CITATION:
ONTARIO SUPERIOR COURT OF JUSTICE (TORONTO REGION) **CIVIL ENDORSEMENT FORM** *(Rule 59.02(2)(c)(i))*

BEFORE	**Judge/Associate Judge** **Justice FL Myers**	**Court File Number**: **CV-24-00715537-0000**

Title of Proceeding:

13240762 Canada Inc. Applicant

-v-

Saturday Life Barbershop Bayview Inc., et al Respondents

Case Management: ☐ **Yes** If so, by whom:	**X No**

Participants and Non-Participants:*(Rule 59.02(2)((vii))*

Party	Counsel	E-mail Address	Phone #	Participant (Y/N)
1) **Plaintiff** 13240762 Canada Inc	Justin J. Robinson	jrobinson@jrlaw.ca		**Y**
1) **Defendant** Saturday Life Barbershop Bayview Inc.	Michael Mandarino	mmandarino@rousseaumazzauca.com		**Y**

Date Heard: *(Rule 59.02(2)(c)(iii))* **March 5th, 2024**

Nature of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ Motion ☐ Appeal ☒ Case Conference ☐ Pre-Trial Conference ☐ Application

Format of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ In Writing ☒ Telephone ☐ Videoconference ☐ In Person

If in person, indicate courthouse address:

Relief Requested: *(Rule. 59.02(2)(c)(v))*

Brief Reasons, if any: *(Rule 59.02(2)(b))*

In my case conference endorsement of March 1, 2024, I implored the parties to try to resolve matters at least in the interim before the costs of the proceeding overwhelm the value of the business. Unfortunately they were not able to do so. I also gave them express notice under Rule 50.13 (6) that the issues before me today would include the applicant's request for the imposition of interim terms pending a scheduled return of its application.

On reading the supplementary affidavit of the applicant and the Aide Memoire of the respondents today, it seemed to me that I was likely going to be required to decide on a schedule for the application and I would need to decide whether to impose any of interim terms pending its interlocutory or final return. Therefore, I told counsel and their clients that I would not try to help them with mediation unless they both agreed that I could do so and still be able to resolve the schedule and interim terms if required. The applicant did not consent. So I heard only submissions concerning scheduling and interim terms.

The applicant seeks a very urgent return of the application. Mr. Robinson picked up on my suggestion last week that there could be material exchanged this week and a very early hearing. If that happened, there would be somewhat less urgency to put the applicant back into the premises pending the hearing of the application.

Mr. Mandarino is very new to the file. He quite properly seeks three weeks to deliver evidence and a return in early May after cross-examinations are completed. I accept that this is a reasonable period of time for counsel to get up to speed in a new matter in the ordinary course. But, if this schedule is accepted while the sublandlord remains in possession of the business premises, the applicant's business will be lost to it in any practical sense.

I accept that the respondents need three weeks to deliver full material and then more time to exercise their right of cross-examination. But that requires me then to consider if the applicant ought to be allowed to re-take possession of the premises in the interim.

Counsel know there is a three-part inquiry guiding whether the court will grant interim or interlocutory orders.

The applicant has raised a serious issue to be tried. It appears that the respondent sublandlord terminated the sublease based on claims to enforce an illegal interest rate and after having accepted February rent. I do not decide today if the respondent sublandlord acted unlawfully. That will be for the return of the application. But there is certainly a non-frivolous case raised in the applicant's evidence.

The sublandlord says it is implicit in the relationship that it controls the subleased premises. But there are no cross-default clauses in the branding agreement and the sublease. On its face, there is no requirement in the sublease that the applicant carry on business solely under the respondents' brand. Nor are there any noncompetition clauses preventing the applicant from operating a barber shop in the subleased premises after the termination of the branding agreement. While the sublandlord has control of the site, unless or until it establishes that its control includes terms enabling it to re-enter on breach of the other agreement (if one has already occur red or arises) there is a serious issue as to whether the sublandlord is entitled to terminate the sublease at this time.

I raised previously the concern that the applicant had purported to rescind its franchise agreement (as defined in the *Arthur Wishart Act*). If that was effective, then the applicant would have has no ongoing rights as franchisee and possibly also as subtenant depending on the terms of the rescission and the breadth of the statutory remedy. But, the respondents deny that the *Arthur Wishart Act* applies. This too cannot be decided today and therefore is an issue for the main hearing of the application. If the respondents are right and there is no right to rescission, then the applicant is entitled to try to continue to enforce the sublease.

The applicant has delivered evidence that it has insurance and proper licensing. The respondents may be able to show that the insurance is deficient is its scope of coverage or that the proper type of license is not

in hand. But the respondents lived with the state of the applicant's insurance and licensing up to the time of re-entry. The efficiency of the applicant's evidence can be tested before the next hearing. These are possibly serious issues and they also go to the balance of convenience discussed below.

I have no hesitation in finding that the loss of the business to the applicant will be irreparable harm. It has invested in goodwill that Is not recoverable. Its ability to replicate another shop would require it to have the star- up capital that is currently embedded in the business.

Plus, I do not see how the respondents have any right to operate using the applicant's business assets and goodwill. I see no basis in either agreement for the respondents to seize the value of the applicant's business whatever it may be. If there is a valid termination fo the sublease, the applicant is entitled to its personalty at minimum.

If I refuse to make an order prohibiting the respondents from treating the sublease as being terminated, then I need to schedule the return of the application or a next interlocutory hearing sooner than is fair to the respondents. Or if I give the respondents a fair amount of time without relieving the applicant fo the forfeiture of the sublease, the applicant is effectively precluded from re-taking the business and it will be confined to a remedy in damages. As noted above, I view the loss of a business and its goodwill as the archetype of irreparable harm that is not readily recoverable in damages. Valuing goodwill in this circumstance is an exercise in speculation. Moreover, I have doubts that either small business can afford to sustain the costs of the proceeding, damages, and perhaps the other side's costs.

If, however, I prohibit the respondents from treating the sublease as terminated pending the next return of the application, there is no tangible harm to the respondents. They are not going to recover 25% per diem interest or 60% per annum in the alternative. It will be a term of any order that the applicant keep its accounts current and that it be transparent in recordkeeping and reporting. There is possibly a risk that the head landlord might re-enter if the applicant carries on business in a manner that breaches the head lease (i.e. without proper licensing as required by law). That could well occur under the respondents too. The applicant's principal is a co-indemnifier of the head lease. The parties are both motivated to protect the site. If one tries to play games by trying to do a separate deal with the head landlord, that will be obvious and will not work out well for them in the end.

In my view the balance of convenience favours granting interim relief from forfeiture to the applicant.

Mr. Robinson has a two-day trial in Small Claims Court on May 6 and 7 which are dates available from the Motions Coordinator. Mr. Robinson asks me to book the return of the application on April 12 or 22 which are also available for an urgent short hearing. But those dates are too soon for Mr. Mandarino.

In my view, if I grant interim relief, the urgency is lifted as long as the applicant operates lawfully and accounts properly. If the respondents are of the view that they have new or different grounds to complain as a result of fresh or different breaches committed by the applicant after today, they may seek an urgent case conference through the Motions Coordinator and the Civil Team Lead (Motions). I can advise all parties that no judges are going to be willing to see them over and over again. Neither can the value of the business sustain such costs. They need to find a way to co-exist while the litigation proceeds.

The parties should consider quickly finding a knowledgeable mediator to try to reach a settlement.

As I am enforcing terms very early-on, in my view the terms should be confirmed or varied at a motion once the respondents' evidence is completed and cross-examinations are conducted as the parties may desire. I set a schedule below. But I leave it to the parties to schedule a case conference once they are closer to ready in order to set an early return date. Moreover, the parties can agree to forgo an interlocutory return and just bring the application back on a final basis if they choose.

The respondents shall deliver all evidence on which they intend to rely, including conducted nay examinations under Rule 39.03, by March 26, 2024.

The applicant may deliver reply material by April 2, 2024.

Cross-examinations shall be held by April 19, 2024.

To prevent the action from becoming bogged down in refusals motions, I order that Rule 34.12 (2) applies to all examination and cross-examination on the motion regardless of whether the parties consent. All questions refused shall be answered but the answers may not be used unless the judge who hears the motion overrules the objection. This does not apply however to questions objected to on the basis of lawyer client privilege. Questions objected to for lawyer client privilege do not need to be answered unless or until a ruling has been obtained on the propriety of the objection. Questions to which objections are made based on all other forms of privilege however shall be answered under Rule 34.12 (2). (Other privileges are not destroyed by the mere disclosure of an answer.) In addition, requests for document production that may be made at an examination are not proper questions to which Rule 34.12 (2) applies. A refusal to produce documents can be resolved by a judge or an associate judge at a case conference prior to the motion being heard or by the judge at the motion hearing. If a refusal to produce documents leads to an adjournment of the motion hearing, the judge will have costs orders available.

Counsel are reminded that Rule 34.14 remains available should someone think it a good idea to ask abusive questions because the other side cannot refuse to answer. The court will take a strong view toward any misuse of the *Rules*.

The terms granted are set out below.

Additional pages attached: ☐ Yes **X** No

Disposition made at hearing or conference (operative terms ordered): *(Rule 59.02(2)(c)(vi))*

Pending the next return of this application or an interlocutory motion to continue or vary this interim order:

1. **The respondents, anyone acting on their behalf or with their instructions, and anyone with knowledge of this order, are prohibited from acting on the purported termination of the sublease between the parties. The respondents shall forthwith return possession of the premises to the applicant under the sublease and they are prohibited from re-entering into possession of the premises except with leave of the court;**

2. **The respondents have leave to seek an urgent case conference if they wish to assert new or different grounds to terminate the sublease hereafter. They shall not re-enter using self-help without leave of the court;**

3. **The applicant shall operate its business in compliance with the sublease. It will keep full and accurate records of all transactions of any kind that it undertakes. It will record all transactions, whether cash, credit, barter, or otherwise, in its computer tracking system and report to the respondents with complete financial transparency on or before the last day of each month; and**

4. The costs of this proceeding to date are reserved to the judge who hears the fiunal application.

Costs: On a **N/A** indemnity basis, fixed at $ are payable by to [when]

Frederick Myers
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March 5th , 20 **24**

Date of Endorsement *(Rule 59.02(2)(c)(ii))*

Signature of Judge/Associate Judge *(Rule 59.02(2)(c)(i))*