

## Substance Over Form: The Ontario Court of Appeal Provides Guidance on *Wishart Act* Damages

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A recent decision of the Ontario Court of Appeal has provided franchisors and franchisees with further guidance on how to calculate statutory rescission damages under section 6 of Ontario's *Arthur Wishart Act (Franchise Disclosure), 2000* (the *Wishart Act*).<sup>1</sup>

The case, *2122994 Ontario Inc. v. Lettieri*, was an appeal from a judgment of the Ontario Superior Court of Justice<sup>2</sup> upholding the decision of the trial judge and dismissing the franchisor's attempt to challenge the franchisee's rescission claim, including the categorization of rescission losses.<sup>3</sup> The franchisor appealed on the grounds that the trial judge erred in failing to permit it to cross-examine the franchisee about the arrangement she had with TD Bank, which was said to have loaned her the money to pay for certain leasehold improvements made to the franchise premises.

In upholding the trial judgment, the Ontario Court of Appeal rejected the franchisor's argument and stated that whatever the arrangements were between TD Bank and its customer were irrelevant to any issues as between the franchisor and the franchisee. The only relevant fact in determining losses is the amount the franchisee paid to the franchisor.

The Court of Appeal held that language of the *Wishart Act* is clear - on rescission, the franchisor is required to "refund to the franchisee any money received from or on behalf of the franchisee, other than money for inventory, supplies or equipment." The source of the franchisee's funding was found to be irrelevant to her claim against the franchisor.

The franchisee had initially categorized these losses as "supplies and equipment" under subsection 6(6)(c) of the *Wishart Act*. Despite this, the Court of Appeal stated that the trial judge correctly categorized the leasehold improvements made to the property as "money received from or on behalf of the franchisor other than money for inventory, supplies or equipment," under subsection 6(6)(a) of the *Wishart Act*. Without any evidence of prejudice to the franchisor, the Court held that it was immaterial how the leasehold improvements were categorized under the *Wishart Act*. The objection was simply one of "empty formalism."

The takeaway from this decision is that the manner in which a franchisee may categorize damage amounts under the *Wishart Act* may not be of much, if any, significance when determining whether the franchisor is required to refund these monies to the franchisee. The Court of Appeal has indicated that it will take a flexible rather than a rigid approach in calculating *Wishart Act* rescission damages. As such, litigants should

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be focused on the substance of rescission damages claims rather than their arbitrary classification under the different section 6(6) heads of damage.

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<sup>1</sup> 2002, S.O. 2000, c.3. 38

<sup>2</sup> 2122994 Ontario Inc. v. Lettieri, 2016 ONSC 6209, <<http://canlii.ca/t/gv1m9>>

<sup>3</sup> 2122994 Ontario Inc. v. Lettieri, 2017 ONCA 830, <<http://canlii.ca/t/hms31>>

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