Cassels

New Year, New Look: Ontario Court of Appeal Addresses What Constitutes Franchise Deidentification

Derek Ronde

February 23, 2023

When a franchise relationship ceases, the franchisee generally has an obligation to deidentify, which means to stop using the intellectual property of the franchisor and to cease doing anything that would demonstrate that the franchisee is still associated with the franchised business. Objectively this does not seem like a difficult task; however, when tested in practice, there is often a significant dispute between franchisors and franchisees as to whether the deidentification is sufficient. In a recent decision, *Unicity Holdings Ltd. v. Great British Vape Co*.,[1] the Ontario Court of Appeal addressed whether a former vape shop franchisee had sufficiently deidentified its retail location after a breakdown of the franchise parties' relationship. This appellate decision provides helpful guidance as to what Ontario courts will examine when determining if a franchisee has in fact complied with its obligations and can no longer be associated with its former brand.

In *Unicity*, the franchisor was Great British Vape Co. (GBVC), which operated the "Signature Vape" franchise brand of vaping equipment and cannabis accessories. The franchisee was Unicity Holdings Ltd. (UH), which operated a Signature Vape store in Windsor, Ontario. The franchise agreement between the parties terminated in January 2021 after only a few months of operation. UH went on to operate a retail outlet called London Vape at the Windsor location. The parties settled the dispute over the termination by way of Minutes of Settlement, which required the franchisor to pay $100,000 to UH after UH fulfilled several conditions surrounding the termination, including to cease "using any and all designs, brandings or marks used by Signature Vape." The franchisor claimed that UH did not fulfil its obligations regarding de-identification and refused to pay the $100,000. UH sued and was successful, as the judge on the initial application held that UH met the required conditions. GBVC appealed this decision to the Ontario Court of Appeal, claiming that the judge had failed to consider sections of the parties' franchise agreement that set out what designs, marks, and branding UH was not to use, which in turn meant that the judge had misinterpreted the Minutes of Settlement.

The Ontario Court of Appeal unanimously upheld the application judge's decision and dismissed the appeal. In reviewing the obligations under the franchise agreement and the Minutes of Settlement, the Court also noted that the application judge reviewed the distinguishing features of UH's store post-termination, specifically the designs, branding and marks, and compared them with those in a Signature Vape location. The application judge was assisted by photographs of these items that were included in the evidentiary record. The application judge noted the distinctive features in UH's deidentified store, including the different colour of the walls, the absence of a distinctive chandelier found in Signature Vape stores, new Union Jack emblems and designs affixed to UH's floors and black display cases, and the addition of tri-colour stripes along the entire perimeter of the floor. Although the grey tiles and black glossy display cabinets from the previous look remained, they appeared different with the addition of the Union Jack emblems and designs. The application judge further held that GBVC did not own the concept of an open floor with shelving along the walls, which remained in UH's rebranded location. As such, the only remaining issue was whether grey floor tiles and black glossy display cases (despite the addition of Union Jack emblems and tri-coloured stripes) were unique design features that were so distinctive that the new London Vape location could not be distinguished from a Signature Vape location. The application judge rejected this contention, stating:

"In my view, even if there were something distinctive about the grey floors and black cabinets – a proposition of which I am dubious – the addition of the Union Jacks and coloured stripes distracts from those features and distinguishes the London Vape store from a Signature Vape store. The two stores depicted above resemble each other in the way that, for example, a Rexall Pharmacy's interior resembles that of a Shoppers Drug Mart, or a Burger King resembles a McDonald's. The overall impression is similar as the products and businesses are similar; but the branding details are different, and consumers are certainly able to distinguish the brands."

The Court of Appeal agreed with the application judge's approach in its entirety and found no error in his finding that the design of UH's London Vape store was "sufficiently distinct from that of Signature Vape stores that no customer would be confused into thinking the respondents' outlet was associated with [GBVCs]' stores." The Ontario Court of Appeal also noted that the absence of a list of objects, designs, brandings or marks that UH was not to use was an unhelpful fact for GBVC. GBVC was ordered to pay the amount owed under the Minutes of Settlement plus costs.

The key takeaways from this decision for franchisors are 1) to the extent possible, the use of photographic evidence is a helpful tool for a court to use to determine whether a former franchisee has adequately de-identified; 2) if there has been a real, significant effort to deidentify by the franchisee, it may not be worth pursuing legal enforcement where the concerns involve generic aesthetic issues with the new location, and 3) greater specificity in respect of deidentification obligations in both franchise agreements and settlement agreements may be helpful.

A copy of the decision can be found here.

---

[1] *Unicity Holdings Ltd. v. Great British Vape Co*., 2022 ONCA 545 (CanLII), <https://canlii.ca/t/jqzmv> (*Unicity*).

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.