stupid thing,” but still held that he was personally liable for negligently cutting the cable. The company was also liable for his negligence. This was the case even though he was incorporated and had been acting in the course of his corporate duties, much like a director.

Other exceptions are found in legislation. The most common ones occur where a prospectus or similar document is issued which contains a misrepresentation.

British Columbia’s Securities Act imposes liability on all directors for misrepresentations in a prospectus or circular, or in prescribed disclosure documents such as financial statements. In addition, the Securities Act says the purchaser is automatically deemed to have relied on any such misrepresentation (without requiring the plaintiff to prove reliance as would normally be the case).

In relation to this issue, a leading case in Ontario, which has a similar provision in its legislation, is Kerr v. Danier Leather Inc.. Warm weather created a low demand for leather clothing, and Danier missed its sales forecast. Shareholders alleged a misrepresentation and brought a class action against Danier along with the company’s CEO and CFO. The trial judge found that the CEO and CFO had acted in good faith in issuing the forecast, but still held them personally liable for the company’s misrepresentation because their belief that the year-end forecast would be met was objectively unreasonable.

Fortunately for Danier’s directors, on appeal, both the Court of Appeal and the Supreme Court of Canada held that the original estimate had been reasonable and, consequently, there had been no misrepresentation.

B.C.’s Securities Act also offers directors some protection by setting out a number of defences for misrepresentations made in a prospectus or similar document. For example, a director is not liable if, among other things, the prospectus was filed without the director’s consent or if, upon learning of the misrepresentation, the director withdrew consent and gave public notice of the reason for withdrawing.

As well, in cases of secondary market disclosure, where shares are purchased other than directly from the company, the court’s permission is required before a party can start a lawsuit on the basis of misrepresentations. To weed out frivolous claims or “strike suits”—lawsuits that likely cannot succeed on their merits but may end up being settled to avoid costly litigation—the court must be satisfied that the action is being brought in good faith and has a reasonable chance of success.

Bottom line: the watchword for corporate directors is “vigilance.” Know that a director may be exposed to liability if other directors in the company misrepresent a material fact to investors. What follows are only some of the steps all directors should take as a matter of routine:

• Reviewing the company’s investment disclosure documents;
• Ensuring that all pertinent information is available before approving financial statements; and
• Confirming that any forecasts or disclosure documents are based on up-to-date information and include appropriate cautionary statements.

For more information on directors and officers liability, please contact

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PETER MENNIE, Articled Student, assisted with the research and writing of this article.

The electronic version of this article at www.singleton.com contains links to the cases mentioned above.
Mediation: Effectively resolving construction disputes

(Continued from page 2)

the strength or weaknesses of the positions taken in the negotiations of the parties.

A facilitative model might be preferable to the parties when better communication between the parties is required and encouraged; one party is more informed of the underlying facts than the other; non-monetary solutions are important to a settlement; and it is important to maintain or improve an ongoing relationship between the parties (for example, when the project has not yet completed and the parties must still interact to attain common goals).

Sometimes the mediator will start with a facilitative method, only moving toward an evaluative model, if necessary, to assist the parties in later negotiation stages move beyond impasses.

During the pre-mediation conference, it is important for the parties to actively discuss with the mediator what role they wish her or him to take, and what model they think stands the best opportunity for compromise and settlement.

Whichever approach the parties wish the mediator to adopt, they will share an interest in selecting a knowledgeable construction mediator willing and able to “roll up their sleeves”, one who is helpful, persistent, flexible and energetic in assisting them reach the goal of settlement. But even if the dispute remains unsettled at the end of the formal mediation, it is not unusual for the mediator to agree to stay involved should the parties wish further assistance in resolving the dispute.

The Mediation Process

Throughout the mediation, representatives of the parties with authority to negotiate a binding settlement and their respective lawyers and, sometimes, insurance adjusters and their representatives, are present. At a minimum the party’s or insurer’s decision-maker should attend, or be available by phone or e-mail throughout the mediation process.

At the start of the formal mediation, the mediator may convene a joint meeting or separate meetings with the individual parties and their counsel to explain the process and the mediator’s role. At the outset, a written Mediation Agreement is normally presented by the mediator, which is signed by all persons attending the mediation. The Agreement typically sets out:

- the role of the mediator as a neutral who does not provide legal advice to the parties
- the signatories’ agreement to confidentiality throughout the process
- acknowledgment that the mediation proceedings are “without prejudice”
- the granting of immunity of the mediator from legal compulsion to disclose in any subsequent proceedings, legal or otherwise, what was said and done during mediation.

These points of agreement are designed to encourage full, candid exchanges between participants without concern that their statements could be used against them or will bind them to any position in later proceedings.

Typically in construction mediations, the parties agree to move directly to separate caucus rooms following a brief joint session in which the mediators explain the process and their role. If the parties wish, they or their counsel may make opening statements in the initial joint meeting, although this is not usually done when, as has become the norm in construction mediations, written Mediation Summaries or briefs have been exchanged between the parties in advance of the formal mediation. These documents serve to inform the parties of the positions and “facts” asserted by the parties, out of which the issues and points of disputes are communicated between them and for the benefit of the mediator.

After the joint session and introductory remarks by the mediator and, if the parties wish, brief introductory remarks by them or their lawyers, the parties with their respective legal counsel will move to separate caucus rooms, either individually or in select groups. The mediator will then engage in the process of “shuttling” back and forth between the caucus rooms and separate meetings with the parties, carrying offers and counteroffers back and forth between them. In effect, the mediator becomes the point of contact between the parties.

If this procedure is used, apart from the introductory joint presentation by the mediator, the parties themselves may not meet at all throughout the balance of the process.

This “shuttle” process is most commonly used in construction mediations of litigated cases. The process remains flexible, however, and the mediator may recommend that the parties or their lawyers leave their individual caucus rooms and meet jointly at different stages of the mediation process if deemed desirable.

The parties should work with the mediator and look for solutions as negotiations proceed, keeping in mind that persuading the mediator to one side or the other is not generally a productive use of mediation time.

The negotiation process is directed at the other side to the dispute. The messages that the mediator carries between them comprise substantive offers and responses to offers as well as the “metadata” of negotiations—subtle messages as to where one side might go as the exchanges of serial offers unfold. An experienced mediator can assist the parties interpret these messages in a constructive manner.

There will be times during negotiations where it appears that one or the other of the parties is unreasonable and intransigent, and that settlement is impossible, but it is not unusual to see the start of “real” bargaining in the late stages, and the achievement of a settlement which earlier appeared out of reach. It is to be
expected that the negotiation process will not be wholly predictable and have bumps, disappointments and impasses.

Advising the mediator in caucus of recognized weaknesses or areas of probable compromise in a party’s position allows the mediator to meaningfully assist in bringing the parties together. There are different approaches to regulating what the mediator may repeat to adverse parties during the mediation. If a party wishes the mediator not to disclose certain things communicated by it in a caucus setting, it may advise the mediator accordingly.

If the parties agree on an “evaluative” role for the mediator, during negotiations they may ask the mediator for the following:

- input on how and when to present an offer
- what the mediator’s view of the offer is
- what the expected response to an offer should or may be.

It is not unusual in multi-party mediations for one or more parties to want their offers to contribute to a global settlement to remain confidential and not be disclosed to other parties. The mediator will then aggregate the offers and not disclose to any other parties the amount that an individual party has offered.

Not all mediations end in a settlement, but the majority do. Sometimes some, but not all, parties to a multi-party dispute will agree to settle with one another. In such cases, special arrangements are typically made by the parties to prevent the settling party from being brought back into the global dispute by a non-settling party. Their lawyers are generally well aware of these tools. In these instances, care should be taken to ensure that the settlement terms are unambiguous and can be implemented, and that the settlement is a durable one.

At the conclusion of a successful mediation, the parties’ lawyers will typically record the terms of the settlement in a short form agreement, which is signed by the parties. These written agreements may, and usually are, followed up by more comprehensive agreements containing releases, confidentiality terms and provisions relating to the termination of all formal legal proceedings.

The timely and effective use of mediation in resolving construction disputes is now standard business practice throughout the architectural, engineering and construction sectors. Skilled construction mediators with subject matter knowledge as well as experienced construction lawyers have a key role to play in optimizing the potential benefits of mediation, and providing value-added service to owners and industry stakeholders.

For more information on resolving construction disputes through mediation and integrated dispute resolution processes, please contact

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An electronic version of this article is available at www.singleton.com.

**NEW FACES @ SU**

**SU is pleased to welcome AVON MERSEY, JANE INGMAN BAKER and JESSICA TAYLOR to the firm. Avon joins as associate counsel and will practice with our insurance and ICBC groups. Jane recently re-joined the firm as an associate practicing in civil litigation with an emphasis on insurance litigation, and Jessica joins our commercial business litigation practice as an associate.**

We also welcome four new associates who have article d with us. BRENDAN WARD has a general litigation practice focused on commercial, construction and insurance law. BRENDAN DAWES, KELLY ANN MAW and KYLIE THOMPSON all completed their articles this September. Brendan will begin practicing primarily in immigration, workplace law and commercial litigation. Kelly Ann will focus on civil fraud, commercial litigation and insurance law while Kyle practices in commercial litigation, civil fraud, estate litigation, and more.

**LAWYERS IN THE RANKS**

**BARBARA CORNISH** chaired the International Association of Mediators (IAM) fall conference, “Perspective is Everything”, held in Vancouver September 22–24. Over 150 attendees from around the world discussed best practices in Alternative Dispute Resolution.

Both Barbara and **JEFFREY HAND** continue to garner recognition for their mediation work, most recently being named as top Canadian mediators by Who’s Who Legal.

In other mediation news, **DEREK BRINDLE** recently completed advanced mediation training at the Straus Institute for Dispute Resolution at Pepperdine School of Law in Malibu, California.

**ROGER HOLLAND** was acknowledged for his significant volunteer contributions to March of Dimes Canada when he was awarded The Right Honourable Paul Martin Sr. Award for 2016 at an awards dinner in Toronto.
New Policies Can Assist Immigrants

IMMIGRATION LAW

Faced with unprecedented refugee flows from the conflict in Syria and mindful of backlogs in various immigration programs, including those for spouses and children, newly appointed Immigration Minister John McCallum recently announced new targets for immigration levels in 2016.

The new targets set by the minister represent a refocusing of Canada’s immigration policy away from purely economic considerations—a shift that may have important ramifications for many segments of Canadian society and prospective immigrants alike.

While it is important not to overstate the degree to which the announcement represents a new policy direction, for many Canadian residents with family members abroad, these targets may offer new opportunities for reunification in Canada.

Given the new expanded quota, new opportunities for sponsoring parents and grandparents are available with the two-year super visa allowing family members to be in Canada while applications for permanent residency are pending. The policy seeks to add 12,000 family members with a path to permanent residency in Canada, for a total of 80,000 new permanent residents through the family class program in one year.

Changes to immigration legislation will also increase the maximum age for dependent children from 19 to 22 years, thereby allowing more Canadians and permanent residents to bring their children to Canada. Another change to the family class program includes the removal of a two-year waiting period for permanent residency for new spouses—a policy that was sometimes criticized for causing applicants to have to choose between continuing to cohabitate with an abusive partner or being denied status in Canada.

Generally speaking, the recently announced changes to the family class program can be seen as facilitating non-economic immigration. But despite the projected increase in family-class and refugee-class immigration, economic immigration will continue to account for more than half of new permanent residents in Canada.

Economic immigrants can generally be described as immigrants who provide an economic advantage to Canada through investment, or individuals who fill a void in the Canadian labour market.

Through programs such as the federal skilled worker program, the provincial nominee program, and the related Express Entry program, economic immigrants will account for approximately 160,000 new permanent residents in Canada in 2016 alone. Interested parties should take advantage of these economically related programs, especially since more are expected to roll out over the coming year.

It was also announced that applicants applying through the Express Entry program will now be granted additional points towards their permanent residency application if they have Canadian siblings. With every point counting, this may tip the scales and allow for an Invitation to Apply for Permanent Residency being granted.

For more information on qualifying as well as assessing and optimizing your score under the new immigration targets, please contact

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BRENDAN DAWES, Articled Student, assisted with the research and writing of this article.

The electronic version of this article is available at www.singleton.com.

20 YEARS OF GOLF FUN-RAISING

SU was proud to host friends and clients at our 20th annual golf tournament at Morgan Creek Golf Course September 27. This year the coveted plaid jacket and fish tie went to Chris Pauli of i3 Underwriting. In the Texas Scramble competition, Stefan Ferris (Crowe MacKay), Bryce McGee (D&H Group), Mike Hewitt (SU) and Lyle Langlois (Langlois Brown) finished first.

Our tourney also raised $12,000 for Athletics for Kids and BC Childhood Cancer Parents Association. Over the years our golf friends and supporters have raised more than $100,000 for these remarkable groups. A huge “thank you” to everyone who took part! See you next year!

Tourney winner Chris Pauli of i3 Underwriting (right) with SU’s Robert Hodgins.
You Have an Agreement—Now Exclude the Liability

CONTRACT LAW

Exclusion or limitation of liability clauses are contractual terms that limit or exclude the liability of one or more parties to an agreement. Such clauses have three important purposes. They can excuse a party from liability for a particular type of claim altogether, limit the amount that can be claimed against a party, or restrict the time period within which a claim against a party may be brought.

They are also a common way for parties to an agreement to apportion risk and are regularly included in a variety of different agreements, such as commercial leases and joint venture agreements.

An exclusion clause may be relied on as a complete defence to a legal claim or as a way of reducing the amount of damages that one party may be required to pay to another.

For example, in Felty v. Ernst & Young LLP, the British Columbia Court of Appeal found that the defendant accounting firm could rely on an exclusion clause which limited the firm’s liability for negligence to the amount of its fees. The maximum potential damages in that case was thereby reduced from $500,000 to just over $15,000. Similarly, in a 2016 Ontario Court of Appeal case, Suhag Jewellers Ltd. v. Alarm Factory Inc., the Court held that the exclusion clause in question was a complete bar to liability and dismissed the claim entirely.

Exclusion clauses are closely scrutinized by courts. In order to effectively limit or exclude liability, the clause must be expressed clearly; where there is ambiguity, courts will construe such clauses strictly against the party who wishes to rely on them. The Supreme Court of Canada, in Tercon Contractors Ltd. v. British Columbia (Transportation and Highways), has established the following three-part test, which courts will employ when deciding whether to uphold an exclusion clause:

1. Does the clause apply to the circumstances of the case?
2. If the clause applies, was it unconscionable at the time the agreement was entered into?
3. Are there any overriding public policy reasons for refusing to enforce the exclusion clause?

The first hurdle to overcome when trying to rely on an exclusion clause is establishing that the clause itself applies to the circumstances, so it is important to ensure exclusion clauses are drafted precisely, using plain language, with an eye to the types or value of claims to be excluded.

For example, it is common to see exclusion clauses that attempt to limit a party’s liability for damages or personal injuries unless they are caused by that party’s gross negligence. Parties normally use the term “gross negligence” to signal that conduct worse than simple negligence is required to bring a party outside the protection of an exclusion clause.

However, gross negligence does not have a settled meaning in Canada, and courts do not agree on what conduct constitutes gross negligence vs. negligence. As a result, exclusion clauses should either avoid referring to gross negligence or the agreement should include a definition outlining the kind of conduct that will amount to gross negligence.

Before executing any agreement containing an exclusion clause parties should ensure that the wording of the particular clause has been closely reviewed, preferably by a qualified professional, as any vagueness or uncertainty may result in the clause not being applied to the circumstances.

For more information on adding effective exclusion clauses to your legal agreements, please contact

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The electronic version of this article at www.singleton.com contains links to the cases mentioned above.
For many looking to fulfill the dream of running their own business, opening a franchise with an established customer base, well-known brand and proven system may be a great choice. In reality, though, it is not quite as simple as putting up the golden arches and grilling some burgers.

What may not be immediately apparent is the extent to which the operation of the franchise will be governed by the franchise agreement.

In its simplest terms, the franchise agreement defines the relationship between the franchisor and franchisee as well as their obligations to each other. Typically, agreements are lengthy and cover almost all aspects of the relationship; they can even impose strict restrictions on the conduct of the franchisee.

Good news: British Columbia’s new Franchises Act—the first such legislation for the province—should benefit both franchisers and franchisees. It will help clarify franchise relations for B.C.’s estimated 10,000 franchise outlets, which account for $14 billion in sales annually and 180,000 jobs.

While it is not yet in force, the Franchises Act means B.C. will join five other provinces, including Alberta and Ontario, which have similar legislation. Although many of the new legislation’s provisions are for the benefit of the franchisee, they mirror those already in place and should provide franchisees with the benefit of a uniform system across Canada.

Overall, the new Franchises Act legislates a number of important aspects of the franchisor/franchisee relationship. The following points highlight the benefits expected under the new law:

- A franchise agreement will impose a duty of fair dealing in the performance and enforcement of the agreement. This will include a duty to act in good faith and in accordance with reasonable commercial standards. Parties to a franchise agreement will have a right of action against mutual parties who breach the duty of fair dealing.

- A franchisee will be able to rescind a franchise agreement, without penalty, for up to two years should they not be provided with the disclosure document.

- If a disclosure document contains a misrepresentation, a franchisee will be deemed to have relied on that misrepresentation. If a franchisee suffers a loss because of such a misrepresentation, they will have a right to seek damages against the franchisor, the franchisor’s broker, the franchisor’s associate, and every person who signed the disclosure document.

- Liability for actions brought under the Franchises Act will generally be joint and several, so a wronged franchisee will be able to collect the whole of the judgment from any of the defendants who are found liable.

- Clauses that would attempt to restrict jurisdiction will be void with respect to claims to which the new legislation would apply. This means that franchisors will not be able to circumvent the requirements imposed by the new legislation simply by adding a few lines to the franchise agreement.

- The rights provided to the franchisee under the legislation cannot be waived.

Of course, once the regulations are completed and the legislation comes into force, more will be known about this new Act. However, expectations are that it will be interpreted broadly to offer stronger protections for franchisees as similar legislation has around the country.

For more information about your franchise or any issues arising in the operation of a franchised business, please contact ROBERT MOORE rmoore@singleton.com