

A Wing and a Prayer: The Ontario Superior Court of Justice Shoots Down a Franchisor's Exemption Defence in a Rescission Claim

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In the recent Ontario Superior Court of Justice decision in *Jayasena Management Corp. et al. v. Savannah Wells Holding Inc. (Jayasena)*, the Court grappled with a variety of issues arising out of a franchisee rescission claim under the *Arthur Wishart Act (Franchise Disclosure), 2000* (the Wishart Act). The decision, which granted the franchisee's rescission claims, provides further assistance to franchise parties in respect of delineating what defences a franchisor can legitimately raise to defend against a statutory rescission action arising out of a resale.

Background

The facts in *Jayasena* were relatively straightforward. The plaintiff franchisee purchased an existing Wild Wing restaurant franchise from the original franchisee. After the acquisition, the franchisee ran the Wild Wing franchise for 18 months but was unsuccessfully, incurring significant losses. The franchisee then served a Wishart Act notice of rescission on the franchisor, claiming that the franchisor had failed to meet its disclosure obligations under the Wishart Act, and abandoned the franchise.

Issues

The Court held that the franchisor's disclosure was wholly inadequate and thus would entitle the franchisee to rescission under the Wishart Act. However, the Court had to examine both the franchisor's defences and the extent of liability. In that regard, the Court was faced with three issues:

1. Was the franchise agreement valid?
2. Was the franchisor uninvolved in the sale of the franchise, which would allow the franchisor to claim an exemption from disclosure obligations under the Wishart Act?
3. Were the franchisor defendants who were not the franchisor itself "franchisor's associates" under the Wishart Act?

Was the Franchise Agreement Signed?

Cassels

The franchisor's first line of defence was the curious contention that there was no franchise agreement between the parties. The evidentiary record included a franchise agreement produced by the franchisee that bore the signature of only Mr. Rick Smiciklas, an executive of the franchisor. However, Mr. Smiciklas insisted that he had never signed a franchise agreement and suggested that the agreement was a forgery as it did not follow his regular practice of initialing every page. Mr. Smiciklas did not provide any evidence to support that this was his regular practice.

The Court reviewed email correspondence between both parties setting out a time to meet at the Wild Wing's head office, and the parties agreed that on June 7, 2013, the franchisee went to the Wild Wing head office. Despite this, the parties had differing recollections of what occurred in respect of the execution of the franchise agreement on that date.

The Court took into consideration the form of the franchise agreement, which Mr. Smiciklas agreed was the standard form that Wild Wing Restaurants used at the relevant time and was the only agreement Wild Wing Restaurants signed with their franchisees. The Court found that it defied logic that the franchisee would forge Mr. Smiciklas' signature and not sign the agreement themselves.

The Court found that the only objective, concurrent, documented evidence about the franchise agreement and the meeting on June 7, 2013, was an email from Mr. Chandiok, a representative of the franchisor, to the franchisee indicating that he would bring them to the head office "for [their] franchise agreement". The court concluded this was a clear indication that a franchise agreement had been signed at the head office and was valid. Outside of this analysis, given the ongoing operation of the franchise for 18 months, it is evident that the parties operated under *some* form of agreement that was capable of being rescinded, and therefore the franchisor's defence on this issue was likely of limited assistance to their case.

Was the Grant of the Franchise Effected by or Through the Franchisor?

Under the Wishart Act, if the grant of a franchise was not effected by or through a franchisor, the franchisor may be exempt from disclosure obligations. However, as previous appellate jurisprudence (*2189205 Ontario Inc. v. Springdale Pizza Depot Ltd.*¹ and *2256306 Ontario Inc. v. Dakin News Systems Inc.*²) has explained, Ontario courts have been conservative in their interpretation of their exemption.

In *Springdale Pizza* and *Dakin*, the Court held that the exemption to the disclosure requirements in s. 5(7)(a)(iv) of the Wishart Act, requires the *indirect* involvement of a franchisor in a resale. The exemption does not apply when the franchisor does more than play a passive role in the resale of a franchise beyond what is required for their consent in the franchise agreement.

Applying this to *Jayasena*, the Court held that the franchisor was not able to rely on the exemption. There was evidence that the franchisor was more than simply a passive actor in the sale to the franchisee, as the franchisor required the franchisee to sign a new franchise agreement and a franchisor representative

steered the franchisee to the franchise location and provided them with initial information about the franchise.

Who is a Franchisor's Associate?

In its notice of rescission and subsequent claim, the franchisee sought to recover against not only the franchisor but two other parties: 1516081 Ontario Inc. (151), an affiliate corporation of the franchisor, and Mr. Rick Smiciklas. The franchisee alleged that they were “franchisor’s associates” under the Wishart Act and thus liable for the rescission claim. The Court agreed and held that the franchisee was entitled to recover against both Smiciklas and 151.

Both the Franchisor and 151 were controlled by Mr. Smiciklas, who was the sole director of each entity. Mr. Smiciklas was directly involved in the grant of the franchise. Further, 151 was involved in the allocation of royalties within the Wild Wing system, and 151 also held the Franchisor’s trademarks and provided other direction and information to franchisees.

Summary

In summary, *Jayasena* reaffirms the conservative jurisprudence regarding the availability of the resale exemption to franchisors. This is yet another decision wherein Ontario courts have attributed liability to franchisors for disclosure failures arising out of franchisee-to-franchisee sales. Franchisors should ensure that their statutory disclosure practices are reflective of this potential legal threat.

A copy of the decision can be found [here](#).

¹ 2189205 Ontario Inc. v. Springdale Pizza Depot Ltd., 2013 ONCA 626 [Springdale Pizza].

² 2256306 Ontario Inc. v. Dakin News Systems Inc., 2016 ONCA 74 [Dakin].