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Dial an Accidental Franchise

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In the case of *Fyfe v. Vardy (Dial A Bottle)*, 2018 ONSC 5066, the Defendant, Glen Edward Vardy, found himself liable for damages after he had unwittingly created a franchise relationship with the Plaintiffs, Jill Fyfe and Dan Arthur Stephens.

The Defendant owned and operated a business named *Dial A Bottle*, an on-call alcohol delivery service.

On May 18, 2015, the Plaintiffs entered into a simple one-page Exclusivity Agreement (the "Agreement") with the Defendant, wherein the Defendant granted the Plaintiffs the right to operate a *Dial A Bottle* (the "Business") in certain territories (the "Territory"). The Plaintiffs paid $40,000 to the Defendants as a one-time acquisition fee.

The Plaintiffs were also required to pay to the Defendant on-going fees of $3 per order to operate the Business. In return, the Defendant would operate a central call centre and refer orders to the Plaintiffs if placed within the Territory.

The only documents provided to the Plaintiffs prior to the parties entering the Agreement was a sales projection. Of note is that the Agreement and emails from the Defendant to the Plaintiffs explicitly stated that the Business was not a franchise.

The Business was unsuccessful. The Plaintiffs sued the Defendant, alleging that the Business was actually a franchise, and the disclosure required by the *Arthur Wishart Act (Franchise Disclosure), 2000* (the "*Wishart Act*") had not been provided. The Plaintiffs sought to rescind the Agreement within the two-year period afforded by the *Wishart Act*.

The Defendant conceded that disclosure had not been provided, but stated that the Agreement was not a franchise agreement and the parties' relationship was not that of a franchisor-franchisee. Therefore, disclosure was not required.

One of the key issues on this summary judgement motion was whether the Agreement was in fact a franchise agreement as defined within the *Wishart Act*. To determine this, the court examined the definition of a "franchise" contained in s. 1(1) of the *Wishart Act*. The court had to determine whether:

(i) the franchisee is required to make a payment or continuing payments to the franchisor in the course of operating the business (or as a condition of acquiring the business) (opening paragraph of the definition);

(ii) the franchisee is granted the right to sell or distribute goods or services that are substantially associated with the franchisor's marks, trade name or advertising (Subsection (a)(i) of the definition); and

(iii) the franchisor exercises significant control over, or offers significant assistance in, the franchisee's method of operation (subsection (a)(ii) of the definition).

In this case, the first requirement was easily satisfied. The one-time fee was held to be an initial acquisition cost and the $3.00 fees that were paid on a per-order basis were held to be continuing payments. Although the court did not delineate, it is the view of the authors that either of these payments would have satisfied the first part of the definition of "franchise".

The second requirement was also easily satisfied. The Defendant had granted the Plaintiffs a right to deliver alcohol under the *Dial A Bottle* trademark. The Defendant had further testified that if a third-party company attempted to provide an alcohol delivery service under the *Dial A Bottle* name, he would likely commence legal proceedings against them. That the Agreement was conditional on the Plaintiffs' successful receipt of a license from the Alcohol and Gaming Commission of Ontario did not prevent the court from finding that there was a grant of a right to distribute goods or services in association with the Defendant's trademark, as required by s. 1.1(a)(i) of the *Wishart Act*.

When determining whether the Defendant exhibited "significant control" or offered "significant assistance" to the Plaintiffs, the Court engaged in a fact-based analysis, before holding that this requirement was also met. The Defendant managed the Plaintiffs' day-to-day operations because it took customer orders and referred those orders to the Plaintiffs. The Defendant also managed the marketing — it controlled the logo, marketing materials and web design for the Plaintiffs and the Business.

Resultantly, because all elements of a "franchise" under the *Wishart Act* were met, despite the fact that the Agreement stated that this was not a franchise, the Defendant was held liable for rescission damages to the Plaintiffs.

This case follows a line of cases (see for example: *1706228 Ontario Ltd. v. Grill It Up Holdings Inc.*, 2011 ONSC 2735 and *Chavdarova v. Staffing Exchange Inc.*, 2016 ONSC 1822) in which courts have looked to the nature of the parties' relationship, and not just what the parties called the relationship, to determine whether it met the statutory definition of a "franchise". When entering into licensing and distributing agreements, parties should be warned that the courts will consider the true nature of their relationship when considering whether it was a franchisor-franchisee relationship, and ensure compliance with the *Wishart Act*, if necessary.