

No summary judgment for franchisee in Hepburn v. AlarmForce

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Authors: [Dominic Mochrie](#), Paul Kotschorek

In *Hepburn v. AlarmForce*, a franchisee sought partial summary judgment arguing that the franchisor failed to provide a disclosure document and had breached its duty of good faith and fair dealing in the context of the renewal of its franchise agreement.

The main issue under consideration was whether differences between the original franchise agreement and the form of agreement provided by the franchisor on renewal constituted a “material change” requiring the franchisor to deliver a disclosure document. The franchisor relied on the renewal exemption to argue that no disclosure was required.

In dismissing the motion, the Ontario Superior Court held that a “material change” must be considered in the context of the surrounding circumstances. In this case, there were significant deficiencies in the evidence provided by both parties that prevented the Court from properly evaluating the issues. Also, the relief sought was overly broad.

Facts of the case

In 1995, the parties entered into a franchise agreement and franchise amending agreements. Together, the agreements provided the franchisee with the right to operate an AlarmForce franchise in southwestern Ontario for 10 years. The franchise agreement also included a right of renewal for two additional 10-year periods “on the terms and conditions then offered to new franchisees.”

In 2005, when the initial franchise term was expiring, the franchisee requested a renewal agreement from the franchisor. Despite various communications between the parties, the franchisor did not provide a renewal agreement until 2007. On receiving the renewal agreement, the franchisee requested a disclosure document on the basis that differences between the original franchise agreements and the renewal agreement constituted a material change. The franchisor did not provide a disclosure document, the renewal agreement was never signed and the franchisee continued to operate the franchise.

Subsequently, the parties engaged in various unsuccessful negotiations and the franchisor made multiple offers to purchase the franchise. The standstill ended in 2014 when the franchisor provided a notice of termination effective at the end of 2015. The franchisee acknowledged the termination under protest and brought an action claiming \$18 million in damages.

Decision of the Ontario Superior Court

In its motion for partial summary judgment, the franchisee sought a declaration that the franchisor failed to provide the required disclosure document and breached its duties of

good faith and fair dealing in its conduct with the renewal.

The court dismissed the motion, noting the insufficiency of the parties' evidence, including the following:

- The franchisor did not file affidavit evidence from any individuals who dealt with the franchisee before 2015.
- There was no evidence regarding whether the 2007 renewal agreement contained the terms and conditions offered to new AlarmForce franchisees in 2005, as required by the original franchise agreement.
- Both the franchisee and franchisor made bald assertions of fact "without reference to any source or basis."

Notably, the Court emphasized that the "surrounding circumstances" must be considered in determining whether there is a material change necessitating disclosure. The franchisor had decided to pursue a corporate service model over a franchise model, and it made multiple offers to purchase the franchise from the franchisee. The Court observed that the franchisor's change in business model affects the interpretation of its renewal agreement, and may itself constitute a material change.

Finally, the Court found that the declaration sought by the franchisee pertaining to the breach of the duty of good faith and fair dealing was overly broad: such a breach could be found even if AlarmForce was under no duty to provide a disclosure document. AlarmForce also argued that limitation defences were applicable, and that the franchisee's remedies for any such breach were limited, if available at all.

The Court concluded that, because of the nature of the issues and the deficiencies in the evidentiary record, a trial was necessary.

Takeaways

Summary judgment, under the appropriate circumstances, can improve access to justice and can lead to the resolution of actions in a proportionate, timely and affordable manner. This case serves as another reminder that both franchisees and franchisors must provide fulsome evidence on motions for summary judgment; each party must put its "best evidentiary foot forward," including providing sources for all of its assertions.

This case is another reminder of the risks involved in relying on an exemption from disclosure. Also, franchisors who are considering expanding their corporate presence to the detriment of their franchise network should consider this case when evaluating whether to disclose changes to their business model.

If you have any questions about this case or your disclosure practices, please contact a member of our [Franchise and Distribution team](#).