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To Sum it Up, A Costly Decision: Judge Orders \$150,000 in Costs Against Plaintiff Franchisee After Failed Summary Judgment Motion

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February 25, 2020

In *2461292 Ontario Ltd v Paramount Franchise Group Inc*, the Ontario Superior Court of Justice made a substantial costs order against a plaintiff franchisee following a failed summary judgment attempt in a rescission case.¹ While the Court was unwilling to grant the defendant its full partial indemnity costs, it awarded costs in the amount of \$150,000. This decision may discourage plaintiffs from seeking summary judgment, as losing the motion could result in a steep adverse costs award.

Background of the Case: Failed Attempt at Seeking Summary Judgment

The underlying dispute in this case concerns a claim by the franchisee for over \$2 million in damages for rescission of a franchise agreement pursuant to the *Arthur Wishart Act (Franchise Disclosure)*, 2000. The plaintiff moved for summary judgment. During the motion, the defendant franchisor claimed that there were too many factual disputes and issues of credibility to be resolved on a summary judgment motion. In its reasons on the summary judgment motion, the Court agreed with the defendant, finding that the rescission claim in this case could only be decided with a complete evidentiary record at trial.²

As described in the Costs Endorsement, “the motion records were 2,700 pages in total, with seven different witnesses giving evidence.” Cross-examinations on the affidavits took six days, and resulted in “900 pages of transcript and over 50 exhibits.”³

The Court’s Decision: You Lose, You Pay the Price

In its written submissions with respect to costs, the defendant franchisor requested \$200,000 in costs, which represented a discount of over \$20,000 from its actual partial indemnity costs. The plaintiff submitted that costs should be left to the trial judge, as most of the work done for the motion was work that would have been required for the trial.⁴

The Court once again ruled in favour of the defendant, as the defendant was successful on the motion and was therefore, entitled to costs. However, as the defendant’s bill of costs was double that which would have

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been claimed by the plaintiff, the Court agreed that the costs claimed were excessive and fixed the costs award at \$150,000.

Key Takeaway Principles

As with any costs award, the order in this case was contextual, as the costs claimed were based on the amount of time and effort that went into the summary judgment motion. Nevertheless, the precedent set by this award could dissuade future plaintiffs from bringing a summary judgment motion in lieu of proceeding to trial. Litigants may decide to push towards a lengthier trial process rather than attempting to resolve the matter sooner by way of summary judgment, as the risk of an adverse costs award after this decision may be too high.

Despite reflecting a reduced amount, the award in this case is higher than that in the recent *Raibex Canada Ltd. v ASWR Franchising Corp.* case, which also involved a failed summary judgment motion by a franchisee. Combined with the courts' increasing trend away from summary judgment in rescission matters, franchisees will need to strongly weigh the dangerous prospect of a failed motion and the resulting costs before seeking summary judgment.

The author gratefully acknowledges the contribution of articling student Robert Sniderman in preparing this article.

¹ 2019 ONSC 3788, <<http://canlii.ca/t/j1hq6>> ["Costs Endorsement"].

² 2019 ONSC 2962, <<http://canlii.ca/t/j0q9g>>.

³ Costs Endorsement, *supra* note 1 at para 3.

⁴ *Ibid* at paras 2 and 5.