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A Notice of Rescission by Any Other Name: Pleadings May Double as Notices of Rescission

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Under the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (the "*Wishart Act*"), franchisees are given a broad right to rescind their franchise agreement within the two year period, if the franchisor has failed to provide adequate disclosure, or if the franchisor provided no disclosure at all. The *Wishart Act* does not specify any form of notice of rescission, but requires that notices of rescission be in writing and delivered to the franchisor in a manner prescribed by the *Wishart Act*.

In *779975 Ontario Ltd. v. Mmmuffins Canada Corp.*, 2009 ONSC 4055, the court stated that for a notice of rescission to be valid, it must adequately inform the franchisor that "the franchisee is exercising its statutory right of rescission under the [*Wishart Act*] and to inform the franchisor that the clock has begun to run". In that case the court found that a pleading in the context of litigation was not sufficient notice to the franchisor of the franchisee's right to rescind.

The recent case of *2352392 Ontario Inc. v. MSI*, 2020 ONCA 237 ("*MSI*"), has however concluded that an originating process can sometimes double as a valid notice of rescission.

Factual Background

In a previous action on the same facts, the former franchisee's bank commenced an action against the former franchisee. In response, the former franchisee, through its former solicitors, issued a third-party claim against the franchisor, wherein it claimed rescission, and damages, due to inadequate disclosure. In *MSI,* both the former franchisee and the former franchisor argued that the third-party pleading did not constitute a valid notice of rescission, while the former franchisee's former solicitors argued that it did. There is a certain amount of irony here in that the franchisor and the former franchisee were on the same side, so to speak, against the former franchisee's former solicitor. If the pleading did not constitute a notice of rescission, then the former franchisee would have a claim in negligence against the former solicitor. The parties brought a Rule 21 motion to determine this issue.

The motion judge held that the third party claim did not constitute sufficient notice under the *Wishart Act*. According to the motions judge, an originating pleading is distinct from a notice of rescission because the two documents serve different purposes. Moreover, since the *Wishart Act* states that a franchisor has sixty days to pay rescission amounts after the notice of rescission is delivered, an action for damages cannot be commenced until that time period has expired.

Legal Analysis

In *MSI*, the Court of Appeal reversed the motion judge's decision. According to Feldman J.A., there was nothing in the *Wishart Act* that precluded a valid notice of rescission being delivered through a third-party claim, as long as it was delivered within the prescribed time period.

The reasoning for this is because the *Wishart Act* is remedial legislation, and as such, "it should be interpreted in a generous manner" and in a way that balances the rights of both franchisees and franchisors.

Moreover, according to Feldman J.A., a notice of rescission is not always a precondition to litigation, and should not be treated as such. The *Wishart Act*'s only requirements for a valid notice of rescission are that it be in writing and that it be delivered to the franchisor.

A pleading may comply with these requirements, as it did in this case, because it notified the former franchisor of the former franchisee's intention to rescind its franchise agreement, without prejudicing either party.

Practice Takeaways

The Court of Appeal's decision reinforces that in franchise law disputes, substance will be prioritized over form. It must be noted that, although in this case a pleading (the third-party claim) was held to be a valid notice of rescission, a separate statement of claim was issued for the actual rescission damages. It is unclear whether a notice of rescission contained within the statement of claim for rescission damages will constitute sufficient notice.

Moreover, in *MSI,* a key distinguishing factor from previous jurisprudence was the high level of detail included in the third-party claim. The third-party claim referenced the *Wishart Act* and adequately informed the former franchisor of the former franchisee's intent. Franchise law practitioners should ensure that any documents that are meant to be notices of rescission are detailed and follow all requirements set out in the *Wishart Act*.

The Court of Appeal also emphasized that this approach is not ideal or recommended. As such, practitioners ought to be careful, at least until *MSI* becomes widely adopted, and best practice should dictate that practitioners should issue a separate, stand-alone notice of rescission.