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Suncor Successful in Dismissing Proposed $200 Million Class Action

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In the first decision to consider the meaning of the "one-year/no-franchise fee" exemption in the *Arthur Wishart Act*, the Ontario Court of Appeal has confirmed that a franchisor is not required to provide a franchisee with a disclosure document where the franchise agreement has a term of one year or less and where the franchisee does not pay any non-refundable fees in exchange for the franchise. The Court's decision in *T A & K Enterprises Inc. v. Suncor Energy Products Inc.* represents a significant victory for franchisors, as the Court recognizes that disclosure is not required for low-risk "one-year/no franchise fee" franchises. Osler represented Suncor in successfully dismissing this $200 million proposed class action.

Background

T A & K Enterprises Inc. v. Suncor Energy Products Inc. was a proposed class action launched by a former Suncor retailer, T A & K Enterprises Inc. (TAK). TAK operated a Sunoco gas station under a franchise agreement. Its franchise came to an end, and TAK commenced the action alleging that Suncor failed to deliver a disclosure document to 241 proposed class members. As a result, TAK alleged that Suncor had breached the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (the Act). For this breach, TAK alleged that class members were entitled to rescind their franchise agreements and were entitled to aggregate damages of $200 million.

Prior to determining whether the case should be certified as a class proceeding, Suncor moved for summary judgment. Suncor relied on the "one-year/no franchise fee" exemption in section 5.7(g)(ii) of the Act, which provides that a disclosure document is not required where "the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable franchise fee."

Suncor argued that it could rely on the exemption because TAK's franchise agreement had an express term of one year and did not require TAK to pay any upfront fees in exchange for the right to operate the franchise.

TAK claimed that the franchise agreement was "valid" for longer than one year because (a) the agreement was signed more than one year before the end of the stated term; (b) it was allegedly extended by Suncor beyond the one year term and; (c) it contained certain clauses that made the term of the agreement extend beyond one year. Further, TAK argued that the

agreement involved the payment of “non-refundable franchise fees” because it required the franchisee to pay certain royalties.

The motion for summary judgment was heard in December 2010. In a decision released December 17, 2010, the motion judge rejected all of TAK's arguments and granted summary judgment to Suncor.

An appeal by TAK was heard in June 2011. On September 27, 2011, the Court of Appeal unanimously affirmed the motion judge's decision, dismissing TAK's appeal in its entirety.

Key Findings

- While the exemption refers to “validity,” the key issue is the *term* of the agreement: the period during which the franchisee is granted rights and assumes obligations with respect to the franchise.
  - The purpose of the disclosure requirement in the Act is to protect franchisees by ensuring that they receive a disclosure document before committing to a franchise agreement. However, an exemption is provided where the period in which the franchisee will have rights and obligations under the agreement is of short enough duration that the franchisee is at minimal risk. The Act fixes this duration at one year or less. This is the time frame during which the franchisee is bound to certain rights and obligations. It is during this time frame that the franchise agreement is valid for the purposes of the exemption. TAK's agreement only had a term of one year, and therefore, was not valid for longer than one year.
- The fact that the agreement was signed before its stated term did not extend the “validity” of the agreement beyond one year.
  - Once signed, TAK may have sued for anticipatory breach of contract if Suncor had repudiated the agreement. However, the availability of this cause of action differs from the purpose of the exemption, which focuses on the duration of the rights and obligations under the franchise agreement.
- The fact that Suncor wrote to TAK before the expiry of its franchise agreement, extending the agreement upon expiry on a month-to-month basis, did not make the franchise agreement valid for longer than one year.
  - This letter simply created a new monthly agreement following the expiration of the one-year franchise agreement.
- The “overholding” provision in the franchise agreement did not extend its validity beyond one year.
  - This section provided that if the franchisee remained in possession of the premises after the expiry of the term of the agreement and continued to pay a monthly rent, the tenancy became one of month-to-month, subject to the terms of the agreement. This section did not extend the agreement beyond one year; the agreement simply became a monthly tenancy. Further, at the commencement of the agreement, this section only created the possibility that the franchisee would become an over-holding tenant at the end of the term. This possibility did not itself make the agreement valid for longer than one year.
- Neither the “indemnity” nor the “confidentiality” provisions, which survived the termination of the franchise agreement, extended the agreement beyond one year.
  - By definition, these sections only applied once the agreement had been terminated or expired. The survival of these provisions did not extend the agreement itself.
- A “franchise fee” is in the nature of a fee paid for the right to become a franchisee. It does not include royalties or payments for goods or services.
  - If fees in the nature of royalties were included in the definition of “franchise fee”, there would be virtually no circumstances in which the exemption could operate. The French version of the Act, which uses the phrase “*redevances de franchisage non remboursables*” does not support the conclusion that the term “franchise fee” includes royalties. The Regulations, legislative history, and existing jurisprudence all support a distinction between “franchise fees” and royalties.

Lessons Going Forward

Principles Underlying Disclosure and Exemptions

This decision provides important guidance on the principles that underlie the disclosure requirement and the exemptions to that requirement. The Court of Appeal has recognized that where a franchisee does not pay any non-refundable fees for the right to become a franchisee and only commits to operate the franchise for a term of one year or less, the risk to the franchisee is limited and does not warrant a disclosure document. Franchisors who intend to rely on the one-year/no franchise fee exemption or any of the other statutory exemptions to the disclosure requirement should pay careful attention to the reasons of the motion judge and the Court of Appeal.

Summary Judgment and Class Actions

This case also serves as an example of a class action where the merits of the action could be addressed prior to certification through a motion for summary judgment, as the primary issue in dispute was one of statutory interpretation. Given the broader scope of the new summary judgment procedures under Ontario's *Rules of Civil Procedure*, and the significant cost of fighting a certification motion and participating in discovery, both plaintiffs and defendants may increasingly consider summary judgment motions as a useful tool in their procedural arsenal for achieving fast and cost-effective results.