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Case Law Update: TA & K Enterprises Inc v Suncor Energy Products Inc

October 20, 2011

2011 ONCA 613 (Released September 27, 2011)

Franchise – *Arthur Wishart Act* – Disclosure Document – One-year Term – Franchise Fee

In this decision, the Court of Appeal for Ontario concluded (1) that the franchise disclosure requirements in the *Arthur Wishart Act (Franchise Disclosure), 2000*, SO 2000 ("**Act**") do not apply to franchise agreements where the term of the franchise rights and obligations is one year or less and (2) that "franchise fees" do not include ongoing payments such as royalties.

The case came to the Court from Perell J.'s decision which granted the defendant Suncor's motion to dismiss a proposed class action brought by TA & K Enterprises Inc. ("**TAK**") on behalf of a class of over 200 former Sunoco retailers. The claim arose from Suncor's merger with Petro-Canada and Suncor's subsequent decision to cull some franchisees and re-brand the remainder. In asserting that Suncor had not met an obligation to provide disclosure, TAK hoped to recover some of its set-up and wind-down costs. In response, Suncor relied on s. 5(7)(g)(ii) of the Act which provides an exemption from disclosure where "the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable franchise fee".

Justice Goudge (MacFarland and Watt JJ.A. concurring) rejected all of TAK's arguments. He held that although the franchise agreement was signed on November 11, 2008 and due to expire on November 14, 2009, it was not valid for longer than one year. Rather, the "time frame during which the franchisee is bound to certain rights and obligations" was only one year. The franchisee's ability to repudiate the agreement for franchisor non-performance in the period between the signing of the agreement and the commencement of its performance did not tip the term length over the one year.

Further, the existence of obligations such as indemnity and confidentiality which survive the termination of the agreement did not extend the agreement past one year. By definition those obligations only arise after the termination of the agreement and so after the agreement can be considered valid. The existence of a clause within the franchise agreement which provided for a monthly tenancy in the event the franchisee remained in possession and continued to pay rent at the conclusion of the agreement did not extend the term. Because the term came into force at the expiration of the agreement, it did not extend it. Finally, a letter from Suncor extending the franchise relationship on a month-to-month basis did not stretch the franchise agreement beyond a year.

The Court also dismissed TAK's claim that its payments to Suncor were franchise fees and that as a result Suncor did not satisfy the second branch of the disclosure exemption. Goudge J.A. relied on the relevant regulation and the law reform report which led to the Act to hold that a franchise fee is paid to become a franchisee, and does not include royalties or other payments for goods or services.

The Court's decision makes sense as a plain interpretation of the Act. However, it leaves potential franchisees faced with one-year agreements which will surely now become more popular with franchisors to bargain for longer agreements or more complete disclosure. The decision thereby does not live up to the Act's broad goal of rebalancing power between potential franchisees and

franchisors.

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