

A Paramount dismissal — ONCA dismisses appeal of Premium Host Inc. v. Paramount Franchise Group, 2023 ONSC 1507



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In *Royal Bank of Canada v. Everest Group Inc.*,^[1] the Ontario Court of Appeal (the Court) released its much anticipated decision relating to a dispute about disclosure practices in Paramount Franchise Group's grant of several franchises.

Here are the main findings:

1. The Court found the franchisor's mid-level employee was a "franchisor's associate", subject to the same liability as a franchisor and its directors and officers under the *Wishart Act*.^[2] The Court affirmed the trial judge's finding that an employee was a franchisor's associate as defined in s. 1(1) of the *Wishart Act*. The Court went further than the trial decision to state that the employee "may not have been a director or officer, but neither was she a clerical or junior employee" and had the "significant role in the process of reviewing the applications, exercising professional judgement and advising the ultimate decision-makers". It is important to understand that, at trial, the franchisor conceded that the mid-level employee satisfied the "control" aspect of the definition of a franchisor's associate (as further explained below), which may not be the case in other situations.

The decision suggests that employees who are at a level other than a director or officer, but above a "clerical or junior employee", may be subject to significant personal liability, even if they have no ultimate decision-making power related to the grant of a franchise.

2. The Court affirmed the trial judge's findings that
 - the burden to prove an entitlement to a rescission remedy under the *Wishart Act* rests on the franchisee, as the party making such claim;
 - a franchisee can rescind a franchise agreement that has already been terminated by the franchisor and

- generally speaking, exemptions from the obligation to disclose a franchise disclosure document under the *Wishart Act* are narrowly interpreted

Notably, while it was not before the Court to address the trial judge's controversial finding that a "generic franchise agreement" (i.e., a franchise agreement without a defined location and/or territory) did not grant a franchise within the meaning of the *Wishart Act*, questions remain surrounding the use of "generic franchise agreements".

Below is a high level review of the facts and findings of this case.

The parties

The trial level decision at the Ontario Superior Court of Justice was called *Premium Host Inc. v. Paramount Franchise Group*.^[3] The plaintiffs were three franchisees of the "Paramount Fine Foods" Middle Eastern franchise system (the Franchisees: Versatile Holdings Inc. (Versatile), Everest Group Inc. (Everest), and Premium Host Inc. (Premium Host). The Franchisees were distinct legal entities (despite common ownership) and each entered into separate franchise agreements with the franchisor, Paramount Franchise Group Inc. (Paramount). Versatile and Everest each entered into franchise agreements for new-build franchises, and Premium Host entered into a franchise agreement for a resale franchise at the "Heartland" location.

The claims

The Franchisees each sought to rescind their respective franchise agreements pursuant to s. 6(2) of the *Wishart Act* based on the alleged failure of Paramount to, among other things, include financial statements in the disclosure document and deliver each disclosure document in "one document at one time". The Franchisees also sought compensation from the following affiliated parties to Paramount, arguing that they were "franchisor's associates" within the meaning of the *Wishart Act*: Paramount Franchise Inc. (Paramount Leasing), Fakih Group Inc., 2302733 Ontario Inc. (Paramount Wholesale), Mohamad Fakih, Holly Graham and Michel Gagnon.^[4]

Paramount disputed the claim of rescission and argued, among other things, that Paramount was exempt from the obligations to disclose, relying on three exemptions from disclosure set out in s. 5(7) of the *Wishart Act*: (a) an investment in a franchise in an amount over \$5 million, per s. 5(7)(h); (b) the grant of an additional franchise to existing franchisee exemption, per s. 5(7)(c), and (c) the resale of an existing franchise by a franchisee that is not effected by or through the franchisor, per s. 5(7)(a).

In cases where the franchise location was not known at the time the franchise agreement was signed, Paramount's practice was to have franchisees sign a generic franchise agreement (i.e., a franchise agreement that did not define the location or territory for the franchise), then sign an additional identical franchise agreement with the site-specific information, after the territory or location was identified and defined. Paramount followed this practice with Versatile. When Versatile sought the rescission remedy from the second, site-specific franchise agreement, Paramount argued that the first franchise agreement was the proper agreement to rescind and, since it was signed more than two years before the notice of rescission, was time barred.

The findings

The trial judge reviewed extensive underlying facts regarding the disclosure process, content of disclosure documents, and timing of delivery to the Franchisees. The facts were

complicated by an incomplete documentary record in which the plaintiffs and defendants gave conflicting evidence.

In lengthy reasons, the claims for the rescission remedy brought by Versatile and Everest were dismissed. While Premium Host's claim suffered from similar documentary issues as Versatile and Everest, the trial judge granted the rescission remedy to Premium Host on the basis that Paramount failed to disclose all material information related to the Heartland location in one disclosure document at one time.^[5]

The trial judge determined that none of the three exemptions to the disclosure obligations claimed by Paramount applied.^[6]

Further, the trial judge found that the generic franchise agreement was not a grant of a franchise within the meaning of the *Wishart Act*, such that the clock for a two-year rescission claim did not commence until the second, site-specific franchise agreement was signed.^[7]

Given that franchisor's associates are jointly and severally liable along with the Franchisor for statutory compensation under s. 6(6) of the *Wishart Act*, the trial judge reviewed which of the affiliated parties to Paramount qualified as franchisor's associates, as defined in s. 1(1) of the *Wishart Act*. The definition of a "franchisor's associate" under the *Wishart Act* has two elements, both of which must be satisfied:

A "franchisor's associate" means a person

(a) who, directly or indirectly (i) controls or is controlled by the franchisor or (ii) is controlled by another person who also controls, directly or indirectly, the franchisor and

(b) who (i) is directly involved in the grant of the franchise (A) by being involved in reviewing or approving the grant of the franchise or (B) by making representations to the prospective franchisee on behalf of the franchisor for the purpose of granting the franchise, marketing the franchise or otherwise offering to grant the franchise or (ii) exercises significant operational control over the franchisee and to whom the franchisee has a continuing financial obligation in respect of the franchise.

Mr. Fakhri admitted to being a franchisor's associate, and the parties alleged to be a franchisor's associate conceded the "control" element of the franchisor's associate definition.^[8]

The trial judge found Paramount Leasing (the lease-holding entity with which the Franchisees entered into a sublease) as a franchisor's associate because it exercised significant operational control over the Franchisees.^[9] The trial judge found Ms. Holly Graham (Paramount's Manager of Franchise Sales and International Development) as a franchisor's associate on the basis that she was involved in reviewing or approving the grant of the franchise.^[10] Neither Fakhri Group Inc. nor Paramount Wholesale were found as franchisor's associates.

The appeal

Versatile and Everest raised the following issues on appeal:

1. the trial judge erred by requiring them, and not Paramount, to prove that there was no

disclosure or insufficient disclosure

2. alternatively, the trial judge erred by finding that the franchisees had failed to prove no, or insufficient, disclosure and
3. the trial judge erred by finding that Paramount Wholesale and the Fakih Group Inc. were not franchisor's associates

On cross appeal, Paramount, Paramount Leasing, Paramount Wholesale, Fakih Group Inc., Mohamad Fakih, and Ms. Graham appealed on the following bases:

1. the trial judge erred in finding that the disclosure exemptions in s. 5(7) of the *Wishart Act* do not apply to the disclosure obligations for Premium Host
2. the trial judge erred in finding that termination of a franchise agreement because of the franchisee's breach does not preclude rescission by the franchisee
3. the trial judge erred in finding that the omission of financial statements concerning a franchise referred to as the Heartland location was a material fact entitling Premium Host to statutory compensation and
4. the trial judge erred in finding Ms. Graham and Paramount Leasing are franchisor's associates

The Court dismissed each of these claims of appeal.

If you have any questions about this case or its impact on your franchise disclosure or contracting processes, please contact a member of the [Osler Franchise Group](#).

[1] *Royal Bank of Canada v. Everest Group Inc.*, 2024 ONCA 577.

[2] *Arthur Wishart Act* (Franchise Disclosure), 2000, S.O. 2000, c. 3 (the *Wishart Act*).

[3] *Premium Host Inc. v. Paramount Franchise Group*, 2023 ONSC 1507.

[4] The actions were discontinued as against Mr. Gagnon, and he did not testify at trial. See 2023 ONSC 1507, para. 39.

[5] 2023 ONSC 1507, paras. 418, 421.

[6] 2023 ONSC 1507, paras. 334, 342 and 352.

[7] 2023 ONSC 1507, paras. 360, 361.

[8] 2023 ONSC 1507, para. 426.

[9] 2023 ONSC 1507, paras. 434, 435.

[10] 2023 ONSC 1507, para. 459.