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AN UNSIGNED CERTIFICATE REMAINS A FATAL FRANCHISE DISCLOSURE DOCUMENT FLAW IN A POST-*RAIBEX* WORLD

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The recent Ontario Superior Court decision in *2483038 Ontario Inc. v. 2082100 Ontario Inc.* (“*Fit for Life*”)[1] confirms that an unsigned certificate accompanying a Franchise Disclosure Document (“FDD”) can constitute a fatal flaw entitling a franchisee to rescind the franchise agreement under section 6(2) of the *Arthur Wishart Act* (*Franchise Disclosure*), *2000*, S.O. 2000, c. 3 (the “Act”). The decision also provides guidance on when representations contained in a FDD are sufficient to make an individual personally liable as a “franchisor’s associate”.

Background

Section 7 of O.Reg. 581/00 expressly requires that a FDD include a certificate signed and dated by the sole director and officer of the franchise (or by at least two if there are more than one) confirming that the FDD is accurate and that it includes all material facts and information required by the Act. Subsection 6(2) of the Act provides that a franchisee has up to two years to rescind its franchise agreement if the franchisor failed to provide it with a FDD. Numerous appellate cases have held that where a FDD is provided but fails to satisfy the statutory requirements to such an extent that it is tantamount to no disclosure (such as where no signed and dated certificate is provided), this two-year right of rescission remains available to a franchisee.[2]

The Facts in Fit for Life

The defendants provided the franchisee plaintiffs with a FDD in respect of a Fit for Life restaurant in Oakville on August 21, 2015. Although the sole director and officer of the franchisor signed the FDD on page four (following some prescribed information about the Fit for Life franchise system and its objectives), he failed to sign the certificate on page 27 of the FDD. The plaintiff franchisees subsequently entered into a franchise agreement and operated the franchise for approximately 20 months, until they issued a notice of rescission under s. 6(2) of the Act on August 1, 2017.

In doing so, the franchisee plaintiffs relied solely upon the franchisor’s failure to provide the signed certificate required by s. 7 of O.Reg. 581/00. The franchisee plaintiffs argued that they could make no meaningful investment decision in the absence of a signed certificate, irrespective of the content of the FDD and even

though they did not allege their ability to make an informed investment decision was compromised by any misleading or incomplete disclosure.

The defendants argued that the unsigned certificate was simply a “technicality” that did not prevent the franchisee plaintiffs from making an informed investment decision. In particular, the defendants argued that the 2018 Ontario Court of Appeal decision in *Raibex Canada Ltd. v. ASWR Franchising Corp.*[3] shifted the focus of s. 6(2) rescission cases. The defendants argued that, post-*Raibex*, franchisees must show that they were subjectively deprived of the ability to make an informed investment decision due to the absence of a signed certificate.

The Decision

The Court agreed with the plaintiff franchisees and concluded that *Raibex* does not overrule prior appellate decisions holding that an unsigned certificate can, on its own, be a fatal defect that gives rise to rescission rights under 6(2) Act.

The Court distinguished between cases involving non-disclosure of material facts and those involving unsigned certificates, and noted the different policy objectives of the Act that apply to each. While permitting franchisees to make informed investment decisions is one of the policy objectives of the Act, the policy objective underlying the certificate requirement is to impress upon its signatory(ies) (by making them personally liable for the failure to comply with disclosure obligations) the importance of ensuring the FDD is complete and accurate. The Court concluded that this is a “free-standing” and “laudatory” objective of the Act. Accordingly, the Court held that the absence of a signed and dated certificate is a fatal flaw entitling the franchisee plaintiffs to rescind the franchise agreement (even though their decision to invest was not affected by any untrue, inaccurate or misleading statements in the FDD).

Notably, the Court also considered whether the sole director and officer of the franchisor was a “franchisor’s associate” under s. 1(1) of the Act. Applying the two-part test, the Court found that the sole director and officer was a “franchisor’s associate” because he: (i) controlled the franchisor; and (ii) promoted the franchise as a worthy investment by signing the FDD on page four, under a series of statements that were made for the purpose of marketing and offering the franchise. In doing so, the Court recognized the irony that the signature of the sole officer and director on page four of the FDD was not sufficient to meet the requirements of constituting a valid certificate, but was sufficient to render him a franchisor’s associate within the meaning of the Act. The Court consequently held that both the franchisor and the franchisor’s associate are liable to pay the amounts due on rescission to the franchisee plaintiffs under s. 6(6) of the Act.

Key Takeaway

The takeaway from *Fit for Life* is that, notwithstanding Raibex, an unsigned and undated certificate in a FDD remains a fatal flaw. Rather than constituting a mere technicality, it entitles the franchisee to rescind its franchise agreement for up to two years after entering into same under s. 6(2) of the Act. This is so regardless of whether the franchisee even reads the FDD or otherwise has sufficient information to make an informed decision about investing in the franchise. Franchisors are accordingly, once again, advised to review all outgoing FDDs to ensure that the requisite certificate is properly signed and dated.

by W. Brad Hanna and Paola Ramirez

[1] 2020 ONSC 475, reasons for decision released on January 30, 2020.[ps2id id='1' target=''/]
[2] See, for example, *6792341 Canada Inc. v. Dollar It Ltd.*, 2009 ONCA 385 and *Mendoza v. Active Tire & Auto Inc.*, 2017 ONCA 471.[ps2id id='2' target=''/]
[3] 2018 ONCA 62.[ps2id id='3' target=''/]

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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