

CN-12-450503

Court File No.

OOCF

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

1146845 ONTARIO INC., 1634481 ONTARIO INC. and J.P. CLEGHORN
PROFESSIONAL PROPERTY INSPECTION SERVICES INC.

Plaintiffs

- and -

PILLAR TO POST INC.,
D.R. STEWARD, also known as DAN STEWARD
and KIM CLARKE

Defendant

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario Lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGEMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: April 3, 2012

Issued by _____


Local Registrar

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TO: PILAR TO POST INC.
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AND TO: D.R. STEWARD also known as DAN STEWARD
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1. **THE PLAINTIFFS CLAIM**, on their own behalf and on behalf of all members of the class:

- a. a declaration that the defendants have failed to provide a disclosure document as required by the *Arthur Wishart Act (Franchise Disclosure) 2000*, the *Franchises Act*, R.S.A. 2000, c. F-23 and the *Franchises Act*, S.N.B. 2007, c. F-23.5 (collectively, the "Franchise Legislation");
- b. in the alternative, in the event the defendants are found to have provided a disclosure document, a declaration that the disclosure document provided by the defendants failed to comply with the requirements of the Franchise Legislation in that it was deficient, inadequate and misleading, and that these omissions constitute misrepresentations on which class members are deemed to have relied;
- c. damages for failure to provide a disclosure document, or any adequate or accurate disclosure document, which omission constitutes misrepresentation, estimated in the amount of \$25,000,000.00;
- d. an interim, interlocutory and permanent injunction restraining the defendants from converting any franchisee's exclusive territory to a non-exclusive territory and/or from terminating the franchise agreement of any franchisee, for alleged failure to meet any requirement of the franchise agreement or other additional or ancillary documents or agreements with

respect to the franchise, for which no or inadequate disclosure was provided;

- e. an order setting aside the termination of any franchise agreement of any franchisee for alleged failure to meet any requirement of the franchise agreement for which no or inadequate disclosure was provided, and a mandatory order requiring the defendants to permit any such franchisee to operate under the franchise agreement in place at the time of the termination;
- f. a mandatory order requiring the defendants to re-establish the exclusive territory of any franchisee which lost exclusive rights to that territory as a result of an alleged failure to meet any requirement of the franchise agreement for which no or inadequate disclosure was provided;
- g. damages in the amount of \$200,000.00 per franchisee for the defendants' breach of the duty of fair dealing pursuant to the Franchise Legislation;
- h. damages in the amount of \$200,000.00 per franchisee for interference with the class members' right to associate pursuant to the Franchise Legislation;
- i. prejudgment and postjudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C43 as amended;
- j. costs of this action on a substantial indemnity basis, plus applicable

harmonized sales tax; and

- k. such further and other relief as counsel shall advise and this Honourable Court permit, including all further necessary or appropriate orders, inquiries and directions.

THE PARTIES

2. The plaintiffs 1146845 Ontario Inc. ("114"), 1634481 Ontario Inc. ("163") and J.P. Cleghorn Professional Property Inspection Services Inc. ("Cleghorn Inc.") are all corporations incorporated pursuant to the laws of the province of Ontario. The plaintiffs at relevant times are or were franchisees of the "Pillar to Post" home inspection franchise system operated by the defendants.

3. The defendant Pillar to Post Inc. ("PTP") is a corporation incorporated pursuant to the laws of the Province of Ontario. PTP is the franchisor of the "Pillar to Post" home inspection franchise system.

4. D.R. Steward, also known as Dan Steward ("Steward"), is an individual residing in the City of Toronto, Ontario and was a director or officer of PTP at all relevant times. Steward has control of, or was controlled by, PTP and had direct involvement in the grants of franchises. As such, Steward is a "franchisor's associate" as that term is defined in the Franchise Legislation.

5. Kim Clarke (“Clarke”) is an individual residing in the City of Toronto, Ontario, and was the regional director for Canada for PTP at all relevant times. Clarke has control of, or was controlled by, PTP and had direct involvement in the grants of PTP franchises. As such, Clarke is a “franchisor’s associate” as that term is defined in the Franchise Legislation.

6. The plaintiffs are members of, and bring this action on behalf of the following class: all corporations, partnerships and individuals which currently carry on business in Canada as franchisees of the PTP franchise system; those corporations, partnerships and individuals who carried on business as franchisees of the PTP franchise system in Canada from and after January 1, 2001, but whose franchise was terminated, transferred, assigned, converted to a non-exclusive territory or altered in any other manner as a result of the alleged failure to comply with the PTP franchise agreement.

7. There are currently approximately 100 Canadian PTP franchisees operating in eight Canadian provinces.

Overview

8. This claim arises out of the unilateral and fundamental changes which PTP made to the PTP franchise system under which PTP implemented its plan to convert what were previously exclusive territories to non-exclusive territories in breach of PTP’s contractual, statutory and other duties to the PTP franchisees. PTP failed to provide current and former franchisees with any or any appropriate disclosure document as

required by the Franchise Legislation and as a result current and former franchisees were unable to adequately assess their rights, obligations and risks inherent in entering into or renewing franchise agreements with PTP. PTP nevertheless relied upon its failure to provide any or any proper disclosure to appoint or terminate franchisees, transfer or assign franchise agreements or to alter the status of franchisees in a manner which was materially to the detriment of franchisees. This change improperly benefitted PTP and caused serious and continuing losses to current and former franchisees as a class as represented in this action by the plaintiffs.

The PTP Franchise System

9. Established in 1994, the PTP franchise system created a network of home inspectors throughout Canada. Franchisees were permitted to operate within designated territories, primarily on an exclusive basis but in certain instances on a non-exclusive basis, to provide home inspection reports to prospective purchasers within the parameters established by PTP and with the support of PTP's franchise system. Regardless of their location in Canada, PTP franchisees would input information obtained from the inspection of the subject premises to the PTP website, which would then generate the inspection report for distribution to the prospective purchaser.

10. Relevant terms of typical franchise agreements were, *inter alia*, as follows:
- a. the franchisee was granted the exclusive right to operate a PTP franchise in the respective territory for a term of five years;

- b. the franchisee had the right to renew the franchise agreement for five consecutive terms of five years provided that, *inter alia*, the franchisee executed PTP's then current form of franchise agreement, which would supersede the previous agreement in all respects and which may contain substantially different terms;
- c. the franchisee was obliged to pay a royalty fee to PTP equal to seven percent (7%) of the minimum Gross Revenues (as defined in the franchise agreement) which the franchisee earned in the territory;
- d. the franchisee was obliged to achieve minimum Gross Revenues as defined in the franchise agreement, and if the franchisee failed to do so for any twelve month period, it was required to pay to PTP seven percent (7%) of the difference between the minimum Gross Revenues required for that twelve months and the total royalty fees already paid by the franchisee for that twelve month period. Alternatively, if the franchisee failed to achieve the minimum Gross Revenues for any twelve month period, then the franchisee could lose its right to exclusively service its territory;
- e. in the case of renewal of an existing franchise, franchisees were to receive a document titled "Addendum for Renewal Franchise Agreement" which would act to amend the franchise agreement to reflect
 - i. which renewal term the franchise was for and how many renewal

- terms were remaining; and
 - ii. higher Gross Revenues for the territory;
- and
- f. any controversies, claims or disputes between the parties were to be submitted to arbitration.

FAILURE OF PTP TO COMPLY WITH THE ACT

11. In advance of the grant or renewal of any given franchise agreement, PTP provided franchisees with a document purporting to be a franchise disclosure document (the “Disclosure Document”) as required by the Franchise Legislation. The Disclosure Document distributed by PTP was materially deficient and accordingly did not constitute a “Disclosure Document” within the meaning of the Franchise Legislation. In particular, the Disclosure Document was deficient, *inter alia* in that:

- a. the certificate was not in the form required by the regulations made under the Franchise Legislation (the “Regulations”);
- b. the certificate was unsigned as required by the Regulations;
- c. it did not contain the Addendums that franchisees were required to sign on the renewal of their franchise agreements;
- d. it did not contain updated information as to the required amount of minimum Gross Revenues franchisees were required to achieve in order

to meet their obligations under the Addendums and in order to maintain their exclusivity in the territory;

- e. it failed to include all material facts by providing the information upon which the earnings projections set out in the minimum Gross Revenue requirements were based for each territory, and as a result it failed to specify a reasonable basis for the assumptions underlying the earnings projections or the location at which information supporting the earnings projection could be found as is required by the Regulations.

12. By virtue of the deficiencies in the form and content of the Disclosure Document, PTP failed to provide any or any proper disclosure as required by the Franchise Legislation. Franchisees were unable to make a properly informed decision about whether to enter into or renew their franchise agreements and franchisees have suffered significant damages as a result.

PTP Implements Its Plan to End Exclusivity

13. At a point in time known only to the defendants, PTP determined that it wished to convert the PTP franchise system to one where no franchisee would have the exclusive right to service any particular territory and instead each franchisee would be required to compete with other PTP franchisees for home inspection engagements. In order to implement its plan, PTP undertook various changes to the PTP franchise system which operated to the detriment of franchisees and to the unfair and inappropriate benefit

of PTP, *inter alia*, as follows:

- a. For the first number of years of the PTP's operations, it was PTP policy that requests for a home inspection received through PTP's toll-free number would be referred to the PTP franchisee in the territory where the inspection referral originated, rather than the office where the property to be inspected was located. At some point after 2004, PTP unilaterally changed its practice such that inquiries were sent to the PTP franchisee in the territory where the property to be inspected was located rather than to the territory where the request originated. In doing so, PTP effectively compromised the exclusive rights granted to the PTP franchisee in the originating territory;

- b. PTP changed the manner in which PTP categorized its territories. Whereas PTP had previously designated a territory as either a "large" and "small" based on certain demographic information, PTP adopted a three-tiered system of classifying territories. PTP did so unilaterally, without providing any or any adequate disclosure or explanation of the basis on which tiers would be classified, the basis on which each tier's minimum Gross Revenues would be calculated or how any franchisee's franchise would be effected by the change. In doing so, PTP fundamentally and unfairly diminished the substantive rights existing franchisees had developed with respect to their franchise;

- c. PTP unilaterally set new onerous guidelines for the establishment of new minimum Gross Revenue requirements upon the renewal of franchise agreements by adding at least \$5,000.00 per year to the Gross Revenue requirements from the last year of the expiring franchise agreement. This effectively meant the minimum Gross Revenue requirements for a renewed franchise agreement would increase by at least \$25,000.00 over a five year term. However, PTP failed to provide any basis or information on which franchisees could analyze the earnings projections contained in the minimum Gross Revenue requirements or and refused to allow any discussion or negotiation with respect to these new requirements;

- d. PTP permitted franchisees who had purchased a non-exclusive franchises to operate in territories which PTP had improperly converted from exclusive to non-exclusive status, and required or permitted these new non-exclusive franchisees to discount and undercut the price structure established by the original franchisee. In doing so, PTP materially effected the original franchisee's ability to meet minimum Gross Revenue requirements and diminished or destroyed the original franchisee's investment in the franchise; and

- e. PTP created what it called the "5-50-5 Program" under which an exclusive franchisee would relinquish its exclusive right over its territory in return for a payment of:

- i. \$5,000.00 from PTP in the event a competing franchisee conducted a home inspection in the territory; and
- ii. fifty percent (50%) of the royalties payable by the competing franchisee with respect to home inspections in that territory.

PTP pressured exclusive franchisees to join this Program and misrepresented to them the benefits that would be payable thereunder.

14. In addition to implementing fundamental changes to the PTP franchise system, PTP also began a campaign under which it imposed new conditions on franchisees for the operation of their franchise agreement, which had not previously existed, and then either converted the territory to a non-exclusive territory or terminated the franchisee for failure to meet these new requirements. Additionally, PTP refused to renew franchise agreements on an exclusive basis, claiming the franchisee had failed to meet minimum Gross Revenue requirements, despite the fact PTP had failed to provide any or any proper disclosure to franchisees. In some instances, terminated franchisees for refusing to forfeit their exclusivity.

15. By altering the franchise system, imposing new conditions on the operation of franchisees and converting or terminating franchise agreements in contravention of its obligations under Franchise Legislation, PTP has unfairly benefitted itself at the expense of franchisees, who have either lost their investment upon the franchise being terminated or have had the value of their franchise significantly compromised by virtue of the loss of exclusivity. In doing so, PTP has breached its contractual, statutory

and common law obligations to franchisees and has caused them significant damages.

Claims for Failure to Provide a Proper Disclosure Document

16. As a result of the PTP's failure to provide any or any adequate disclosure document to franchisees as required by the Franchise legislation, franchisees have suffered and will continue to suffer significant losses, including, *inter alia*, the termination of their franchise agreements, the loss of the exclusive right to service their territory, the diminution or loss of their investment in the franchise, the loss of expected profit they would have earned as an the exclusive PTP franchisee in their territory as they have lost the exclusivity of the Vaughan Territory and the Etobicoke Territory.

17. PTP is liable for such losses and damages pursuant to the Franchise Legislation.

Breach of the Duty of Fair Dealing

18. In addition, PTP's conduct, *inter alia*, in altering the franchise system, imposing new conditions on franchisees on the operation of the franchise and unreasonably converting franchises from exclusive to non-exclusive status as set out above is a breach of PTP's statutory duty of fair dealing pursuant to the Franchise Legislation, entitling the franchisees to damages.

Claims for Contravention of the Right to Associate

19. At all material times, PTP was aware that franchisees were trying to

organize a franchisee association in order to better protect the rights of PTP franchisees and to equalize the bargaining and economic power between PTP and franchisees. PTP employed its strategy to alter the PTP franchise system and to intimidate franchisees in order to ensure they did not form an association or otherwise join together in order to level the bargaining power between PTP and franchisees.

20. In addition, the defendants have undertaken a strategy to intimidate franchisees and ensure that this action is not commenced by, *inter alia*, threatening that they will lose their franchises if the action is commenced, that they will never be able to sell or market their franchise if the action proceeds, that the entire PTP franchise system will suffer and that the franchise system will lose its value if the proceeding is commenced.

21. The defendants' actions as set out above are an attempt to bully franchisees and to intimidate PTP franchisees from associating with each other. As a result, the defendants are liable for interference with the franchisees' right to associate pursuant to the Franchise Legislation.

Injunctive Relief and Mandatory Orders

22. As a result of PTP's numerous breaches of the Franchise Legislation, PTP's actions in:

- a. Terminating or assigning franchisee agreements;
- b. Converting territories to non-exclusive status;
- c. Coercing new franchisees to enter into franchise agreements providing for

non-exclusive territories without providing full disclosure as to the plans as to the number of franchisees who would have access to the territory, thereby significantly affecting a franchisee's ability to determine its ability to earn income from the operation of the PTP franchise in that non-exclusive territory,

franchisees are entitled to the injunctions and mandatory orders set in paragraph 1 of this Statement of Claim.

23. The plaintiffs propose this action be tried at Toronto, Ontario.

April 3, 2012

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Plaintiffs

- and -

PILLAR TO POST INC. ET AL
Defendants

Court File No.

01-12-480503-0004
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

STATEMENT OF CLAIM

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