

Ring the Alarm: Ontario Court Dismisses Franchisee Motion for Partial Summary Judgment

February 8, 2018

In *Hepburn v. AlarmForce*,¹ the Ontario Superior Court of Justice considered the question of what constitutes a material change under the *Arthur Wishart Act (Franchise Disclosure), 2000* (the Wishart Act). The Court dismissed the plaintiff franchisee's motion for partial summary judgment, concluding that there were genuine issues requiring a trial, in part due to the insufficiency of the evidentiary record.

In this case, the franchisee (115) entered into a franchise agreement with AlarmForce in 1995 for the right to operate an AlarmForce franchise in Southwestern Ontario for a period of ten years (the 1995 Agreement). The 1995 Agreement included a right of renewal.

In March, 2005, the 1995 Agreement was up for renewal and 115 provided notice of its intention to renew the agreement. After 115 requested a renewal agreement, AlarmForce advised that it would provide the document "in due course." The renewal agreement was provided to 115 in August, 2007, more than two years after the franchisee requested the renewal agreement (the 2007 Agreement).

Upon receipt of the 2007 Agreement, counsel for 115 noted a number of changes between the renewal agreement and the 1995 Agreement, and took the position that AlarmForce was required to provide a disclosure document since the differences between the agreements constituted a material change. The 2007 Agreement was never signed and the parties entered into a stand-off. Communication between the parties in the subsequent years was limited to occasional and unsuccessful offers by AlarmForce to purchase the franchise, until December, 2014, at which point AlarmForce provided notice of termination effective December, 2015.

Following completion of the pleadings, 115 brought a motion for partial summary judgement, seeking declarations from the Court that AlarmForce breached the Wishart Act by failing to provide a disclosure document and breached its duty of good faith and fair dealings.

With regards to the disclosure document, the central issue was whether AlarmForce was required to provide 115 with disclosure as a result of material differences between the 1995 Agreement and the 2007 Agreement. The Court found that the appropriate approach was a context-driven analysis, and noted that this required more information than a direct comparison of the two agreements; consideration of the surrounding circumstances was necessary. Since the Court found that the affidavit evidence put forward by the parties contained unsubstantiated assertions of fact, the Court determined that the evidentiary record was insufficient for it to make a finding regarding the issue of material change.

The Court also considered whether AlarmForce breached its duty of good faith and fair dealings. 115 submitted that AlarmForce had failed to properly support the franchisee. In particular, 115 alleged that AlarmForce had provided unequal levels of advertising, corporate support and product opportunities between its corporate territories and 115. The Court, drawing from its conclusions regarding disclosure, found that the issue required a context-driven analysis which the evidentiary record could not support. Accordingly, the Court determined that there was a genuine issue requiring a trial.

In dismissing the plaintiff's motion for partial summary judgment, the Court determined that it could not "fairly and justly adjudicate the issues" based on the evidentiary record. The decision is a useful reminder that parties must put their "best evidentiary foot forward," particularly on motions for summary judgment.

¹ *Hepburn v. AlarmForce*, 2017 ONSC 6012, <<http://canlii.ca/t/h6ktq>>