

Case Name:

**Personal Service Coffee Corp. v. Beer (c.o.b. Elite
Coffee Newcastle)**

Between

Personal Service Coffee Corp., applicant (appellant),
and
Stanley Beer operating under the firm name and style as
Elite Coffee Service Newcastle, Elite Coffee Service
Newcastle and Personal Service Coffee of Durham,
respondents (respondents in appeal)

[2005] O.J. No. 3043

Docket: C43153

**Ontario Court of Appeal
Toronto, Ontario**

E.A. Cronk, E.E. Gillese and J. MacFarland JJ.A.

Heard: May 5, 2005.

Judgment: July 18, 2005.

(43 paras.)

Civil procedure — Appeals — Appeal by applicant from application judge's decision allowed.

Civil procedure — Applications and motions — Where material facts in dispute, application should be converted to action.

Commercial law — Franchises — Duties of franchisor — Franchisee's absolute right to rescission for lack of disclosure not precluding franchisor from bringing action for damages arising from franchisee setting up competing business.

Appeal by the Personal Service Coffee from an application judge's decision dismissing its application against the respondent franchisee, Beer, for accounting and injunctive relief preventing Beer from setting up a competing business. Beer received incomplete disclosure before entering into the franchise agreement to supply and distribute coffee and related services to offices and businesses. Days before the expiration of the limitation period in the Arthur Wishart Act (Franchise Disclosure), Beer served notice to the franchisor that he sought rescission of the agreement on the basis of lack of disclosure. On the same day, he sent a letter to his clients informing them that he would

no longer be servicing them through the franchise but would continue to service them through a new business of his own. Beer used equipment provided by the franchisor. The application judge found that there were material facts in dispute about the franchisor's application but dismissed it on the basis that the application was ill conceived. The application judge allowed a separate application by Beer for rescission of the agreement on the basis of the franchisor's lack of disclosure. The application judge ordered the franchisor to pay Beer \$23,627.

HELD: Appeal allowed. The franchisor's application was converted to an action. Having found the purported material facts in dispute, the application judge was not entitled to dismiss the franchisor's application rather than converting it to an action. Beer had an absolute right to rescission and payment which was not conditional on his conduct as a franchisee. However, the franchisor had a separate right to pursue an action against him under s. 9 of the Act. The Act imposed a duty of fair dealing on both parties to a franchise agreement. Section 3 of the Act dealt with conduct while the agreement was still in force. In situations such as this where the agreement was rescinded, the franchisor had a right under s. 9 of the Act to bring an action based on its common law right to damages. Beer's right to rescission without penalty or obligation did not prevent the franchisor's action.

Statutes, Regulations and Rules Cited:

Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3, ss. 3, 3(3), 5, 5(1), 5(3), 5(4), 5(5), 5(6), 5(7), 5(8), 6, 6(1), 6(2), 6(6), 7, 9

Ontario Regulation 581/00

Ontario Rules of Civil Procedure

Appeal From:

On appeal from the order of Justice John E. Sheppard of the Superior Court of Justice dated January 7, 2005.

Counsel:

James F. Diamond for the appellant

Ian A. Johncox for the respondent

The judgment of the Court was delivered by

1 **J. MacFARLAND J.A.:**— The respondent franchisee, Stanley Beer, received incomplete disclosure before entering into a franchise agreement with the appellant franchisor, Personal Service Coffee Corporation ("PSCC"). Mr. Beer sought rescission of the franchise agreement, as he was entitled to do under s. 6 of the Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3 (the "Act"). The difficulty is that he sought rescission mere days before the expiration of the two-year limitation period provided under the Act, and he immediately set up a competing business that served the same customers as PSCC. In these circumstances, the issue before this court is whether the franchisee's right to rescission in the face of inadequate disclosure under the Act is

absolute and what, if any, remedy is available to the franchisor.

2 The application judge in this case granted Mr. Beer's right to rescission and dismissed PSCC's counter-application seeking an accounting and injunctive relief barring him from setting up his competing business. For the reasons that follow, I would allow the appeal. While I agree that Mr. Beer has an absolute right to rescission, which is in no way conditional on his conduct as a franchisee, I also conclude that PSCC has a separate right to pursue an action against him under s. 9 of the Act.

FACTS

3 The facts giving rise to the appeal are as follows. The appellant PSCC has carried on business throughout Ontario for fifteen years in the supply and distribution of coffee and coffee-related services to offices and businesses. The company loans or rents equipment such as coffee brewers to a customer in return for the customer's agreement to purchase all coffee products from PSCC. Such products include coffee, filters, cream, and filtered water. PSCC also sells a variety of brand name coffees and related products in addition to its own lines of coffee.

4 In the fall of 2002, the respondent Mr. Beer contacted PSCC with a view to becoming a dealer in Durham region. On October 28, 2002, Mr. Beer and PSCC executed a five-year dealership agreement. Mr. Beer paid PSCC an initial royalty fee of \$10,000 and executed a \$25,000 promissory note in favour of PSCC. He agreed to pay a monthly royalty fee of \$100 and to purchase all inventory and equipment from or through PSCC. Training was to be provided by PSCC, and Mr. Beer was obliged to attend. Equipment leases were to be arranged through PSCC. In exchange, PSCC provided Mr. Beer with its list of existing customers and the value of the equipment being loaned or rented to those customers in Durham as at the date of the agreement. Mr. Beer had the right to use the PSCC trademark and systems, as well as the exclusive right to market them in Durham.

5 About one year later, on October 1, 2003, Mr. Beer executed a second dealership agreement for the Peterborough area on similar terms. He was permitted to pay the initial royalty fee of \$10,000 over time.

6 On September 27, 2004, Mr. Beer, through his solicitor, served two notices of rescission on PSCC pursuant to the provisions of s. 6(2) of the Act. It is a matter of dispute between the parties as to what, if any, conduct on the part of PSCC precipitated Mr. Beer's decision to rescind the agreements. The notices came three days before the expiration of Mr. Beer's two-year right of rescission for the original Durham dealership agreement.

7 On the same day that Mr. Beer served the notices of rescission on PSCC, he sent a form letter to his clients under the letterhead "Elite Coffee Service". That letter read:

ELITE COFFEE SERVICE

September 27, 2004

To My Valued Customers:

I would like to take this opportunity to inform you that I will no longer be

servicing you under the name of "Personal Service Coffee of Durham".
As always, all services will remain the same under my new company.
I promise to provide the same quality coffee and related products you are receiving at present.
I have sincerely valued your business in the past and look forward to continuing our relationship in the future.
Please feel free to contact me directly if you need any clarification to the above.

Thank you!
Cordially,
ELITE COFFEE SERVICE
Stan Beer

8 Mr. Beer admitted in cross-examination that he is operating a business "similar" to the one he carried on under the agreements with PSCC. He is competing with PSCC in the same business and is selling to the same customers that he serviced during the terms of the dealership agreements with PSCC.

9 PSCC took the position that the agreements were not "franchise agreements" as defined in the Act and that Mr. Beer had no right to rescind those agreements because the Act did not apply. As a result, Mr. Beer brought an application pursuant to the Act for orders declaring that the agreements were franchise agreements, rescinding the agreements, rescinding the promissory notes, and refunding amounts paid to PSCC under the terms of the agreements. In response, PSCC brought a separate application in which it sought an accounting of the operations of Personal Service Coffee of Durham and of Elite Coffee Service Newcastle; injunctive relief to essentially preclude Mr. Beer from carrying on business in the purchase and sale of coffee and related supplies and equipment; and miscellaneous related relief.

10 The applications were heard together; Mr. Beer succeeded while PSCC did not. The application judge concluded that the agreements were franchise agreements and that PSCC's admitted failure to deliver a disclosure document as required by s. 5 of the Act allowed Mr. Beer to rescind the agreements without penalty or obligation. The application judge declared the agreements null and void and ordered PSCC to pay \$23,627.87 (the amount agreed to by the parties) to Mr. Beer.

11 As for PSCC's application, the application judge noted "... that in a proceeding commenced by application ... Rule 14.05(3)(b) [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] requires that there are no material facts in dispute." He went on to state:

That cannot be said with respect to the second application. The relief sought there would require a trial based on an action brought by P.S.C.C. And, without deciding the question, it is unlikely a mandatory order would issue in the context of an action for damages for breach of a non-competition agreement, on the facts of this case. In my view, the second application is ill conceived and must be dismissed with costs.

12 Before this court, PSCC does not appeal the finding of the application judge that the agreements with Mr. Beer were "franchise agreements" governed by the Act. PSCC further admits that it did not provide disclosure to Mr. Beer as required by s. 5 of the Act.

While the appellant accordingly concedes - as it must - Mr. Beer's right to rescind the agreements as provided in s. 6(2) of the Act, it submits that in light of Mr. Beer's conduct such rescission should be granted on terms restricting his ability to compete with it.

THE LEGISLATION

13 This appeal is one of the first opportunities this court has had to consider the meaning and interpretation of various provisions of the Act. In particular, we must consider the effect of alleged misconduct by a franchisee on its statutory right to rescission because of non-disclosure. For ease of reference, I set out the relevant provisions of the Act below before turning to the analysis of the issues raised on appeal.

14 Section 3 of the Act provides that a duty of fair dealing is imposed on either party to a franchise agreement:

3. (1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.
- (2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement.
- (3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

15 The duty of disclosure is imposed on the franchisor by s. 5 of the Act. Section 5(1) of the Act imposes a duty to provide a prospective franchisee with a disclosure document at least fourteen days before the signing of a franchise agreement or the making of any payment to the franchisor. The remaining subsections flesh out this duty of disclosure in more detail (with certain exceptions set out in ss. 5(7) and 5(8) that are not germane to this appeal). Section 5(3) provides that disclosure must be made in a single document delivered at one time; s. 5(4) sets out the required contents of the disclosure document; s. 5(5) requires the franchisor to report any material changes to the prospective franchisee; and s. 5(6) provides that the information in the disclosure document must be accurate, clear, and concise. These provisions read as follows:

5. (1) A franchisor shall provide a prospective franchisee with a disclosure document and the prospective franchisee shall receive the disclosure document not less than 14 days before the earlier of,
 - (a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and
 - (b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise.
- (2) A disclosure document may be delivered personally, by registered mail or by

(3) A disclosure document must be one document, delivered as required under subsections (1) and (2) as one document at one time.

(4) The disclosure document shall contain,

- (a) all material facts, including material facts as prescribed;
- (b) financial statements as prescribed;
- (c) copies of all proposed franchise agreements and other agreements relating to the franchise to be signed by the prospective franchisee;
- (d) statements as prescribed for the purposes of assisting the prospective franchisee in making informed investment decisions; and
- (e) other information and copies of documents as prescribed.

(5) The franchisor shall provide the prospective franchisee with a written statement of any material change, and the franchisee must receive such statement, as soon as practicable after the change has occurred and before the earlier of,

- (a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and
- (b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise.

(6) All information in a disclosure document and a statement of a material change shall be accurately, clearly and concisely set out.

16 Finally, the requirements for the disclosure document are set out in greater detail in Ontario Regulation 581/00 passed pursuant to the Act; however, as PSCC concedes that it did not provide the necessary disclosure, it is not necessary here to address the specific contents of the Regulation.

17 Under the terms of the Act, if proper disclosure is not provided by the franchisor, the franchisee may rescind the franchise agreement "without penalty or obligation". Section 6(1) provides that a franchisee has sixty days to rescind upon receipt of a disclosure document that was late or that did not meet the requirements of s. 5. Section 6(2) provides that a franchisee may rescind within two years of signing a franchise agreement if disclosure is never provided at all. Section 6(6) enumerates the obligations of the franchisor upon rescission, including the obligation to refund the franchisee any payments made, to buy back inventory, supplies, and equipment, and to compensate the franchisee for losses. These provisions read as follows:

6. (1) A franchisee may rescind the franchise agreement, without penalty or obligation, no later than 60 days after receiving the disclosure document, if the franchisor failed to provide the disclosure document or a statement of material change within the time required by section 5 or if the contents of the disclosure document did not meet the requirements of section 5.

(2) A franchisee may rescind the franchise agreement, without penalty or obligation, no later than two years after entering into the franchise agreement if the franchisor never provided the disclosure document.

[...]

(6) The franchisor, or franchisor's associate, as the case may be, shall, within 60 days of the effective date of the rescission,

(a) refund to the franchisee any money received from or on behalf of the franchisee, other than money for inventory, supplies or equipment;

(b) purchase from the franchisee any inventory that the franchisee had purchased pursuant to the franchise agreement and remaining at the effective date of rescission, at a price equal to the purchase price paid by the franchisee;

(c) purchase from the franchisee any supplies and equipment that the franchisee had purchased pursuant to the franchise agreement, at a price equal to the purchase price paid by the franchisee; and

(d) compensate the franchisee for any losses that the franchisee incurred in acquiring, setting up and operating the franchise, less the amounts set out in clauses (a) to (c).

18 Section 7 creates an action for damages based on misrepresentation or failure to disclose:

7. (1) If a franchisee suffers a loss because of a misrepresentation contained in the disclosure document or in a statement of a material change or as a result of the franchisor's failure to comply in any way with section 5, the franchisee has a right of action for damages against,

(a) the franchisor;

(b) the franchisor's agent;

(c) the franchisor's broker, being a person other than the franchisor, franchisor's associate, franchisor's agent or franchisee, who grants, markets or otherwise offers to grant a franchise, or who arranges for the grant of a franchise;

- (d) the franchisor's associate; and
- (e) every person who signed the disclosure document or statement of material change.

19 Finally, the last provision relevant to this appeal is s. 9 of the Act, which expressly preserves any rights or remedies that a franchisee or franchisor would have had notwithstanding the existence of the Act:

9. The rights conferred by this Act are in addition to and do not derogate from any other right or remedy a franchisee or franchisor may have at law.

ISSUES

20 The appellant has abandoned its appeal from the order made in relation to Mr. Beer's application. Only the appeal from the order dismissing PSCC's application remains before this court. The appellant raises three issues:

- (1) Having found the presence of purported material facts in dispute, was the application judge entitled to dismiss the PSCC application?
- (2) If there are no material facts in dispute, what are the powers of this court in dealing with the PSCC application?
- (3) What is the proper interpretation of the term "without penalty or obligation" as set out in s. 6(2) of the Act?

ANALYSIS

(1) Having found the presence of purported material facts in dispute, was the application judge entitled to dismiss the PSCC application?

21 It appears from his reasons that the application judge concluded that there were material facts in dispute in relation to the application brought by PSCC that required resolution by "a trial based on an action brought by P.S.C.C." Nowhere in his reasons does he state what material facts he considers to be in dispute. Rather than directing the trial of an issue or converting the application to an action, he dismissed the application with costs.

22 It is apparent from reading the affidavits of Mr. Beer and of Michael Chapelle, a director of PSCC, that there are material facts in dispute. By way of example, if one compares para. 30 of Mr. Beer's affidavit:

One of my accounts was Midas Muffler in Oshawa. The owner of that shop also owned a Midas Muffler shop in Peterborough. In order to make my trips to Peterborough profitable, I started to solicit other business in that area. PSCC then advised me that I had to buy the Peterborough territory to continue to solicit that business.

to paras. 26 and 27 of Mr. Chapelle's affidavit:

The allegations contained at paragraph 30 of the Beer affidavit are simply not true. The Midas Muffler shop in Peterborough, Ontario was an existing customer of PSCC long before Beer ever entered into his Dealership Agreement for the Durham territory. I attach hereto and mark collectively as Exhibit "M" a true copies [sic] of various PSCC invoices between June 2002 and September 2002 to Midas Muffler in Peterborough, Ontario.

It was Beer who approached me in the late summer of 2003 inquiring about an expansion of his business and acquiring the Peterborough territory. At that time, Midas Muffler was the only existing customer serviced by PSCC in the Peterborough area.

it certainly appears as though there is a dispute over the "ownership" of the Midas account, if not in Durham, then in Peterborough. Similar observations can be made in relation to many of the other paragraphs in the two affidavits. Therefore, subject to my analysis of the third issue below, it is my view that the trial judge erred by dismissing the application rather than converting it to an action so that the disputed facts may be determined in a trial.

23 In light of my conclusion that there are indeed material facts in dispute, it is unnecessary to deal with the second issue raised by the appellant.

(2) What is the proper interpretation of the term "without penalty or obligation" as set out in s. 6(2) of the Act?

24 Before this court, as stated above, PSCC does not dispute that the dealership agreements are franchise agreements, that disclosure was not made as required by s. 5 of the Act, and that Mr. Beer is therefore entitled to rescind the agreements pursuant to section 6(2) and to be repaid monies in accordance with s. 6(6). PSCC says, however, that it is entitled under s. 9 of the Act to pursue Mr. Beer for improperly appropriating its business and carrying on the same business in competition with PSCC using the know-how, suppliers, customers, and equipment provided by PSCC during the course of their relationship. PSCC says it is entitled to an accounting in relation to any profits made from such business and to injunctive relief to prevent Mr. Beer from carrying on a competing business for eighteen months.

25 Before being passed into law in 2000, when still before the provincial legislature, Bill 33 (as it was then known) was entitled, "An Act to require fair dealing between parties to franchise agreements, to ensure that franchisees have the right to associate and to impose disclosure obligations on franchisors." Claudette Boyer, an opposition member for Ottawa-Vanier, noted when the Bill was before the House for second reading:

We really cannot deny the fact that legislation in this field is desperately needed. After hearing the testimonials of people who lost their life savings and went through many hardships, it became clear to other members of the committee and myself that something had to be done. Through these public hearings we were all made aware of the difficulties encountered by many who had been involved in franchises. The number of presentations that brought to light serious problems allows me to conclude that these were not isolated incidents. Constituents, franchisees and potential franchisees approached us with their concerns and they really wanted this bill to go ahead.

Ontario, Legislative Assembly, Official Report of Debates
(Hansard), L060A (17 May 2000) at 1620 (Claudette Boyer).

26 Steve Gilchrist, government member for Scarborough East, stated the following on second reading:

[B]ut I just want to touch very briefly on the three core components of this bill.

First off, the disclosure issues: Franchisors will be required to meet a very high standard of disclosure. They're going to be required to disclose information on their backgrounds, including any litigation history and business background. They're going to be forced to disclose information in the franchise offer, including any terms of possible renewals or termination. In addition they're going to be required to disclose all material facts; that is, any information about the business whatsoever that a franchisee would reasonably be expected to take into account before making their sometimes very significant investment.

Penalties: If a franchisor does not provide full disclosure, I think it's quite an extraordinary penalty that we've provided for in this bill: the right to rescission; an expectation that the franchisor will have to buy back the equipment, buy back the inventory and buy back the supplies if they have not dealt honourably, honestly and completely candidly with the franchisee. That is about as onerous a penalty as you could ever expect. And that's over and above any civil penalties that the franchisee would still be able to apply for through the courts.

At the heart of it, though, is the issue of fair dealing. How will that help franchisees? Quite simply, the government has been called on to ensure that we have a bill that guarantees there's an incentive for reasonable actions on both parties.

Ontario, Legislative Assembly, Official Report of Debates
(Hansard), L060A (17 May 2000) at 1720 (Steve Gilchrist).

27 There was all party-agreement to move the Bill quickly through the House where it unanimously passed third reading on May 17, 2000 and received Royal Assent on June 8, 2000.

28 It is clear, therefore, that the focus of the Act is on protecting the interests of franchisees. The mechanism for doing so is the imposition of rigorous disclosure requirements and strict penalties for non-compliance. For that reason, any suggestion that these disclosure requirements or the penalties imposed for non-disclosure should be narrowly construed, must be met with scepticism.

29 However, while the Act imposes fairly onerous disclosure requirements on franchisors, it is not entirely one-sided. In particular, s. 3 of the Act imposes a duty of fair dealing on "each party" to a franchise agreement with respect to performance and enforcement and gives the parties a right to damages for breaches of this duty of fair dealing. In this way, the Act obliges both the franchisor and the franchisee to deal fairly with one another.

30 There is no issue here that the franchisor did not comply with the mandatory disclosure obligations in s. 5 of the Act, having provided no disclosure document. In such

circumstances, s. 6(2) of the Act provides that the franchisee has the right to rescind the agreement no later than two years after signing it. As stated, once rescinded, the franchisor must fulfil the reimbursement obligations set out in s. 6(6). In this case the parties are agreed that the amount payable to the franchisee under s. 6(6) is \$23,627.89. The money has not been paid to date and was not paid within the sixty days contemplated by s. 6(6).

31 However, PSCC argues that it should not be required to pay the money until the issues it raises against Mr. Beer and his new business are resolved.

32 There is nothing in the language of s. 6(2) suggesting that a franchisee's right to rescind is in any way conditional. Where there is non-disclosure, the statutory right to rescind appears to be absolute. Equally, the payments detailed in s. 6(6) are required to be made by the franchisor within sixty days of the date of rescission. Again, there is nothing in the language of the section that suggests such payments are conditional in any way on the conduct of the franchisee and, therefore, the right to payment also appears to be absolute.

33 In my view, s. 6 deals only with the statutory right of rescission remedy available to a franchisee where a franchisor has failed to comply with the mandatory disclosure required by s. 5. If the franchisor has a complaint about the conduct of the franchisee, it must look beyond s. 6 to assert any such claim.

34 Put another way, a franchisor cannot avoid the remedy available to a franchisee under s. 6(2) or its obligations in relation thereto by raising issues about the conduct of the franchisee. Were it permissible to do so, it would in my view emasculate the stringent disclosure provisions of the Act and the consequences that follow from the failure to meet those obligations. It would run counter to the intention of the legislature and the express language of the Act to diminish the rights of a franchisee where there has been non-disclosure.

35 In my view, where a franchisor has a complaint about the conduct of a franchisee, it is obliged to assert such a claim under ss. 3 or 9 of the Act.

36 As stated, s. 3 of the Act imposes on each party to a franchise agreement a duty of fair dealing in its performance and enforcement. Section (3)(3) defines the duty of fair dealing to include the duty to act in good faith and in accordance with reasonable commercial standards. Any breach of that duty by a party gives rise to an action for damages by the party wronged.

37 The language of s. 3 contemplates the existence of an agreement and speaks in terms of the "performance" and "enforcement" of such an agreement. It does not relate to a s. 6 situation where, because of non-disclosure, the agreement has been rescinded. In those circumstances there is no longer an agreement capable of either performance or enforcement. Section 3, in my view, deals with the situation where disagreements arise between the parties when the agreement is in force and effect and provides remedies where it is alleged that the duty of fair dealing has been breached by one of the parties. It might apply on the facts of this case if the franchisor's complaints relate to a time period prior to September 27, 2004 when the franchise agreement was still in force and effect.

The notice of application in this case seeks some relief in respect of time periods that pre-date the rescission date.

38 Insofar as the franchisor's complaints relate to the conduct of the franchisee after rescission, the franchisor would, under s. 9 of the Act, have the right to bring an action at common law against the franchisee. PSCC's claims in relation to the alleged appropriation of business, unlawful use of customer lists and equipment, misappropriation of know-how and systems, and related complaints would fall to be determined under s. 9.

39 The language of s. 9 specifies that rights under the Act are in addition to any other right or remedy available to either a franchisor or franchisee. In other words, if a party has a common law or equitable right of action against another party, he or she may assert such right under this section where the Act does not otherwise specifically deal with such right. The respondents argue that the words "without penalty or obligation" in s. 6(2) must be read expansively. They say that, had they never entered an agreement with the appellant, they would have the right to compete with him in the same business. To suggest they cannot do so now because of the agreement, is to in effect impose a "penalty or obligation" on the franchisee which the legislation prohibits.

40 I cannot accept this argument. To give s. 6(2) the meaning the respondents suggest would be to render s. 9 of the Act an empty vessel. If the legislature intended that in no circumstances where there had been non-disclosure could a franchisor ever bring an action against a franchisee, it could and would have said so in plain terms, and s. 9 would not have been included in the Act in its current form.

41 The other flaw with the respondents' argument is that it ignores the fact that, on the franchisee's own admission, he set up a competing business the very day he rescinded the franchise agreement with the appellant and he continues the very same business to the same customers whose names were provided to him by the franchisor and uses equipment provided by the franchisor. While I accept that the facts of this case are still in dispute, it is nonetheless clear that in some cases the respondents' position would allow unscrupulous franchisees to take advantage of inadvertent non-disclosure by unwitting franchisors. In my view, this would be an unacceptable result.

42 In the result, I am of the view that the appellant has the right to assert a claim against the respondents by way of an action. An application is inappropriate where there are factual disputes as there are here. In dismissing the application, the application judge erred; he ought instead to have issued an order converting the application to an action.

43 The order dated January 7, 2005 on the application by PSCC is therefore set aside, and the application is converted to an action. The appellant shall have thirty days from the date hereof to deliver a statement of claim. Thereafter, the action shall proceed in accordance with the Rules of Civil Procedure. The appellant is entitled to its costs of the appeal, fixed in the sum of \$10,000.00, inclusive of G.S.T. and disbursements.

J. MacFARLAND J.A.

E.A. CRONK J.A. — I agree.

E.E. GILLESE J.A. -- I agree.

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CRPT,