

# Cassels

## Ontario Decision Confirms That Substance of an Agreement, Not its Title, Will Determine Whether a Franchise Relationship Exists

October 9, 2018

On August 27, 2018, in *Fyfe v. Stephens* (Dial A Bottle),<sup>1</sup> the Ontario Superior Court of Justice granted partial summary judgment and awarded damages to franchisee plaintiffs, despite the defendant franchisor's claim that it did not enter into a franchise agreement with the plaintiffs.

The parties entered into an agreement to operate a liquor-delivery business using the defendants' trademark "Dial A Bottle." The parties signed a document titled "Exclusivity Agreement," which explicitly stated "this is not the purchase of a franchise." The plaintiffs, however, argued that the relationship between the parties was effectively a franchise relationship and applied for rescission on the basis of non-disclosure pursuant to the *Arthur Wishart Act (Franchise Disclosure), 2000*.<sup>2</sup> The plaintiffs further argued that the defendant made "misleading" representations about the business opportunity enticing the plaintiffs to enter into the agreement.

In determining whether a franchise relationship existed between the parties, the Court noted that where the elements of an agreement meet the requirements of the definitions contained in the *Wishart Act*, including, "franchise," "franchise agreement," "franchisee," "franchise system," and "franchisor," then the agreement will be a franchise agreement and treated as such in law.

The defendant argued that the Exclusivity Agreement was not a franchise agreement as it explicitly indicated that "this is not the purchase of a franchise" and the parties did not intend for the agreement to be a franchise agreement. The Court was not persuaded by this argument and cited *Chavdarova v. The Staffing Exchange*<sup>3</sup> and *1706228 Ontario Ltd. v. Grill It Up Holdings Inc.*<sup>4</sup> as authority that the Court must examine the **substance** of a relationship to determine whether there is a franchise relationship.

In doing so, the Court held that the relationship between the parties in Dial A Bottle was a franchise relationship and the agreement between them was a franchise agreement for the following reasons:

- the plaintiffs were required to make an upfront payment and continuing payments in the course of operating the business;
- the defendant granted the plaintiffs the right to operate as a Dial A Bottle business, using the defendant's trademark, contingent on the plaintiffs' obtaining a license to distribute alcohol delivery services; and

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- the franchisor exercised significant control over the plaintiffs' method of operation, including, management of the territory owner/operator's business, taking orders, referring those orders to the plaintiffs, the logo, marketing material and web design. As well the defendant controlled phone line billing, telemarketing and telephone book advertising *and* it charged a \$3 management fee on each delivered order.

As such, the Court held that the franchisor should have disclosed pending administrative actions and that the plaintiffs would not have entered into the agreement had they been made aware of such violations, which resulted in set-up and operational costs being incurred by the plaintiffs.

Ultimately the Court awarded judgment for rescission, loss of income and moving expenses *and* left it open for the plaintiffs to claim for damages on a trial of the issue of damages.

## Key Takeaway

Dial A Bottle represents the courts willingness to look behind the surface of an agreement to fully understand the substance of a relationship between parties. Going forward, it is imperative to look at the operation of a business relationship and be sure to provide disclosure where necessary. Parties cannot avoid the operation of the *Wishart Act* by simply labelling an agreement something other than a franchise agreement. If a franchisor-franchisee relationship is found to exist, the franchisor may be on the hook for more than just rescission if it did not comply with the *Wishart Act*.

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<sup>1</sup> 2018 ONSC 5066.

<sup>2</sup> S.O. 2000 c. 3 (the "*Wishart Act*").

<sup>3</sup> 2016 ONSC 1821.

<sup>4</sup> 2011 ONSC 2735