Legal Digest

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LEGISLATION

A. Digest does not cover legislative response to COVID-19

Responses to the Novel Coronavirus COVID-19 pandemic by the federal and provincial legislatures in Canada have been developed and implemented rapidly and continue to evolve. The Canadian Franchise Association has been actively involved in lobbying for and in disseminating information about these responses in real time, using communication channels better suited to sharing urgent information, such as daily e-mail updates, social media posts, and frequent webinars. Given the inherent "lag" between the time when this Legal Digest is drafted and when it is received by CFA members, we have determined, for the current edition of the Legal Digest at least, that this is not an appropriate vehicle for providing useful, up-to-date information about legislative responses to the COVID-19 pandemic. Accordingly, we have made the decision to limit this Legal Digest to non-COVID-19-related legal developments only.

B. Ontario seeks to clarify ambiguities and codify business practices under the AWA

In an effort to further improve Ontario's business law statutes, the provincial government established the Business Law Modernization and Burden Reduction Council. This pro bono Council is comprised of various corporate lawyers with firsthand experience in dealing with technical areas of law and offers practical insight to the government throughout the law reform process.

As part of their mandate, the Council launched a proposal in October 2019 seeking feedback on a number of recommendations, including bringing into force previous amendments to the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000 c. 3 (the "*AWA*") and making related amendments to its regulations.

As discussed in our Winter 2018 Legal Digest, the Legislative Assembly of Ontario passed Bill 154, the *Cutting Unnecessary Red Tape Act* in November 2017, which resulted in a number of amendments to the *AWA*.

The 2017 amendments have remained largely ineffective since most of the changes have not come into force pending further regulation. The Council's public consultation should finally allow the Ontario government to enact the necessary regulations.

Items for consideration in the Fall 2019 proposal included amending the general regulation under the *AWA* to prescribe:

1. The manner of determining "Total Initial Investment" for the purposes of the minimum and large investment thresholds;
2. Any changes to the minimum and large investment threshold amounts for exemptions from disclosure;
3. The amount of the deposit payment under which fully refundable deposit agreements that does not bind a prospective franchisee to enter into a franchise agreement would be exempt from disclosure;
4. The information that must be contained in a Statement of Material Change; and
5. The accounting standards for financial statements that must be included in the Disclosure Document.

A further question posed was whether Ontario should consider harmonizing the above requirements with any particular Canadian jurisdiction(s).

The public consultations came to a close on November 26, 2019 and a Bill was expected to be tabled in the following months. However, in light of the COVID-19 pandemic and measures taken to combat it in early 2020, it is uncertain when a Bill can reasonably be expected.

CASE LAW

C. Ontario Court confirms broader availability of *Tutor Time* release exemption

In *New Vision Renaissance MX Ltd. v The Symposium Café Inc.*, 2020 ONSC 1119 ("New Vision"), the Court confirmed that claims under the *AWA* may be released pursuant to the *Tutor Time* exemption in broader circumstances than those reflected in previous case law. The Court also commented on certain alleged disclosure deficiencies in a disclosure document in light of the purposive and contextual analytical framework laid down by the Ontario Court of Appeal in *Raibex Canada Ltd. v. ASWR Franchising Corp.*, 2018 ONCA 62 ("*Raibex*").

In this case, the plaintiff franchisee acquired a franchise in the Symposium Café system pursuant to a franchise agreement made in February 2015 and a subsequent franchise amending agreement made in June 2015. Prior to the closing of the purchase, the franchisee indicated that it would be unable to pay the balance owing pursuant to its development agreement with the franchisor by the scheduled closing date. The franchisee advised the franchisor that there had been a delay in receiving its funds and requested a meeting to discuss payment options.

On June 24, 2015, the parties met to discuss options to resolve the shortfall in funds and over the next few days, the lawyers for both sides exchanged comments on a draft franchise amending agreement. As a result of the discussions, the franchisor agreed to provide a short-term loan to the franchisee in order to help meet the scheduled closing date and the plaintiffs signed the franchise amending agreement dated June 24, 2015. As a condition to the loan, the franchise amending agreement included broad language releasing the franchisor from any claims for rescission due to failing to provide disclosure as required by the *AWA*.

On June 27, 2015, the plaintiffs opened their doors to the public. In May 2016, the plaintiffs delivered a notice of rescission to the franchisor and other defendants alleging deficiencies in the franchise disclosure documents and requesting that the franchisor take over the operation of their franchise on May 16, 2016. The franchisor assumed the operation of the plaintiffs' franchise location on that date and terminated the franchise agreement and sub-lease the following day, alleging it had been wrongfully repudiated.

The issues to be determined by the Court were the validly of the rescission by the franchisee due to the alleged disclosure deficiencies, the validity of the release in the June franchise amending agreement, relied upon by the franchisor, and the validity of the termination of the franchise agreement by the franchisor due to the franchisee's alleged unlawful abandonment of the restaurant.

The plaintiffs contended that the release was void by virtue of s.11 of the *AWA* which contains a general prohibition against the waiver of statutory rights by a franchisee. However, the Court applied the judicially developed *Tutor Time* exception derived from *1518628 Ontario Inc. v. Tutor Time Learning Centres, LLC*, [2006] O.J. No. 3011 (S.C.J.) which states that s.11 does not preclude parties from entering into valid and binding settlement agreements, for adequate consideration, with the advice of counsel, for existing, known breaches of the Act.

In this case, the evidence showed that the preambles to the June franchise amending agreement specifically referenced the *Tutor Time* exception. Following *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2015 ONSC 3824, the Court found that the reference to *Tutor Time* in the language of the release, while not determinative, did corroborate an intention to settle a dispute or potential dispute. The Court went on to state that the inability of the franchisee to pay the amounts owing on closing gave rise to a potential dispute. This was enough to meet the *Tutor Time* exemption requirement that the release must be given in the context of a dispute. The fact that it was not identified as a "dispute" at the time did not matter.

In terms of the establishment of independent legal advice ("ILA"), the Court determined that while the production of an ILA certificate has been used to prove that a franchisee obtained ILA in some cases, it was not found to be a requirement on these facts. This was not a situation where a franchisee was being asked to sign something that would lead it to retain a lawyer for the first time. It was clear on the facts that the plaintiffs had previously consulted with their lawyer in relation to the disclosure documents and that he was retained to assist with the closing and related negotiations. The plaintiffs' counsel subsequently negotiated the language contained in the release. The Court therefore inferred that the plaintiffs had been advised in relation to the release.

The Court determined that the subjective knowledge of a party giving the release as to whether a particular set of facts engages a statutory right isn't required to engage the Tutor Time exemption. Knowledge of contractual and statutory claims in existence at the time of the release may be inferred based on the factual matrix. In this case, the claims made by the plaintiffs in relation to the disclosure deficiencies were known or knowable at the time of the release.

The Court also rejected arguments that the release was unconscionable, given under duress, that there was a failure of consideration, and that the franchisor had breached its duty of fair dealing in obtaining the release. The Court upheld the validity of the release and found that it was a complete answer to the claims brought by the franchisee.

Although the Court's finding with respect to the validity of the release was dispositive of the motion, the Court went on to make a number of statements, in obiter, with respect to the viability of certain disclosure deficiency arguments put forth by the franchisee. In light of the analytical approach of the Ontario Court of Appeal in the *Raibex* case, the Court repeatedly expressed the view that, although the franchisee claimed that the alleged deficiencies deprived it of the ability to make an informed investment decision, its arguments were rendered ineffective by the franchisee's failure to say how the alleged deficiencies had impacted its decision-making.

The Court stated that the fact that the certificate was not properly executed was a fatal flaw in disclosure, notwithstanding the above-noted *Raibex* considerations. However, the Court went on the state that it was not convinced that the fact that the franchisor gave piecemeal disclosure, rather than providing the disclosure document as one document at one time, as required by s. 5(3) of the *AWA*, was a fatal flaw in disclosure. On this point, the Court stated, at para. 116:

> "Having regard to the Court of Appeal's decision in *Raibex* I am not satisfied on the record before me that the ability of the plaintiffs to make an investment decision was affected by the piecemeal disclosure that they received. It is reasonable to infer that the plaintiff's ability to make an informed decision was not affected by this, in the absence of them demonstrating that it was."

The Court was similarly unmoved by allegations that the franchisor failed to disclose all material facts, noting that the franchisee had not identified any specific material facts that were missing and, as with the piecemeal disclosure argument above, had failed to demonstrate how the alleged deficiency impeded or affected the franchisee's ability to make an informed investment decision.

For substantially similar reasons, the Court also dismissed allegations that the franchisor failed to provide accurate, clear, and concise disclosure with respect to the development agreement for the premises, that the franchisor failed to provide required statements of material change to disclose changes to the terms of the franchise agreement, a copy of the lease and information regarding the location of the premises and that the franchisor failed to provide a list of franchisee's costs associated with establishing the franchise in respect of leasing costs and a staffing chart that had been provided. It is unclear to what extent franchisors may or may not be able to rely on these obiter statements.

In the end, the defendants' motion for summary judgment was granted. The release by the plaintiffs contained in the June franchise amending agreement was declared valid and enforceable, the rescission by the plaintiffs of the franchise agreement, its schedules, and ancillary agreements was found to be invalid, and the defendant franchisors' termination of the franchise agreement by notice on May 17, 2016 was declared valid.

D. Improperly-signed disclosure certificates still a fatal flaw post-*Raibex*

In *2483038 Ontario Inc. v. 2082100 Ontario Inc.*, 2020 ONSC 475, the plaintiff franchisee, 2483038 Ontario Inc., sought rescission of a franchise agreement and ancillary agreements with the defendant franchisor 2082100 Ontario Inc., which related to the operation of a "Fit for Life" restaurant. The principal disclosure deficiency considered in this case was the sufficiency of the disclosure document certificate.

The franchise disclosure document provided to the franchisee was only signed by Mr. Davis, the franchisor's sole director and officer, on page 4 of the 29 page document. The disclosure certificate on page 27 of the disclosure document remained unsigned. Mr. Davis also testified that he only signed the disclosure document once a year and relied on other franchisor personnel to see that it was updated and accurate.

The franchise opened its doors for business on or about December 14, 2015 and ceased operations on or about August 11, 2017 following the delivery of a notice of rescission.

The plaintiffs sought statutory compensation and damages against both the franchisor and Mr. Davis under ss. 6(7) and 7 of the *AWA*. Mr. Davis was alleged to be a franchisor's associate and personally liable. The franchisor, by way of counterclaim for the wrongful rescission of the franchise agreement, sought damages for lost royalties and the removal of equipment as well as various claims for alleged operation defaults and misrepresentations.

The main questions for determination at trial were whether the plaintiffs were entitled to deliver notice of rescission and if so, whether Mr. Davis would qualify as a franchisor's associate and be personally liable.

The Court confirmed that the disclosure certificate provided by the franchisor was fatally flawed. The Court found that, while *Raibex* has informed the Court's analysis in a number of statutory disclosure cases, it does not overrule the long-standing line of case law regarding the issue of non-compliant certificates. Kimmel J. confirmed that an unsigned certificate in a Franchise Disclosure Document ("FDD") is, in and of itself, a fatal flaw resulting in non-disclosure within the meaning of s. 6(2) of the *AWA*.

The Court at para 25 of this decision took the opportunity to restate the guiding principles that have emerged from the appellate courts over the last two decades. Namely that the *AWA* is intended to reduce the imbalance of power between franchisor and franchisee and must be given a "generous interpretation that errs on the side of over-inclusion to ensure the broadest scope of disclosure" and that it "balances the interests of both franchisees and franchisors". At para 33, Kimmel J. states:

> "It is apparent from the jurisprudence that section 6(2) *Wishart Act* cases are informed by two policy objectives: (1) informed investment decision making; and (2) impressing upon those who sign a disclosure certificate the importance of ensuring the disclosure document is complete and accurate. The first policy objective broadly recognizes the rights of franchisees. The second policy objective recognizes a specific obligation upon the franchisor."

There is an important difference in rescission cases relating to non-disclosure of material facts and those concerning non-compliant certificates. The ONCA in *Raibex* endorsed the view that a disclosure document may be so deficient that it amounts to no disclosure at all (see *Raibex* at para. 47). *Raibex* demonstrated a need for purposive analysis of s.5 disclosure deficiencies having regard to both policy considerations stated above.

The defendants tried to argue that post-*Raibex*, a franchisee must now show that a disclosure deficiency affected the franchisee's ability to make an informed investment decision. However, the Court disagreed and sided with the plaintiffs to say that the Ontario Court of Appeal in *Raibex* did not overrule its earlier decisions in which it found deficient certificates to amount to non-disclosure without regard to the impact on the franchisees. The main policy objective concerning certificate requirements is to impress upon the franchisor the importance of ensuring complete and accurate disclosure by attaching liability to its signatories. The informed investment decision approach should not be used in the analysis of deficient certificate cases. The signature requirement does not exist for that purpose.

On this point, the Court stated clearly that Mr. Davis' practice, of signing the Disclosure Document only once a year and relying on others (who did not sign the Disclosure Document) to do the necessary updating, did not satisfy the policy objective behind

the certificate, which is intended to ensure that the person signing the certificate personally verifies and confirms the accuracy of the information in the FDD. The Court stated at paras. 42 and 43:

> "[42]I find that the Fit for Life FDD did not contain the signed and dated disclosure certificate prescribed under s. 7 of the regulation. There is nothing to indicate that the signature of Samuel Davis on page 4 of the FDD applies to anything on the following pages 5 to 27 of the document and no signature at all appears on page 27 under the certificate language. The evidence of Samuel Davis was that he annually signed a similar document to that which appears on pages 2 to 4 of the FDD. He relied on other members of his team to update the FDD and to insert his signature page into the FDD. This demonstrates that his signature did not serve the policy objective of the certificate to impress upon him the importance of ensuring that the entire document was complete and accurate.
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> [43] Samuel Davis' testimony in re-examination that by signing page 4 of the FDD it was his intention to endorse the FDD entirely and be personally liable does not satisfy the policy objective in the circumstances of this case. There is no evidence that he had the whole document in front of him, or that he had even reviewed it, before he signed page 4. The evidence does not support the defendants' contention that this is simply a case of Samuel Davis having signed the certificate on the wrong page."

The non-compliant certificate was a fatal flaw, sufficient, in and of itself, to trigger the franchisee's right of rescission under section 6(2) of the *AWA*. The franchisee properly exercised its right of rescission, and was entitled to statutory compensation pursuant to Section 6(6) of *AWA*. In light of the Court's specific disapproval of Mr. Davis' practice of signing the disclosure document once a year and not participating in reviewing and confirming the accuracy and completeness of disclosure documents as they are issued, franchisors are strongly cautioned to avoid such practices, which do not satisfy the policy objectives behind disclosure certificate execution.

The Court also considered whether Mr. Davis, the sole director and officer of the franchisor, was considered a "franchisor's associate" under the *AWA*. The only element of the "franchisor's associate" definition that was in question was whether Mr. Davis was involved in reviewing or approving the grant of the franchise or making representations to the franchisee to market the franchise. The Court adopted a contextual and grammatical reading of the definition of franchisor's associate and agreed that Mr. Davis did in fact make representations to the prospective franchisee on behalf of the franchisor by way of the written statements included prior to his signature in page 4 of the disclosure document. It was found that these statements about the franchise and its aspirations, read objectively, were made for the purpose of granting the franchise, marketing the franchise or otherwise offering to grant the franchise and as such Mr. Davis was considered a franchisor's associate and therefore personally liable to compensate the franchisee for the franchisor's failure to provide proper disclosure.

E. Statement of claim may constitute sufficient notice of rescission under the AWA

The case of *2352392 Ontario Inc. v. Msi*, 2020 ONCA 237 ("*Msi*") involved a financially unsuccessful franchise. The franchisee's bank sued the franchisee for default on its loan and the franchisee issued a third party claim against the franchisor claiming damages and rescission of the franchise agreement for failure to deliver the required disclosure documents under the *AWA*. The franchisor responded that the franchisee couldn't claim rescission under the Act because it hadn't delivered the required notice under s. 6 of the Act.

Subsequently, the lawyer who drafted the third party claim for the franchisee became involved in his personal capacity. New counsel for the franchisee issued a new statement of claim against the franchisor, taking the position that the third party claim in the bank action constituted the required notice under the *Act*. The franchisee then issued a statement of claim against his former lawyer, alleging that he was negligent in failing to comply with the requirements of the *Act*. In a motion within both actions, both the franchisor and the franchisee argued that the third party claim didn't constitute notice under the *Act*.

The motion judge accepted that position by ultimately relying on *2130489 Ontario Inc. v Philthy McNasty's (Enterprises) Inc.*, 2012 ONCA 381, where the court decided that until the franchisor decides to not fulfill the obligations in s.6(6), the franchisee has no cause of action for compensatory damages. The motion judge in *Msi* concluded that since a notice under ss. 6(3) serves a different purpose from a pleading, the Third Party Claim can't constitute such a notice. They found that the Third Party Claim based on a cause of action dependant upon a failure of the franchisor to abide by its obligations under ss. 6(6) couldn't constitute notice since there was no cause of action until the notice had been given.

The lawyer who issued the third party claim appealed the motion judge's decision and was opposed by both the franchisor and franchisee. The issue to be determined was whether notice of rescission of a franchise agreement is sufficient if contained in a pleading, or, specifically in this case, a third party claim.

The Court allowed the appeal and determined that the relevant sections of the *Act* state that a franchisee can rescind the franchise agreement, without penalty or obligation, no later than two years after entering into it if the franchisor never provided disclosure documents, and that notice shall be in writing and delivered to the franchisor, whether personally, by registered mail, fax or any other prescribed method, and that the franchisor shall take certain prescribed actions within 60 days of the date of the rescission. All such requirements under the *Act* were met by the proper delivery of the Statement of Claim. The notice of rescission and the claim for rescission were brought contemporaneously. The court found no reason to interpret the *Act* in a way that requires a separate notice.

The Court reasoned that the purpose of providing notice of rescission isn't to act as a precondition to litigation, but to avoid litigation altogether. The *Act* is remedial in nature and should be interpreted in a generous manner to redress the imbalance of power in franchising relationships, while balancing the rights of both franchisees and franchisors. While it is fair to contemplate

that notice would typically be given outside the context of litigation, a pleading is sufficient to comply with the Act's requirement and may constitute proper notice to the franchisor. Furthermore, in this case, the franchisor wasn't prejudiced by the manner of receipt, nor did they claim to be. The franchisor's position was simply that no pleading could constitute the required notice under the Act. The court disagreed and concluded that the Act doesn't state that pleadings do not constitute sufficient notice of rescission and allowed the appeal.

F. Court confirms franchisors not normally vicariously liable for acts of franchisees

The court in *Jogia v RE/MAX Ontario*, 2020 ONSC 733 confirmed that a franchisor will only be found vicariously liable for the actions of its franchisees under exceptional circumstances.

The plaintiff. Mr. Jogia, brought an action against a RE/MAX franchisee, RE/MAX Realty Specialists Inc., its principal, Mr. Gilmour, and two brokers employed by the franchisee, Mr. Goel and Mr. Fletcher (collectively, the "Franchisee Defendants"), alleging breach of contract, breach of fiduciary duty, and negligence in connection with the sale of a property. In addition to the claim against the Franchisee Defendants, the plaintiff also claimed against the franchisor, RE/MAX Ontario, and its principals, Mr. Polzler and Mr. Schneider (the "Franchisor Defendants") on the ground that they were vicariously liable for the actions of the Franchisee Defendants. The Franchisor Defendants brought a motion for summary judgment, seeking an order to dismiss the action as against them.

Having found that summary judgment was available to the Franchisor Defendants, the court considered the question of vicarious liability. The Court noted that employer-employee relationships and principal-agent relationships were understood to give rise to vicarious liability. However, the Court noted that, in the decision of *671122 Ontario Ltd. v Sagaz Industries Canada Inc.* 2001 SCC 59 ("*Sagaz*") the Supreme Court of Canada ("SCC") held that, unlike employer-employee relationships, employer-independent contractor relationships do not normally attract vicarious liability.

Per the SCC's decision in Sagaz (at paras. 34-47), the reasons for this were two-fold. First, employers typically do not exert as much control over the actions of an independent contractor as they do over an employee. If an employer doesn't control the actions of a worker, then the policy justifications underlying vicariously liability are not satisfied. Moreover, vicarious liability is "fair in principle" because the hazards of business should be borne by the business itself. Unlike employees, independent contractors are in business for themselves and it therefore does not make sense to assign liabilities from the independent contractor's business to another business (the employer).

The plaintiff argued that RE/MAX Ontario and RE/MAX Realty Specialists had an agency relationship or one akin to agency. The evidence did not support this argument. There was no evidence to indicate that the franchisee was authorized by the franchisor to enter into listing agreements on behalf of RE/MAX Ontario nor was there any evidence to indicate that the franchisee was at any time acting within the authority of RE/MAX Ontario. In fact, the franchise agreement between the defendants specified that the relationship between the parties was one of independent contractor, that nothing contained in the agreement should be construed to create a partnership or joint venture and that neither party shall act as agent for the other.

While the labelling of a relationship as one of independent contractors, alone, is not determinative of the nature of the relationship between the parties, the court reconfirmed that it is a factor to be considered in the determination of the relationship.

Both defending parties were separately owned corporate entities. The court stated that there is no closed list of relationships that attract vicarious liability, however, it referred to *Chow v Subway Franchise Restaurants of Canada Ltd.*, 2017 BCSC 1034 and expressed that it is commonly understood that a franchisor/franchisee relationship is generally akin to that of an owner/independent contractor relationship and that the franchisor is not usually exposed to vicarious liability for the wrongs committed by its franchisee.

While this is the general norm, a franchisor may, under certain circumstances, be held vicariously liable for the acts or omissions of its franchisee based on policy grounds. The example suggested by the court included where the franchisor exercises an especially significant degree of control over the franchisee's day-to-day operations and stands to profit from those operations, in which case the franchisor arguably ought to assume the business risk associated with the franchisee's operations. As such, in order to hold the franchisor vicariously liable, the plaintiff would have to prove that the franchisor exercised such a significant degree of control over the daily operations of the franchisee.

In this case, the franchise agreement stipulated that the franchisee and its brokers had "maximum flexibility" to decide commission rates and fees charged for services provided and how to package those services. Furthermore, the franchise agreement specified that the franchisee was directly responsible for the employment and authorization of persons to act on its behalf. The franchisor had no part in this process. There was no evidence of shared employees between the defendants and no evidence that the Franchisor Defendants, at any time, directed or supervised the activities of the Franchisee Defendants.

The Court concluded that there were no policy reasons to hold the franchisor accountable for the alleged acts and omissions of the franchisee. The franchisee ran an independent business, for its own profit, and maintained substantial control over its day-to-day operations. The franchisor's involvement in the franchisee's operations were limited to the right to intervene in matters relating to the protection of the RE/MAX brand.

For the reasons stated above, the action against the Moving Defendants was dismissed and summary judgment granted.

G. British Columbia court stays multiple franchisee civil actions pursuant to arbitration clause

In *Houm Services Inc. v. Lettuce Eatery Developments Inc.*, 2020 BCSC 430, the British Columbia Supreme Court stayed multiple actions initiated by a terminated franchisee against the franchisor, in order to allow arbitration to proceed under the franchise agreement. The Court also ordered that the franchisee and its principal were prohibited from initiating any further actions without leave of the Court.

The franchisee, Houm Services Inc. ("Houm"), and the franchisor, Lettuce Eatery Developments Inc. ("LEDI"), entered into a franchise agreement in May 2014 for a franchised Freshii restaurant to be operated in Vancouver. In March of 2019, the shares in Houm were sold to a new franchisee principal, unbeknownst to LEDI. In July 2019, LEDI notified Houm alleging it was not in compliance with a number of terms of the franchise agreement and asked that the deficiencies be cured. In September, 2019, LEDI delivered a formal default notice to Houm requiring that the deficiencies be cured. In October, after Houm failed to cure the deficiencies, LEDI delivered a notice of termination to Houm. The alleged breaches leading to the termination included Houm's sale of unauthorized food products, purchase of products from unauthorized suppliers, use of unauthorized marketing, advertising, and promotional material, and various other breaches involving communications to the public, customers, and Freshii suppliers.

In November 2019, LEDI applied for an interlocutory injunction which, when granted, prohibited Houm and any person with notice of the order from: a) using the trademarks referred to in the franchise agreement; b) disposing of, encumbering, dissipating, or relocating any other operating assets as that term was defined in the franchise agreement; and c) operating any competitive business as that term is defined in the franchise agreement from the location in Vancouver.

On November 19, 2019, LEDI's counsel sent Houm's representative an email attaching a copy of LEDI's notice to arbitrate as provided for under the franchise agreement. On Nov. 20, 2019, Houm served a notice of civil claim against LEDI.

Disputes arose between Houm and the landlord of the franchisee's building in Vancouver which resulted in the termination of the lease and the issuance of a notice of re-entry and change of locks. The new principal of Houm engaged in pattern of vexatious conduct, which included, among other things, attempting to break into the franchise premises no less than three times after the locks had been changed by the landlord. In connection with the third such attempt, he was arrested by police. On December 3, 2019 Houm filed another notice of civil claim, this time naming employees of LEDI and the landlord as defendants.

LEDI found a new franchisee to operate the franchise at the location in question and to buy the operating assets, as per its option under the franchise agreement. LEDI notified Houm of its intention to exercise that option and outlined the details.

The termination noticed delivered to Houm outlined LEDI's intention to exercise its option to purchase all of the Operating Assets of the business at fair market value or to assign this option to purchase to a third party. As LEDI and Houm could not agree on a fair market purchase price for the assets, LEDI engaged an independent appraiser to value the assets.

Aside from the civil claims filed against LEDI and employees of LEDI and the landlord, as noted above, Houm filed an additional civil action against the beneficial owners of the new franchisee operating at the franchise location in Vancouver, corporate counsel of LEDI, the proposed independent appraiser of the operating assets, and the LEDI employee included in the second claim (again). Houm further filed a petition against LEDI and the landlord seeking various orders to clarify relief sought in Houm's actions.

LEDI applied under s. 15 of British Columbia's *Arbitration Act*, RSBC 1996, c.55 to stay Houm's claims against it and its employees. It did not apply to stay the claims filed against the beneficial owners of the new franchisee. Houm and its representative were served with the notice.

The court found that the disputes raised in Houm's actions, and the petition as it relates to Houm, appear to fall within the scope of the arbitration clause in the franchise agreement. The case law is clear that, as a general rule, the arbitration panel is the first decision-maker with respect to the jurisdictional issues, absent narrow exceptions, which did not apply in this case.

The question for the court to consider when deciding whether to remit the jurisdictional issues to arbitration is whether it is arguable that the matters are within the jurisdiction of the arbitrator. The court in this case was satisfied that the disputes as framed in the actions filed against LEDI and its employees appeared to fall within the scope of the arbitration clause in the franchise agreement, which was broadly-worded to include disputes under the franchise agreement, arising from the franchisor's relationship with the franchisee, the scope and validity of the franchise agreement or any other agreement between the parties, and with respect to any system standard as that term is defined in the agreement.

The Court noted that the arbitrator is given broad remedial powers, including the power to award damages and to make orders for specific performance, injunctive relief, and costs. MacNaughton J. refered to *ABOP LLC v Qtrade Canada Inc.*, 2007 BCCA 290 at para 24 where the court held that if there was still a dispute between the parties, requiring additional relief outside the scope of the arbitration clause, the matter could be pursued in the courts after the conclusion of the arbitration. In this case, the Court found that a stay of the actions and the petition simply holds the proceedings in abeyance until the arbitrator does the work that the parties have agreed should be arbitrated in a case of unresolved dispute under the franchise agreement.

The arbitration clause in the franchise agreement was deemed valid between the parties. It specified that the arbitration would occur in British Columbia, which is in compliance with the terms of the *Franchises Act* (British Columbia).

As a result, all the actions filed by Houm against LEDI and its employees, and the petition proceeding, were stayed as against LEDI, pending the outcome of the arbitration process commenced by LEDI. The Court found that this was the proper forum for Houm to raise concerns regarding the terms, operation, and application of the franchise agreement. The Court further granted LEDI's application and issued an order under s.18 of the *Supreme Court Act* prohibiting Houm and its representative from instituting further legal proceedings against LEDI, its employees or agents without leave of the Court.

H. No appeal from motion judge's decision regarding stay of civil action under *Arbitration Act* (Ontario)

In *Eggiman v. Martin*, 2019 ONCA 974, the appellants and respondents were parties to an arbitration provision that was part of the contractual arrangements by which the appellants operated two Tim Hortons franchises on behalf of the respondents. The arbitration provisions were broadly-worded as follows:

"All matters in difference between the parties in relation to this Agreement shall be referred to the arbitration of a single arbitrator appointed by TDL, which shall either be an employee of TDL or a third party arbitrator, at TDL's discretion. The award and determination of the arbitrator shall be binding upon the parties and their respective heirs, executors, administrators and assigns."

The respondents alleged to have terminated the operating agreements upon learning about certain conduct of the appellant, Mr. Martin. They subsequently commenced an action against the appellants and another defendant where they sought damages for breach of contract, intentional interference with economic relations, and conversion. The appellants responded by bringing a motion to stay the action in favour of the arbitration process outlined in their agreements. The motion judge dismissed the motion and refused to stay the action or allow for arbitration.

The appellants subsequently appealed on the basis that s.7(1) of the *Arbitration Act*, 1991 requires that the action be stayed and that none of the exceptions to a mandatory stay in s.7(2) applied. Another issue on appeal was whether the motion judge erred in finding that s.7(5) of the *Arbitration Act*, 1991 permitted him to refuse to grant a stay on the ground that it would lead to a multiplicity of proceedings.

In this decision, no analysis of the motion judge's reasons were made. The court went out of its way to say that it should not be seen as agreeing with the analysis of the motion judge; however, the court dismissed the appeal on the grounds that pursuant to s.7(6) of the *Arbitration Act*, 1991, there is no appeal from a decision rendered on a motion to stay, whether the stay is granted or refused.

This point was made clear in both *Brown v Murphy*, 2002 CanLII 41652 (ONCA) and R*adewych v Brookfield Homes (Ontario) Ltd.*, 2007 ONCA 721.

I. Franchisee ordered to compensate franchisor affiliate company for 50% of head lease termination costs

In *MTY Tiki Ming Enterprises Ltd. v Wong*, the British Columbia Provincial Court held that a franchisee principal, who was an indemnifier on the head lease between the franchisor-affiliated tenant and the landlord, was liable to pay for only 50% of the losses incurred by the franchisor-affiliated tenant when the head lease was surrendered.

In 2007, the landlord granted a head lease for the franchisee's premises to the franchisor-affiliated tenant, Jugo Juice Canada Ltd., which subsequently sub-let the property to two individual franchisees. The individual franchisees had a franchise agreement with Jugo Juice International Inc. and signed an indemnity with the landlord, pursuant to which they agreed to indemnify the landlord for any amounts not paid by Jugo Juice Canada Ltd., as tenant under the head lease.

In 2011, the Defendant Mr. Wong and his wife purchased the Jugo Juice franchise from the individual franchisees and their company (which owned the assets) and entered into a franchise agreement with Jugo Juice International Inc. The franchise agreement was subsequently rolled into their numbered company, which thereby became the Jugo Juice franchisee. Jugo Juice Canada Inc. then sub-let the property to Mr. Wong's company; however, Mr. Wong did not give a personal guarantee in connection with the sublease.

In mid-2011, the Claimant MTY Tiki Ming Enterprises Inc. ("MTY") purchased Jugo Juice Canada Inc., and Mr. Wong executed a consent to assignment of lease agreement between the landlord, Jugo Juice Canada Inc. as assignor, MTY as assignee, and Mr. Wong as the 2nd Indemnifier. The Court noted that this agreement bound MTY by the terms of the lease, and named Mr. Wong as indemnifier to the landlord for any default by the tenant. However, it did not make him personally liable for defaults committed by his company under the sublease for the premises.

Between August and November, Mr. Wong's company failed to make the requisite payments under the sublease, and MTY ultimately paid an agreed upon amount of unpaid rent and damages in connection with a surrender of the head lease for the premises and terminated the franchise agreement. MTY brought an action against Mr. Wong and claimed he was required to reimburse MTY for the full amount it had paid the landlord; however, the Court only allowed the action in part.

The Court determined that MTY and Mr. Wong were jointly and severally liable for the debt owed to the landlord under the head lease, in light of Mr. Wong having signed the consent to assignment of lease agreement as 2nd Indemnifier. As Mr. Wong's liability as Indemnifier was to the landlord and not directly to MTY, MTY's claim was based on the legal doctrines of unjust enrichment and recoupment. The Court followed the test laid out by the Supreme Court of Canada in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 and found that Mr. Wong had been unjustly enriched because: (1) MTY's payments to the landlord, when both MTY and Mr. Wong were liable, enriched Mr. Wong because he avoided liability as an Indemnifier under the head lease; (2) MTY suffered a deprivation due to making the payment; and (3) there was no juristic reason for Mr. Wong's enrichment. The Court then considered the extent of Mr. Wong's liability.

MTY and Mr. Wong were both indemnifiers to the landlord. In other words, under the head lease indemnity, MTY and Mr. Wong were equally responsible for the same debt. The Court noted that "[t]he Indemnity Agreement does not require Mr. Wong to be personally liable for the debts owed by his corporation 0907190 B.C. Ltd. What it does is make MTY Tiki Ming and Mr. Wong jointly and severally liable for the same debt." The Court then reviewed the case law regarding the liability of "fellow guarantors" to one another, where one guarantor has paid more than its fair share of a liability. Taking these authorities into consideration, the Court allowed the action in part, finding that Mr. Wong was required to reimburse MTY for his share of the debt paid to the landlord, which was 50 per cent.

J. Franchisor's defamation law suit against CBC dismissed pursuant to Anti-SLAPP legislation

In *Subway v CBC*, 2019 ONSC 6758, the Ontario Superior Court considered an Anti-SLAPP motion brought by the Defendant CBC and the Defendant Trent University in response to a defamation action commenced by the Plaintiffs Subway Franchise Systems of Canada, Inc., Subway IP Inc., and Doctors Associates Inc. ("Subway"). SLAPP is an acronym for Strategic Litigation Against Public

Participation, i.e., litigation initiated to chill public discussion of an important consumer protection issue.

CBC created, aired, and published an investigative report on the national CBC television show *Marketplace* comparing the ingredients in the Plaintiff Subway's chicken sandwiches to those of four competitors in Canada. *Marketplace* claimed that, according to testing done by a laboratory at Trent University, the sandwich meats in Subway's chicken sandwiches contained "only slightly more than 50% chicken", whereas the sandwich meats of its competitors were made nearly entirely of chicken. Subway claimed the investigation and tests were faulty and caused it business losses and damaged its reputation.

According to the Court, s. 137.1(3) and (4) of the Ontario *Courts of Justice Act* creates a two-part Anti-SLAPP test to determine whether litigation should be dismissed. The test creates a "public interest" threshold (s. 137.1(3)) and a "merits" test (s. 137.1(4)). For the public interest threshold, the onus is on the moving parties, i.e., CBC and Trent, to establish that the expression in question relates to a matter of public interest. If the moving party satisfies its onus, the onus shifts to the plaintiff, i.e., Subway, to establish that its claim has substantial merit, that the defendant lacks a valid defense, and that the harm to the plaintiff due to the expression is sufficiently serious that the public interest in permitting the lawsuit to continue outweighs the public interest in protecting the expression.

The Court concluded that CBC clearly met the public interest threshold. The Court stated at para. 18:

> "Furthermore, the *Marketplace* Report raised a quintessential consumer protection issue. There are few things in society of more acute interest to the public than what they eat. To the extent that Subway's products are consumed by a sizable portion of the public, the public interest in their composition is not difficult to discern and is established on the evidence. I consider that CBC has satisfied its burden under s. 137.1(3) of the *CJA*."

The Court also concluded that Subway satisfied the merits test, which only requires the plaintiff to show that its claim is legally tenable. While the Court made no definitive finding, it noted that there was considerable evidence before it that suggested the false and harmful nature of the information conveyed by the *Marketplace* report, including evidence of the statements made by CBC in various media, evidence of dissemination of the statements internationally, evidence from the manufacturer of Subway's chicken and two independent labs that supported Subway's position that its chicken was less than 1% soy, and expert evidence that Trent's tests were fundamentally flawed and conducted incompetently. Moreover, the Court determined that CBC's statements met the tests for libel.

Notwithstanding the finding that Subway's claim had merit, the Court found that CBC did have a defence to a libel claim, namely the defence of "responsible communication". To establish the "responsible communication" defence, CBC had to establish that the communication was on a matter of public interest (already established) and that CBC had been "reasonably diligent" in validating the accuracy of its statements. With respect to "reasonable diligence", the Court found that CBC had retained the services of a reputable university, had conducted multiple tests, retained an outside expert who gave "tempered approval" to the test results, had given Subway and opportunity to respond before the episode aired and to do an interview as part of the episode and had published some points made by Subway in a CBC blog after the episode aired. It could not reasonably be concluded that CBC's defence could not succeed. Moreover, although the Court's conclusion with respect to CBC's defence was enough to dispose of the motion as it related to CBC, the Court went on to consider whether the harm to Subway due to the expression is sufficiently serious that the public interest in permitting the lawsuit to continue outweighed the public interest in protecting the expression. After considerable analysis, the Court concluded that Courts must be careful to ensure that libel suits do not effectively put a chill on investigative journalism of large corporate suppliers of food and other consumer goods and that the public purposes underlying the Anti-SLAPP provisions were met by dismissing the suit as against CBC.

The Court did not dismiss the suit against Trent University. Trent had been sued by Subway both for negligence and defamation. Trent attempted to have only the negligence action against it dismissed pursuant to the Anti-SLAPP provisions of the *CJA*. After considerable analysis of the nature of negligence claims versus defamation claims and the inherent unsuitability of the Anti-SLAPP provisions of the *CJA*, which are geared towards protecting expression, as a means of having a negligence claim dismissed, the Court refused to dismiss the negligence action as against Trent.

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