CITATION: 405341 Ontario Limited v. Midas Canada Inc., 2010 ONCA 478
DATE: 20100706
DOCKET: C51322

COURT OF APPEAL FOR ONTARIO

Sharpe, Cronk and MacFarland JJ.A.

BETWEEN

405341 Ontario Limited

Plaintiff (Respondent)

and

Midas Canada Inc.

Defendant (Appellant)

Proceeding under the *Class Proceedings Act, 1992*

Malcolm Ruby, Jeffrey Hoffman and Scott Kugler, for the appellant

Allan Dick and David Sterns, for the respondent

Heard: April 12, 2010

On appeal from the order of Justice Maurice Cullity of the Superior Court of Justice dated October 16, 2009, with reasons reported at (2009), 64 B.L.R. (4th) 251.

MacFarland J.A.:

[1] This is an appeal from the order of Cullity J. wherein he ordered and declared that any provision contained in the Midas Franchise and Trademark Agreement (the

"Agreement") requiring franchisees to release the appellant, Midas Canada Inc. ("Midas"), from liability as a condition for the renewal or transfer of their rights under the Agreement was unenforceable and void for the purposes of this class proceeding. The motion judge further ordered that the appellant was prevented from requiring the respondent, 405341 Ontario Limited ("405"), to release the appellant from the claims certified in this class proceeding as a condition of renewal or transfer of its rights under its Agreement.

THE FACTS

[2] The within class proceeding was certified by order dated March 26, 2009. The proceeding involves a dispute between the appellant and a national class of franchisees over whether the appellant breached its statutory or common law duties when it outsourced product supply to a third-party supplier. The respondent, 405, was appointed as the representative plaintiff.

[3] The following common issues have been certified for the purpose of the class proceeding:

> A. Did Midas Canada Inc. ("Midas") breach its obligations to the class members by reason of a common law duty to exercise its rights under the Franchise Agreement honestly, fairly and in good faith, or its statutory duties of fair dealing, by terminating the Midas product supply system and

substituting and implementing the Uni-Select agreement, including, without limitation, by:

a. retaining the full 10 per cent royalty after it ceased to sell automotive products and accessories ("Products") to class members;

b. negotiating and receiving rebates, allowances or other consideration from third-party suppliers of products on account of the class members' purchases of Products; or

c. funding its warranty obligations, in whole or in part, through rebates provided by third-party suppliers of Products?

B. If a breach of the duty of good faith is proved, then has Midas been unjustly enriched at the class members' expense by retaining the full 10 per cent royalty after it ceased to sell Products to class members?

C. In the event that Midas breached any of its contractual or statutory duties referred to in A., what is the appropriate measure of the damages, if any, to which members of the class are entitled?

D. Are the class members entitled to either or each of:

a. a rebate of part of the royalties paid by them after Midas ceased to sell Products to class members, and, if so, in what amount; and

b. an abatement of royalties to be paid by them in the future and, if so, in what amount?

E. Are the class members entitled to declaratory or injunctive relief in respect of all, or any, of the breaches referred to in A, that are found to have occurred, including an order for an accounting or audit of rebates and allowances received by Midas from third party suppliers of Products and amounts expended by Midas in discharging its warranty obligations?

F. Should Midas be required to pay punitive, exemplary or aggravated damages to the class members? If so, what is the amount of such damages?

[4] The causes of action on which the class members rely include breaches of the Agreement and of the duty of fair dealing set out in s. 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (the "Act").

[5] The issues raised on this appeal arose as a result of the expiry of the respondent representative plaintiff's Agreement on July 29, 2009, during the pendency of this class proceeding.

[6] While the Agreement permits the respondent to extend its franchise relationship for an additional 20-year term, s. 9.3 of the Agreement provides:

> **Terms of Franchise during Extension Period:** The term of the extension of the franchise relationship shall be twenty (20) years, and the franchise fee for such extension shall be one-half of the franchise fee charged new franchisees by Midas at the time of the extension. In all other respects, the form of the agreement governing the extension of the franchise relationship shall be the same as that granted to new franchisees at the time of such extension, except for special conditions, if any, which are imposed in connection with the extension. *Franchisee and each of its shareholders, directors, and officers shall, as a condition for the extension of the franchise relationship, execute and deliver to Midas a general release of any and all claims and causes of action against Midas, its affiliated corporations, and their respective officers, agents, and employees*. [Emphasis Added.]

[7] Following certification, questions arose as to the obligation of the respondent to execute a release as a condition of renewing its Agreement when it expired on July 29, 2009. The release in the proposed renewal agreement provides:

> GENERAL RELEASE. Franchisee and its owners, officers and directors ("Releasers"), individually, hereby release, remise and forever discharge Midas and its parent corporation, subsidiary entities and affiliated entities, and its/their respective successors, assigns, directors, officers, agents, servants and employees, from all claims, demands, covenants, judgments, agreements, promises, damages, debts, accounts, suits and causes of action of any nature whatsoever, whether at law or in equity, which Franchisee and/or Releasers or any of its/their respective successors, assigns, parent, affiliates, subsidiaries, executors, administrators, legatees and heirs have, or may have, including, but not limited to, matters in any way relating to the Midas Shop, the Franchise Agreement or the franchisor – franchisee

> relationship. Franchisee and Releasers each state that it has read the foregoing and understands that it is a general release and that it intends to be legally bound thereby.

[8] There was also an issue raised in respect of another franchisee and class member, 1078460 Ontario Inc. ("107"), who had under protest provided a release at the time of an assignment in 2007. The provision of the Agreement that provides for a release on assignment is s. 7.4(f). It states:

> Franchisee and each of its shareholders, directors and officers shall have executed and delivered to Midas a general release of any and all claims and causes of action against Midas, its affiliated corporations, and their respective officers, agents and employees.

[9] In August 2009, the respondent moved for an order preventing the appellant from requiring it to execute a release from the claims certified in the class action as a condition of the renewal or transfer of its rights under the Agreement. The respondent also sought an order declaring that any provision requiring class members to release the appellant from liability as a condition of renewal or transfer of their rights under the Agreement was unenforceable to the extent of some or all of the common issues in the proceeding.

THE DECISION BELOW

[10] In his careful and cogent reasons, the motion judge considered the issues, the positions of the parties and the law in respect of the Act. The motion judge concluded that the respondent was entitled to:

> An order declaring that any provision contained in the Midas Franchise and Trademark Agreement (the "Agreement") requiring franchisees to release the defendant from liability as a condition for the renewal or transfer of their rights under the Agreement is unenforceable and void for the purposes of this proceeding.

[11] Before the motion judge, the respondent argued that the right of association granted to franchisees pursuant to s. 4(1) of the Act encompassed the right of franchisees to join in class proceedings with other franchisees for the purpose of enforcing their rights against the franchisor.

[12] The motion judge rejected the appellant's argument that ss. 4(4) and 11 of the Act could not have been intended to apply to agreements and releases in situations where the franchisees voluntarily decided to seek renewals, or effect assignments, of their Agreements.

[13] In paras. 22 and 28 of his reasons, the motion judge concluded:

> It is unquestionable that the provisions and the intentions reflected in such agreements are subject to the overriding provisions of the AWA. In consequence, the fact that Midas is seeking compliance with the agreements is beside the point. If the agreements interfere with the right of association conferred by section 4(1), they will be void to that extent. If they require releases of rights under the statute, the releases would be void and the relevant provisions of the agreement will be unenforceable. I see no difference in principle between this case and any other in which a franchise agreement contains offers of benefits to franchisees conditional on the execution of releases of their rights to fair dealing under the AWA, or their rights to damages for a breach of the franchisor's obligations under the statute. It

> would defeat the purpose of the statute if the obligation of fair dealing could be bargained away by such provisions of standard-form franchise agreements – whether or not an enquiry would be permitted into the fairness of the bargain.
>
> ...
>
> In my judgment, if the exercise of a franchisee's rights under a franchise agreement requires a release of rights given by the AWA, the release will, at least *prima facie*, be void by virtue of section 11. I say "*prima facie*" in order to leave open the possibility of cases such as *Tutor Time*, or other circumstances in which it would be inequitable to permit a franchisee to rely on that provision of section 11. In this case, the fact that the franchisee is under no obligation to exercise the rights under the agreement appears to me to be of no relevance. The case is one where the franchisor is attempting to require the execution of a release that would deprive the franchisees of their rights under the Act. In the absence of any circumstances that should exclude an application of section 11, I am satisfied that such a release would be void and that, in consequence, the agreement to provide it is unenforceable. In my opinion, the agreement is also void pursuant to section 4(4) of the AWA.

[14] As for the appellant's argument that the Act does not apply to franchisees who operate in provinces other than Ontario, the motions judge relied on s. 10.11 of the Agreement, which provides:

> **Controlling Law:** This Agreement, including all matters relating to the validity, construction, performance, and enforcement thereof, shall be governed by the laws of the Province of Ontario.

[15] The motion judge concluded at paras. 35-36 of his reasons:

> I believe the most reasonable inference is that, by agreeing that the laws of Ontario are to govern the validity, construction, performance and enforcement of a franchise agreement applicable to franchises operating in another province, the intention of the parties was that their rights and obligations – including the reciprocal and inviolable rights and duties of fair dealing – are to be the same as if the business of the franchise was operated in Ontario. The territorial limitations in section 2 of the AWA have, in my opinion, no more effect for this purpose than that of the general presumption that statutes are not "intended to apply extraterritorially to persons, things or events outside the boundaries of the enacting jurisdiction" (*Sullivan on the Construction of Statutes*, (5th edition), page 731).
>
> Accordingly, I find that the validity and enforceability of the impugned provisions of the franchise agreements are governed by the overriding provisions of sections 4 and 11 of the AWA irrespective of the location of the Midas franchises in Canada.

ANALYSIS

[16] The appellant raises five grounds of appeal.

1. **Did the motion judge err in law in finding that the extension and assignment provisions of the Agreement are void or unenforceable under s. 11 of the Act?**

[17] The appellant argues that it must be recognized that there is a difference between a claim and a right, and that the release of a claim under the Act is not equivalent to the release of a right under the Act. In this regard, the appellant relies on the decision of Cumming J. in *1518628 Ontario Inc. v. Tutor Time Learning Centres, LLC,* 2006 CanLII 25276 (ON S.C.), aff'd (12 April 2007) 598/06 (Div. Ct.). In my view, this reliance is misplaced.

[18] In *Tutor Time,* the franchisee, exercising its rights under the Act, sought rescission of a franchise agreement entered into with Tutor Time Learning Centres ("TTLC") in December 2003, through a share purchase. The motion judge concluded that TTLC did not meet the disclosure requirements of the Act, and that in the circumstances of the case TTLC "never provided the disclosure document" within the meaning of s. 6(2) of the Act.

[19] Prior to the delivery of the notice of rescission and the plaintiffs' commencement of the action, negotiations took place and a settlement was reached between the parties. The settlement agreement that the plaintiffs signed included a release in favour of TTLC effective May 15, 2004. The motion judge found that, before signing the settlement agreement, the plaintiffs were well aware of the non-disclosure by TTLC, TTLC's failure to comply with the Act and their rights under the Act. He also noted that the plaintiffs had signed the settlement agreement after getting independent legal advice.

[20] The motion judge held that s. 7 of the settlement agreement of May 15, 2004, constituted a release in favour of TTLC by the plaintiffs from any claim for damages the plaintiffs may have suffered because of TTLC's failure to provide the disclosure required by the Act.

[21] In paras. 106-109 of his reasons, upon which the appellant relies, the motion judge held:

> [106] Parties who reach a settlement are to be held to their bargain. The policy reasons for enforcing a valid release

> mirror the policy principles underlying the doctrines of *res judicata* and issue estoppel.
>
> [107] The plaintiffs take the position the *Act* prohibits any waiver of the statutory right of rescission and hence, the "Release" is of no effect, given s. 11 of the *Act* which reads:
>
> > 11. Any purported waiver or release by a franchisee of a right given under this Act or of an obligation or requirement imposed on a franchiser or franchiser's associate by or under this Act is void.
>
> [108] In my view, s. 11 does not have application to a release given (with the advice of counsel) by a franchisee in the settlement of a dispute for existing, known breaches of the *Act* by the franchiser in respect of its disclosure obligations, which would otherwise entitle the franchisee to a statutory rescission.
>
> [109] The settlement of a claim arising from and consequential to an existing statutory right of rescission is not in itself "a waiver or a release" of that statutory right to rescission. It is a release of the claim arising from having exercised the right of rescission or being in the position to exercise the right of rescission. In my view, if a franchisee, as in the instant situation, with full knowledge of a breach of the franchiser's obligations to disclose as required by the *Act* and regulations, and with the benefit of independent legal advice, chooses to affirm the franchise agreement as a term of a settlement of the claims that arise from the franchiser's breach, then the franchisee can no longer rescind and make a claim to the remedies afforded by s. 6(6) of the *Act*. [Citations omitted.]

[22] The appellant argues in para. 35 of its factum:

> The court in *Tutor Time* thus differentiated between a prospective release or waiver of a "right" under the *AWA* and a release or waiver of a "claim arising from and consequential

> to an existing statutory right." The significance, and effect, of the distinction is that franchisees cannot be required to contract out of the *AWA*'s protections by releasing a **right**. Franchisees may, however, elect to release claims they have asserted, or could assert, under the *AWA* either to settle those claims or as consideration for obtaining some other contractual advantage like the right to renew or assign their franchises. [Emphasis in original.]

[23] The motion judge dealt with this aspect of the appellant's argument in paras. 24-27 of his reasons:

> [24] In *Tutor Time* there is no doubt that the release was given for the purpose of an agreement that the franchisee intended to be a settlement of its claims based on the provisions of the AWA. The franchisee subsequently purported to resile from the settlement agreement and, for that purpose, to rely on section 11. The learned judge held (at para. 106) that "parties who reach a settlement are to be held to their bargain" and that section 11 was inapplicable in such circumstances. My understanding of the reasoning of Cumming J. is that, if there was a settlement that would otherwise be binding, section 11 would not apply to a release given pursuant to it.
>
> [25] I do not accept that this is a case that falls within the ratio of *Tutor Time*. The plaintiff is not engaged in settling its claims. On the contrary, this motion is made precisely because it wishes to continue to assert them. The issue is whether in order to obtain benefits under the terms of a franchise agreement, it can be compelled contractually to release rights that it has under the AWA. While the overriding effects of the AWA are not limited to cases where franchisors are relying on, and attempting to enforce, provisions of a franchise agreement, there is no doubt that the statute can apply to such cases.
>
> [26] At times the submissions of defendant's counsel suggested to me that they were seeking to treat any release of

> an existing claim as a settlement and, in consequence, as falling within the ratio of *Tutor Time*. I do not believe this to be a correct interpretation of the decision. Its acceptance would effectively emasculate section 11 of the AWA. It would, in effect, limit the operation of the section to cases where the release covered only claims that might arise in the future. I find nothing in the words of section 11 that would support such a narrow interpretation and the general objectives of the statute are inimical to it.
>
> [27] There may be cases in which the distinction is difficult to draw, but I decline to find that the prerequisite of a settlement has been satisfied here where the question is whether the franchisor can enforce the provisions of the franchise agreements dealing with renewals and assignments by insisting on the execution of a release by an unwilling franchisee. Such a release would not be given in connection with the settlement of claims asserted in this proceeding, and *Tutor Time* is, in my opinion, properly distinguishable on that ground.

[24] I agree with the motion judge for the reasons he gave. *Tutor Time* simply has no application to the facts of this case. In *Tutor Time,* the motion judge concluded that s. 11 did not apply to a release given by a franchisee, with the advice of counsel, in settlement of a dispute for existing and fully known breaches of the Act that would otherwise have entitled the franchisee to a claim. In the present case, the release that would be part of the extension agreement derives from ss. 9.3 and 7.4(f) of the Agreement. Thus, this is not a situation analogous to *Tutor Time.* The Agreement was signed prior to the claims arising and, therefore, without full knowledge of the breaches.

[25] Here the Agreement clearly contains provisions in ss. 7.4(f) and 9.3 that offend and are contrary to s. 11 of the Act. Section 11 states as follows:

> 11. Any purported waiver or release by a franchisee of a right given under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void.

[26] The language of s. 11 could not be clearer. If you include a term in your franchise agreement that purports to be a waiver or release of any rights a franchisee has under the Act, it will be void.

[27] Part of the appellant's argument rests on the use of the word "right", and not "claim", in s. 11 of the Act. In the circumstances of this case, the distinction between rights and claims is artificial. The claims in the class action are derived from rights that the class members are seeking to assert.

[28] In this proceeding the respondent and class members seek to assert their rights both at common law and pursuant to s. 3 of the Act. That section states:

> **Fair Dealing**
>
> 3(1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.
>
> **Right of Action**
>
> (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.

> **Interpretation**
>
> (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.

[29] To permit the appellant to require the class members to release any claims they might have against the appellant in order to take advantage of any other rights they might have under the Agreement, in my view, is simply contrary to the spirit, intent and letter of the Act. Where a franchisor insists upon such waiver or release, s. 11 makes it clear that any such waiver or release will be void.

[30] The purpose of the Act is to protect franchisees. The provisions of the Act are to be interpreted in that light. Requiring franchisees to give up any claims they might have against a franchisor for purported breaches of the Act in order to renew their franchise agreement, unequivocally runs afoul of the Act. To suggest that by accepting the terms of the Agreement, the respondents have in effect "settled" their claims within the meaning of *Tutor Time,* in my view, misapprehends and misstates the ratio of that case. Here there has been no settlement of the respondent's rights; the respondent is merely trying to assert its rights through its claims. The assertion that it has waived or released those rights contravenes s. 11 of the Act.

[31] In my view, the motion judge was correct in concluding that under s. 11 of the Act the extension and assignment provisions of the Agreement were unenforceable and a release in accordance with those provisions would be void.

2. Did the motion judge err in finding the extension and assignment provisions of the Agreement void or unenforceable under s. 4(4) of the Act?

[32] The appellant takes issue with the motion judge's conclusion in para. 17 of his reasons, where he stated in part:

> I am of the opinion that, when read in its context in the AWA, the right of association in section 4 does encompass the right of franchisees to participate in a class action for the purpose of enforcing their rights against the franchisor under the statute or otherwise. Section 4 is not concerned with the right to associate socially or recreationally. Its inclusion in the statute would be inexplicable if it was not intended to permit franchisees to associate for the purpose of protecting their interests and enforcing their rights through collective action.

[33] Section 4(4) of the Act provides:

> 4(4) Any provision in a franchise agreement or other agreement relating to a franchise which purports to interfere with, prohibit or restrict a franchisee from exercising any right under this section is void.

[34] The appellant argues that s. 4 does not mention class proceedings or contain any prohibition on restricting a franchisee's right to commence or participate in class proceedings. In contrast, the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, expressly provides that parties to a consumer agreement may not by agreement prevent a consumer from participating in class proceedings.

[35] Thus, the appellant submits that if the legislature had intended to prohibit parties to a franchise agreement from including terms that prevented franchisees from

participating in class proceedings, it would have explicitly said so as it did in the *Consumer Protection Act*.

[36] The appellant also submits that although the right of association in s. 4(1) does not encompass the right to participate in a class proceeding, it is unnecessary to decide the point in this appeal. It says that it has never taken the position that the respondent, or any other class member, was prevented from commencing a class proceeding or becoming a member of a class; nor does the Agreement contain any term that would prevent such participation.

[37] The appellant submits that the right to participate in class proceedings was not the issue before the motion judge. The issue was whether the release purported to interfere with, prohibit or restrict the exercise of the right of association, or whether it was merely the release of a claim under the Act asserted through the procedural mechanism of a class proceeding. Although the motion judge did not distinguish between rights and claims, the appellant argues that he accepted in his decision that rights cannot be interfered with. Therefore, the appellant submits that if a franchisee chooses a contractual option, like renewal or assignment, which results in a requirement that it settle claims by providing the appellant with a release, then the appellant cannot be said to be interfering with, prohibiting or restricting the franchisees' right of association. In this regard, it says, there is no difference between a franchisee executing a release to secure an existing contractual

advantage and a decision by a franchisee to opt out of a class proceeding under the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 (the "*CPA*").

[38] In my view, the difference is an obvious one. The franchisee is required to release existing claims it has under the Act as a condition of extending or assigning its Agreement. Unless it gives up any claims it has, its Agreement cannot be extended or assigned. It is nothing like a voluntarily negotiated settlement of existing claims as was the case in *Tutor Time*. It is quite simply the franchisor relying on a term of the franchise agreement – a standard form contract of adhesion – to defeat the rights its franchisees would otherwise have under the Act. To interpret the Agreement in any other way is to ignore reality and emasculate the very provisions that are in place in the Act to protect franchisees from this very sort of thing.

[39] The motion judge was correct to hold that the requirement in the Agreement to provide a release upon extension or assignment violated rights of association under s. 4 of the Act.

3. Did the motion judge err in applying the Act to franchise agreements where the businesses are operated outside of Ontario?

[40] Section 10.11 of the Agreement provides:

> **Controlling Law:** This Agreement, including all matters relating to the validity, construction, performance, and enforcement thereof, shall be governed by the laws of the Province of Ontario.

[41] The Act, which is part of the law of Ontario, provides in s. 2:

> 2.(1) This Act applies with respect to a franchise agreement entered into on or after the coming into force of this section, with respect to a renewal or extension of a franchise agreement entered into before or after the coming into force of this section and with respect to a business operated under such an agreement, renewal or extension if the business operated by the franchisee under the franchise agreement or its renewal or extension is to be operated partly or wholly in Ontario.
>
> (2) Sections 3 and 4, clause 5(7)(d) and sections 9, 11 and 12 apply with respect to a franchise agreement entered into before the coming into force of this section, and with respect to a business operated under such agreement, if the business operated by the franchisee under the franchise agreement is operated or is to be operated partly or wholly in Ontario.

[42] Franchises are operated by class members in provinces other than Ontario; several of those provinces have their own franchise legislation. The appellant argues that by its express terms, the Act can only apply to those franchises operating within Ontario.

[43] In this respect, the motion judge concluded at para. 35:

> I believe the most reasonable inference is that, by agreeing that the laws of Ontario are to govern the validity, construction, performance and enforcement of a franchise agreement applicable to franchises operating in another province, the intention of the parties was that their rights and obligations – including the reciprocal and inviolable rights and duties of fair dealing – are to be the same as if the business of the franchise was operated in Ontario. The territorial limitations in section 2 of the AWA have, in my opinion, no more effect for this purpose than that of the general presumption that statutes are not "intended to apply extraterritorially to persons, things or events outside the

> boundaries of the enacting jurisdiction." (*Sullivan on the Construction of Statutes*, (5th edition), page 731).

[44] The appellant submits that the motion judge rewrote s. 10.11 of the Agreement by adding the words "as if the business of the franchise was operated in Ontario" and/or "notwithstanding the terms of section 2 of the [Act]". The appellant argues that no reasonable inference could be drawn from the record that the parties intended such a substantial revision of the Agreement.

[45] I agree with the motion judge and would give no effect to this ground of appeal. Many commercial contracts today contain choice of law clauses. That choice often bears no relationship to where the contract is to be carried out. As the respondent notes in its factum:

> As Peter W. Hogg states "[a]s a general proposition, it is plain that a province may not regulate extraprovincial activity".[1] It is equally plain, however, that this inherent territorial limitation does not prevent parties from adopting the law of one province to regulate contracts which have a connection to other provinces, or in the case of franchise agreements, which can span multiple jurisdictions. The law selected by the parties will ordinarily govern the dispute subject to public policy exceptions:
>
> > Where the parties have expressly selected a governing law, there is no difficulty in identifying the "law intended by the parties." The law will govern the contract provided the choice is *bona fide* and legal, and there is no reason for avoiding the choice on the ground of

[1] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Carswell, 2007) at § 13.3(d).

public policy.[2]

4. Did the motion judge err by applying the circumstances of two franchisees to all franchisees?

[46] The appellant argues that the motion judge's declaration is overbroad and would by its terms apply to all franchisees in Canada in situations where their individual circumstances differ from those of the two class members who were the subject of the motion in this case.

[47] The declaration about which this submission is made is at para. 38 of the reasons and states:

> An order declaring that any provision contained in the Midas Franchise and Trademark Agreement (the "Agreement") requiring franchisees to release the defendant from liability as a condition for the renewal or transfer of their rights under the Agreement is unenforceable and void for the purposes of this proceeding.

[48] The scope of the declaration is not unlimited. As the declaration states, the sections of the Agreement at issue are void "for the purposes of this proceeding." Those words of limitation restrict the application of the order to Agreements where the franchisees are members of the class within this proceeding. In this proceeding all class members assert causes of action as set out above in para. 3. The order provides that if the Agreements of those members come up for renewal or assignment during the pendency

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[2] Janet Walker, *Castel & Walker*: *Canadian Conflict of Laws*, 6th ed., looseleaf (Markham, Ont: LexisNexis Butterworths, 2005) at § 31.2a.

of the litigation then ss. 7.4(f) and 9.3 are unenforceable. The appellant therefore cannot insist, as a condition of renewal or assignment, that the franchisee provide a release that in effect will exclude the franchisee from the class action.

[49] Nothing in the order or declaration precludes a party that wishes to willingly opt out of the class proceeding, or otherwise independently reach a consensual compromise with the appellant, from doing so. Such was the case in *Tutor Time*. Those cases are different from the cases to which the declaration applies.

[50] I would not give effect to this ground of appeal.

5. Did the motion judge err in law in granting substantive relief on a procedural motion?

[51] The appellant argues that the motion judge erred in determining the appellant's substantive rights on a motion under s. 12 of the *CPA*. The appellant submits that the provisions of the *CPA* are procedural and do not modify or create substantive rights. Specifically, s. 5(1)(b) of the *CPA* is a procedural provision that cannot be used to abrogate contractual rights. The provisions of the Agreement providing terms and conditions for extension and assignment are substantive rights. A declaration that affects substantive rights is substantive relief.

[52] The motion judge answered the appellant's objection in para. 12 of his reasons, wherein he stated:

> The motion is concerned essentially with the scope of the class. A franchisee who provides a binding release will automatically be excluded from the class. This is a matter that relates to the requirement for certification in section 5(1)(b) of the *CPA* and, like the requirements in sections 5(1)(c) through (e), it is not a matter to be dealt with in the pleading. It follows that the effect of the AWA might properly have been raised at the hearing of the motion to certify the proceeding. The argument on behalf of the plaintiff is that the effect of an application of the provisions of section 7.4 and 9.3 of the franchise agreement that require releases falls squarely within section 4(4) as it will prevent a franchisee from exercising its right to participate in the class action.

[53] As to this issue, I agree with the motion judge for the reasons he gave. At its heart, this motion was concerned with the scope of the class. It was appropriate for the motion judge to treat it as though it were an extension of the certification analysis. There is no error.

DISPOSITION

[54] For these reasons, I would dismiss the appeal. The respondent is entitled to costs of the appeal, which I would fix, in accordance with the agreement of counsel, in the sum of $34,000 inclusive of disbursements and GST.

RELEASED: RTS

JUL 0 6 2010

Jane Gulland JA
I agree Robert J. Sharpe JA
I agree. E.A. Cronk JA.