CITATION: TA & K Enterprises Inc. v. Suncor Energy Products Inc., 2010 ONSC 7022
COURT FILE NO.: 10-CV-395207-CP
DATE: 20101217

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
TA & K ENTERPRISES INC.	)	*Allan D.J. Dick* and *David Sterns*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
SUNCOR ENERGY PRODUCTS INC. AND SUNCOR ENERGY INC.	)	*Larry P. Lowenstein*, *Jean-Marc Leclerc* and *Adam Hirsh*, for the Defendants
	)	
Defendants	)	
	)	
	)	
	)	
	)	**HEARD:** December 8, 2010

PERELL, J.

A. ***Introduction and Overview***

[1] The Plaintiff, TA & K Enterprises Inc., ("TAK") operated a Sunoco gas station under a franchise agreement. Its franchise came to an end, and it commenced a proposed class action alleging that the Defendants, Suncor Energy Products Inc. ("Suncor Energy Products") and Suncor Energy Inc. ("Suncor Energy"), had failed to deliver a disclosure document to 241 proposed class members and, thus, had breached the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3. For this breach, the class members, all of whom are located in Ontario, would have the remedy of rescission under the Act. TAK also claims aggregate damages of $200 million.

[2] Suncor Energy Products, which is a "franchisor" under the *Arthur Wishart Act*, and Suncor Energy, which is a "franchisor's associate" under the Act, submit, however, that s. 5(7)(g)(ii) of the Act applies and a disclosure statement was not required because "the franchise agreement is not valid for longer than one year" and the franchise agreement "does not involve the payment of a non-refundable franchise fee."

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[3] Alternatively, the Defendants submit that s. 5(7)(f) of the Act applies and a disclosure document was not required because there was: "the renewal or extension of a franchise agreement where there has been no interruption in the operation of the business operated by the franchisee under the franchise agreement and there has been no material change since the franchise agreement or latest renewal or extension of the franchise agreement was entered into."

[4] Both parties now bring motions for summary judgment. TAK seeks a declaration that Suncor Energy Products was required to deliver to TAK a disclosure document, and Suncor Energy Products and Suncor Energy seek an order dismissing TAK's action because they submit that a disclosure document was not required.

[5] For the reasons that follow, I grant the Defendants' motion for summary judgment. By way of overview, it is my opinion that a disclosure document from the Defendants was not required because the exception found in s. 5(7)(g)(ii) was available to them. In my opinion, the exception was available because the Retailer Franchise Agreement, which is a standard form document, is both: (a) not valid for longer than one year; and also (b) it does not involve the payment of a non-refundable franchise fee.

[6] The conclusion that s. 5(7)(g)(ii) is available is dispositive of the motions. However, as it may be of assistance to the parties and because it is inevitable that there will be an appeal, it is further my opinion that the s. 5(7)(f) exception may also be available to the Defendants. I come to this conclusion because, in my opinion, there was "a renewal or extension of the franchise agreement" and thus this exception would be available if "there has been no interruption in the operation of the business operated by the franchisee under the franchise agreement and there has been no material change since the franchise agreement or latest renewal or extension of the franchise agreement was entered into." I say only that this exception "may be available" because if the Retailer Franchise Agreement is a renewal or extension, then there is a genuine issue requiring a trial as to whether "there has been no material change since the franchise agreement or latest renewal or extension of the franchise agreement was entered into."

[7] Thus, my ultimate conclusions are that the s. 5(7)(g)(ii) exception is available and the s. 5(7)(f) exception may be available. (Pursuant to the direction, I made on November 10, 2010, this conclusion is without prejudice to the Defendants' right to argue that any issues not determined by the motions for summary judgment are arbitrable.)

[8] To explain these conclusions, I will organize my Reasons for Decision as follows:

- A. Introduction and Overview
- B. Factual, Contractual, and Statutory Background
- C. The Issues and the Court's Summary Judgment Jurisdiction
- D. Is the Retailer Franchise Agreement the Renewal or Extension of a Franchise Agreement?

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- E. Does the Retailer Franchise Agreement Involve the Payment of a Non-Refundable Franchise Fee?

- F. Is the Retailer Franchise Agreement Valid for Longer than One Year?

- G. Conclusion.

B. ***Factual, Contractual, and Statutory Background***

[9] The Defendant Suncor Energy owns Suncor Energy Products, which before its merger with Petro-Canada was the franchisor of a chain of retail stores selling gas and other products under the Sunoco trade mark and brand.

[10] The Sunoco franchisees signed a standard form Retailer Franchise Agreement. It is not disputed that the Retailer Franchise Agreement is a "franchise agreement" under the *Arthur Wishart Act*.

[11] Suncor Energy Products provided the sites for the store and some equipment to the franchisee. The franchisee may purchase some assets itself for the site. It is a matter of contention and an issue to be decided as to whether the franchisee paid a "franchise fee." It is a matter of contention and an issue to be decided whether the Retailer Franchise Agreement was "valid" for longer than one year.

[12] On November 11, 2008, TAK signed a Retailer Franchise Agreement with Suncor Products to continue operating as a Sunoco franchise.

[13] Mr. Timothy Ryan is the principal of TAK, and he first started operating a Sunoco store in 2005. His corporation signed a series of Retailer Franchise Agreements. The agreement Mr. Ryan signed in November 2008 for TAK, which is the subject of the motions for summary judgment, was a sequel to earlier agreements signed by TAK.

[14] In conjunction with the completion of each agreement, Suncor and Mr. Ryan reviewed and discussed a new business plan, and then his corporation signed an agreement. It is a matter of contention and an issue to be decided whether the Retailer Franchise Agreement was a renewal or extension of a franchise agreement. TAK submits that each agreement was a new agreement and not a renewal or extension of a franchise agreement.

[15] It is also a matter of contention about the significance, if any, of the fact that TAK signed an identical copy of the Retailer Franchise Agreement on November 15, 2008, in addition to the copy it signed on November 11, 2008. The factual and legal dust up here is further complicated by the fact that TAK's Retailer Franchise Agreement stated that its term commenced on November 15, 2008 and ended on November 14, 2009.

[16] For the purposes of deciding the competing motions for summary judgment, the provisions of the Retailer Franchise Agreement set out below are the important provisions. Of these, the most important is s. 50.2 (Suncor's Estate and Overholding):

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1. Authorized Businesses

1.1 The Retailer shall only operate the following businesses at the Store: ….

2. Term

2.1 The term of this Agreement is one year commencing on the ___ day of _____, ____ and ending on the ___ day of ____, ____.

3. *Customer Service, Store Image, Advertising and Promotions and Community Involvement*

3.1 The parties agree that outstanding customer service and Store Image are key to the sustainable success of the Authorized Businesses at the Store. The Retailer agrees to comply with or exceed the customer service and Store Image standards designated by Suncor from time to time. The Retailer shall pay Suncor such fees as are stipulated by Suncor from time to time for its customer service and Store image evaluation programs. ….

4. Product and Service Supply

4.1 The Retailer shall purchase or secure the supply, for resale from the Store, of the following products exclusively from Suncor in qualities sufficient to meet demand: (a) all Fuel products; (b) all Merchandise Inventory; (c) all Petroleum Products and Car Care Products, and (d) any other products designated by Suncor from time to time. ….

13. Training

13.1 Prior to commencement date of this contract, the Retailer will be required to successfully complete a training program supplied by Suncor. In the event that the Retailer does not successfully complete Suncor's training program to a standard acceptable to Suncor, in Suncor's sole discretion, Suncor may terminate this agreement about immediate notice. The Retailer shall pay Suncor $_____ upon the commencement date of this Agreement as a fee for the training program. The Retailer shall be required to purchase software and hardware configuration as Stipulated by Suncor from suppliers designated by Suncor.

13.2 The Retailer shall attend, participate in and achieve acceptable test results in all stipulated Suncor Training Programs and shall pay the fees for such programs as may be stipulated by Suncor from time to time.

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18. Suncor Payments

18.1 Suncor will pay the Retailer a fixed daily commission as set out in Schedule "C" in respect of the sale of the Consigned Products sold by the Retailer and the operating of the designated Authorized Businesses at the Store.

18.2 In addition to the fixed daily commission set out in Schedule "C", the Retailer shall be paid a daily variable commission, as determined by Suncor from time to time, which variable commission will be based on designated operating costs pertaining the operation of one or more of the Authorized Businesses at the Store. ….

18.3 In addition to the fixed daily commission set out in Schedule "C" and the variable commission set out in subsection 18.2, the Retailer may be entitled to an incentive payment based on achieving designated growth targets for the sale of Consigned Products or other designated goods or services. ….

30. Rent

30.1 The Retailer agrees to pay the following rent: ….

33. Loaned Equipment and Repairs ….

33.7 Upon the termination or expiry of this Agreement, the Retailer shall surrender the Store and the Loaned Equipment to Suncor in a state of good repair, clean and tidy, failing which the Retailer shall be responsible for any cost incurred by Suncor to remedy the Retailers' failure which amount shall be charged to the Retailer by Suncor.

43. New Agreement

43.1 At least one hundred and eighty days (180) days prior to the end of the Term, the Retailer shall deliver notice in writing to Suncor stating that it is interested in entering a new Agreement for the Store. Suncor will respond either by providing the terms upon which Suncor is prepared to enter a new Agreement with the Retailer or that Suncor does not intend to enter a new Agreement. The Retailer shall notify Suncor of its acceptance of the terms contained in Suncor's notice of proposed new Agreement within ten (10) days of receipt of Suncor's response otherwise the Retailer will be deemed to have rejected them.

50. Suncor's Estate and Overholding

50.1 This Agreement is subject to the provisions of any leasehold or other interest under which Suncor is entitled to possession of all or any part of the Store and shall terminate automatically upon the termination, expiry

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or assignment of any of Suncor's rights under such interest. The Retailer will not do or fail to do anything which will impair or jeopardize Suncor's interest in the store.

50.2 If the Retailer remains in possession of the Store after the expiry of the term of this Agreement, and continues to pay a monthly rent equivalent to that payable immediately prior to such expiry, such tenancy of the Retailer shall be from month to month only and shall be subject to the terms of this Agreement which month to month term can be terminated by either party upon 30 days written notice.

Schedule "H" – Merchandising Program

1. Merchandising Program

1.1 The Retailer shall operate a Merchandising Business at the Store in accordance with the Standards Manual. The Standards Manual stipulates how the Merchandising Business is to be operated and maintained. The Standards Manual may be amended by Suncor from time to time. The Merchandising Business shall be operated under the trade mark which has been licensed to the Retailer under the Retailer Franchise Agreement.

2. Purchasing Program

2.1 The Retailer shall purchase or secure the supply of Merchandise Inventory exclusively in accordance with the terms of the Retailer Franchise Agreement.

5. Royalty for Merchandise

5.1 The Retailer shall pay Suncor a daily royalty rate as set out below on the Gross Margin per Merchandise Inventory sold as per the following categories:

CATEGORY	ROYALTY PERCENT
Tobacco	75% but can be increased or decreased from time to time by Suncor on 7 days notice
All Other Merchandise Inventory	75%

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Schedule "I" – Car Wash Business

1. Operation of Car Wash Business

1.1 The Retailer shall operate a Car Wash Business in accordance with the Standards Manual. The Standards Manual stipulates how the Car Wash Business is to be operated and maintained by the Retailer including the type of Car Wash services to be offered by the Retailer to the public and their quality. The Standards Manual may be amended by Suncor from time to time. The Retailer shall operate the Car Wash Business under the trade mark which has been licensed under this Agreement.

3. Car Wash Royalty

3.1 The Retailer shall pay Suncor a daily royalty of eighty-five (85%) percent of the Gross Margin per Car Wash service purchased and completed at the Store and per Car Wash Voucher sold at the Store. ….

Schedule "K" – Country Style Business

1. Sublicense

1.1 Suncor grants the Retailer a non-exclusive license to use the Country Style Trademarks at the Store solely in connection with the sale of Country Style Products. Section 10 of the Retailer Franchise Agreement is incorporated by reference and Section 10.2 shall be amended with respect to the Country Style Trademarks to clarify that Country Style is the owner of the Country Style Trademarks.

5. Royalties

5.1 The Retailer shall pay Suncor the following royalties: (a) a daily royalty of eighty-five (85%) of the Gross Margin per Country Style Product sold; and, (b) a monthly royalty stipulated by Suncor from time to time for shortages where the shortages of coffee exceed five (5) cups per day based on a monthly average. ….

[17] TAK acknowledges that the Retailer Franchise Agreements: (a) are generally for one year terms, with no option to renew; (b) Suncor Energy Products often entered into new franchise agreements with franchisees at the end of their one-year terms; (c) a franchisee had no right to insist on the same terms and conditions from one agreement to another; and (d) franchise agreements could and often did change from year-to-year and from agreement-to-agreement.

[18] Before TAK and other franchisees signed the Retailer Franchise Agreement, it was not provided with a disclosure document. Unless a statutory exception applies, a disclosure document is required by s. 5 of the *Arthur Wishart Act*, which states:

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Franchisor's obligation to disclose

5.(1) A franchisor shall provide a prospective franchisee with a disclosure document and the prospective franchisee shall receive the disclosure document not less than 14 days before the earlier of,

(a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise; and

(b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or franchisor's associate relating to the franchise. ….

Contents of disclosure document

(4) The disclosure document shall contain,

(a) all material facts, including material facts as prescribed;

(b) financial statements as prescribed;

(c) copies of all proposed franchise agreements and other agreements relating to the franchise to be signed by the prospective franchisee;

(d) statements as prescribed for the purposes of assisting the prospective franchisee in making informed investment decisions; and

(e) other information and copies of documents as prescribed. ….

[19] As already noted several times above, the Defendants submit that a disclosure document was not required because of s. 5(7)(g)(ii) of the Act, which states:

(7) This section does not apply to, …

(g) the grant of a franchise if, …

(ii) the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable franchise fee, ….

[20] Also, as already noted above, in the mutually exclusive alternative, the Defendants submit that a disclosure document was not required because of s. 5(7)(f) which states:

(7) This section does not apply to, …

(f) the renewal or extension of a franchise agreement where there has been no interruption in the operation of the business operated by the franchisee under the franchise agreement and there has been no material change since the franchise agreement or latest renewal or extension of the franchise agreement was entered into.

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[21] On August 1, 2009, Suncor Energy Inc. merged with Petro-Canada.

[22] The Commissioner of Competition required Suncor and Petro-Canada to divest 194 retail gas stations in Ontario, and, in addition, the new amalgamated corporation decided to convert the Sunoco sites to operate under the Petro-Canada brand.

[23] Under the Petro-Canada business model, a franchisee would operate between 10 to 12 stores and not just a single store. Thus, the conversion to the Petro-Canada brand meant that there would be fewer franchisees. In these circumstances, Suncor did not offer any new one-year term franchise agreements to its franchisees, but in order to keep its chain operating, it rather relied on the overholding provision, s. 50 of the Retailer Franchise Agreement, set out above, to transition to the new business model.

[24] On October 2009, Sunoco wrote Mr. Ryan and other Sunoco franchisees. The letter stated:

> As you are aware, many of the Franchise Retailer Agreements we have with Sunoco Retailers are set to expire early in November. For those Retailers whose agreements are set to expire in November, Suncor Energy Products Inc. will be extending all existing agreements on a month-to-month basis. As remaining agreements reach their end points, they too will be extended in the same manner. As described in the agreement, this extension preserves all existing terms and conditions until further notice is provided. This allows us to continue our work to support the operation of your business, and allows you to operate your site in an uninterrupted manner as future decisions are made.

[25] On January 12, 2010, Suncor wrote to Mr. Ryan to advise him that his agreement would terminate on Thursday, August 12, 2010, and it offered to change the agreement's term from a month-to-month to a seven month term.

[26] In January, 2010, Suncor offered "transition payments" to over 125 franchisees in exchange for their agreement not to exercise their right to terminate the tenancy on 30 days' notice and to continue to operate their store until it was sold or re-branded. To receive the transition payment, the franchisee was required to sign a release. TAK was offered $50,814, if it would agree to operate until August 2010.

[27] On January 17, 2010, Suncor Products Inc. informed the franchisees by e-mail that if they did not sign the termination letter and release by midnight on January 20, 2010, they would forfeit the transition payment.

[28] Mr. Ryan did not accept the offer of a transition payment, and on January 18, 2010, TAK served a Notice of Rescission under the *Arthur Wishart Act* seeking compensation under s. 6 (6) of the Act.

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[29] Section 6 (6) of the Act states:

Franchisor's obligations on rescission

(6) The franchisor, or franchisor's associate, as the case may be, shall, within 60 days of the effective date of the rescission,

(a) refund to the franchisee any money received from or on behalf of the franchisee, other than money for inventory, supplies or equipment;

(b) purchase from the franchisee any inventory that the franchisee had purchased pursuant to the franchise agreement and remaining at the effective date of rescission, at a price equal to the purchase price paid by the franchisee;

(c) purchase from the franchisee any supplies and equipment that the franchisee had purchased pursuant to the franchise agreement, at a price equal to the purchase price paid by the franchisee; and

(d) compensate the franchisee for any losses that the franchisee incurred in acquiring, setting up and operating the franchise, less the amounts set out in clauses (a) to (c).

[30] Also on January 18, 2010, TAK commenced a proposed class action. It alleges a breach of the *Arthur Wishart Act*, the right to rescind his Retailer Franchise Agreement and an entitlement under s. 6 of the Act to a refund of "any money received from or on behalf of a franchisee."

[31] TAK also claims damages under .s 7 (1) of the *Arthur Wishart Act*, which states:

Damages for misrepresentation, failure to disclose

7. (1) If a franchisee suffers a loss because of a misrepresentation contained in the disclosure document or in a statement of a material change or as a result of the franchisor's failure to comply in any way with section 5, the franchisee has a right of action for damages against,

(a) the franchisor;

(b) the franchisor's agent;

(c) the franchisor's broker, being a person other than the franchisor, franchisor's associate, franchisor's agent or franchisee, who grants, markets or otherwise offers to grant a franchise, or who arranges for the grant of a franchise;

(d) the franchisor's associate; and

(e) every person who signed the disclosure document or statement of material change.

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[32] On April 6, 2010, Suncor was advised that TAK would cease operating its store on April 22, 2010.

[33] TAK no longer operates a gas station.

[34] In addition to the sections of the *Arthur Wishart Act* noted above, the following sections are important for the resolution of the competing motions for summary judgment:

> *Definitions*
>
> 1. (1) In this Act,
>
> "disclosure document" means the disclosure document required by section 5; ("document d'information")
>
> "franchise" means a right to engage in a business where the franchisee is required by contract or otherwise to make a payment or continuing payments, whether direct or indirect, or a commitment to make such payment or payments, to the franchisor, or the franchisor's associate, in the course of operating the business or as a condition of acquiring the franchise or commencing operations and,
>
> (a) in which,
>
> (i) the franchisor grants the franchisee the right to sell, offer for sale or distribute goods or services that are substantially associated with the franchisor's, or the franchisor's associate's, trade-mark, service mark, trade name, logo or advertising or other commercial symbol, and
>
> (ii) the franchisor or the franchisor's associate exercises significant control over, or offers significant assistance in, the franchisee's method of operation, including building design and furnishings, locations, business organization, marketing techniques or training, or
>
> (b) in which,
>
> (i) the franchisor, or the franchisor's associate, grants the franchisee the representational or distribution rights, whether or not a trade-mark, service mark, trade name, logo or advertising or other commercial symbol is involved, to sell, offer for sale or distribute goods or services supplied by the franchisor or a supplier designated by the franchisor, and

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> (ii) the franchisor, or the franchisor's associate, or a third person designated by the franchisor, provides location assistance, including securing retail outlets or accounts for the goods or services to be sold, offered for sale or distributed or securing locations or sites for vending machines, display racks or other product sales displays used by the franchisee; ("franchise")
>
> "franchise agreement" means any agreement that relates to a franchise between,
>
> (a) a franchisor or franchisor's associate, and
>
> (b) a franchisee; ("contrat de franchisage")
>
> "franchisee" means a person to whom a franchise is granted and includes,
>
> (a) a subfranchisor with regard to that subfranchisor's relationship with a franchisor, and
>
> (b) a subfranchisee with regard to that subfranchisee's relationship with a subfranchisor; ("franchisé")
>
> "franchisor" means one or more persons who grant or offer to grant a franchise and includes a subfranchisor with regard to that subfranchisor's relationship with a subfranchisee; ("franchiseur")
>
> "grant", in respect of a franchise, includes the sale or disposition of the franchise or of an interest in the franchise and, for such purposes, an interest in the franchise includes the ownership of shares in the corporation that owns the franchise; ("concession")
>
> "prospective franchisee" means a person who has indicated, directly or indirectly, to a franchisor or a franchisor's associate, agent or broker an interest in entering into a franchise agreement, and a person whom a franchisor or a franchisor's associate, agent or broker, directly or indirectly, invites to enter into a franchise agreement; ("franchisé éventuel")

[35] In support of their argument, discussed below, the Defendants also referred to s. 6 para. 1 of Ont. Reg. 581/00, which contains directions about the content of a disclosure document. Section 6 para. 1 of the regulation states:

> 6. For the purpose of clause 5 (4)(a) of the Act, every disclosure document shall include the following presented together in one part of the document:
>
> 1. A list of all of the franchisee's costs associated with the establishment of the franchise, including,

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> i. the amount of any deposits or franchise fees, whether the deposits or fees are refundable, and if so, under what conditions,
>
> ii. an estimate of the costs for inventory, leasehold improvements, equipment, leases, rentals, and all other tangible and intangible property necessary to establish the franchise and an explanation of any assumptions underlying the estimate, and
>
> iii. any other costs associated with the establishment of the franchise not listed in paragraph i or ii, including any payment to the franchisor, whether direct or indirect, required by the franchise agreement, the nature and amount of the payment, and when the payment is due.

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C. ***The Issues and the Court's Summary Judgment Jurisdiction***

[36] Both sides seek a summary judgment, and both sides submit that the court has the jurisdiction to decide the issues that they advance.

[37] I agree with both sides that the case at bar is appropriate for a summary judgment, and I see no purpose in reviewing the current state of the law about summary judgments, for which see: *Healey v. Lakeridge Health Corporation*, 2010 ONSC 725; *2189205 Ontario Inc. v. Springdale Pizza Depot Ltd.* 2010 ONSC 3695; *Cuthbert v. TD Canada Trust*, [2010] O.J. No. 630 (S.C.J.); *Valemont Group Ltd. v. Philmor Goldplate Homes Inc.*, [2010] O.J. No. 1217 (S.C.J.); *Hino Motors Canada Ltd. v. Kell*, [2010] O.J. No. 1105 (S.C.J.).

[38] I have no doubt that there are no genuine issues that require a trial and that I am in as good a position as a trial judge to decide this matter. There are no issues of credibility, and the parties have provided an adequate evidentiary record to interpret the Retailer Franchise Agreement and the legislation as it applies to the circumstances of TAK and similarly situated franchisees.

[39] Although they are not genuine issues requiring a trial, there are three issues to be determined on this motion for summary judgment. Those issues may be conveniently addressed in the following order: (1) Is the Retailer Franchise Agreement the Renewal or Extension of a Franchise Agreement? (2) Does the Retailer Franchise Agreement Involve the Payment of a Non-Refundable Franchise Fee? And, (3) Is the Retailer Franchise Agreement Valid for Longer than One Year?

[40] In resolving these issues, the following principles of statutory interpretation will be particularly important:

- The words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute, and the intention of the Legislature: *R. v. Lewis*, [1996] 1 S.C.R. 921; *R. v. Heywood*, [1994] S.C.R. 761 at p. 784; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025; *Stubart Investments Ltd.* v. *The Queen*, [1984] 1 S.C.R. 536.

- It is presumed that the legislature avoids superfluous words and that every word in a statute has a role to play: *A.G. Quebec v. Carrières Ste-Thérèse Ltée* (1985), 20 D.L.R. (4th) 602 (S.C.C.) at p. 608.

- Legislation should not be interpreted to leave parts thereof mere surplusage or meaningless: *Subilomar Properties (Dundas Ltd.) v. Cloverdale Shopping Centre Ltd.*, [1973] S.C.R. 596 at p. 603.

- Clear and unambiguous language must be used for a statute to be interpreted as having retrospective application: *Gustavson Drilling (1964) Limited v. M.N.R.*, [1977] 1 S.C.R. 271 *per* Dickson, J. at p. 279; *Angus v. Hart et al.* (1988), 52 D.L.R. (4th) 193 (S.C.C.) *per* La Forest, J. at p. 200.

- Both official language versions of a statute are official, original, and authoritative expressions of the law: *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.

- The general rule is that the English and the French versions of a statute must be read together to assess the Legislature's intention: *R. v. Lewis*, [1996] 1 S.C.R. 921 at p. 957.

- If there is a conflict between the English and the French, then resort may be had to the objective of the statute to determine which version best accords with the intent of Parliament, and if one version is unambiguous then that version should govern: *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680.

[41] To these general principles of interpretation, several principles particular to the *Arthur Wishart Act* should be noted; namely:

- The purpose of the Act is to protect franchisees and the provisions of the Act should be interpreted in that light: *Salah v. Timothy's Coffees of the World Inc.* 2010 ONCA 673 at para. 26; *404341 Ontario Ltd. v. Midas Canada Inc.* 2010 ONCA 478 at para. 30. *6792341 Canada Inc. v. Dollar It Ltd.* (2009), 95 O.R. (3d) 291 (C.A.) at paras. 12, 13, and 72; *Beer v. Personal Service Coffee Corp.*, [2005] O.J. No. 3043 (C.A.) at para. 28; *MDG Kingston Inc. v. MDG Computers Canada* 2008 ONCA 656 at para. 1

- The disclosure requirements of the Act are rigorous and the duty to comply is mandatory: *Beer v. Personal Service Coffee Corp.*, [2005] O.J. No. 3043 (C.A.); *14906664 Ontario Ltd. v. Dig This Garden Retailers Inc.*, [2005] O.J. No. 3040 (C.A.) at paras. 12 and 19; *MDG Kingston Inc. v. MDG Computers Canada* 2008 ONCA 656 at para. 1.

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D. ***Is the Retailer Franchise Agreement the Renewal or Extension of a Franchise Agreement?***

[42] The Defendants rely on the exception found in s. 5(7)(f) of the *Arthur Wishart Act* to the obligation to deliver a disclosure document. In order for this exception to be available, the Retailer Franchise Agreement must be "the renewal or extension of a franchise agreement."

[43] TAK submits, however, that its November 2008 Retailer Franchise Agreement and the Retailer Franchise Agreements of other franchisees who had pre-existing Retailer Franchise Agreement were "new agreements" and, therefore, these agreements were not a "renewal or extension" that would make the exception found in s. 5(7)(g) potentially available.

[44] TAK argues that each Retailer Franchise Agreement is a new agreement because of s. 43 of the immediately preceding Retailer Franchise Agreement envisions the franchisee having the right to express an interest in entering into a new Agreement. Indeed, s. 43 has the title "New Agreement," and s. 43.1 requires the franchisee to deliver a written notice "stating whether it is interested in entering into a new Agreement." It states further that "Suncor will respond either by providing the terms upon which Suncor is prepared to enter into a new Agreement."

[45] TAK further argues that the idea that each successor Retailer Franchise Agreement is a new Agreement is borne out by the conduct of the parties because each party is free to end their contractual relationship at the end of the term of the existing Retailer Franchise Agreement if they cannot come to an accord with Suncor Energy Products about the terms of a new agreement.

[46] I agree with TAK that each newly signed Retailer Franchise Agreement is a new agreement.

[47] It does not follow, however, that a new agreement is not a "renewal" or "extension" of a franchise agreement. Indeed, I would go farther and conclude that if there is an existing franchise agreement, the intent of the Legislature was to regard the next signed agreement between the franchisor and franchisee as necessarily being either a renewal or an extension of that existing franchise agreement. In other words, the Legislature intended to be comprehensive by referring to both renewals and extensions and thus meant that the availability of the exception found in s.5(7)(f) would depend on three factors being satisfied; namely: (1) there being a pre-existing franchise agreement; (2) there being no interruption of the operation of the franchise business; and (3) there having been no material change comparing the old franchise agreement with the new one. In the case at bar, the first two factors are satisfied and there is a genuine issue for trial about the third factor.

[48] In an admittedly different context, the Supreme Court of Canada addressed the difference between renewals of an agreement and extensions of an agreement in *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415. In this case, which concerned the

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principles that govern when a guarantor will be discharged from his or her guarantee, the guarantor, Mr. Conlin, would be discharged if an agreement between the mortgagor, whose mortgage he had guaranteed, and the mortgagee to renew the mortgage for a further three-year term was not an “extension” of the original mortgage. Under his guarantee, Mr. Conlin had agreed to bind himself only to extensions and not to renewals.

[49] Justice Cory for a majority of the Court (Justices La Forest, Sopinka, Cory, and Major concurring) interpreted the meaning of the guarantee drafted by the Manulife and in the course of doing so, Justice Cory discussed the nature and difference between renewals of an agreement and extensions of an agreement. He stated at para. 29 of his judgment:

> Since clause 7 so carefully distinguishes between extensions and renewals, they must be referring to different situations. Both Black's legal dictionary and The Oxford Dictionary give separate and distinct definitions of the terms extension and renewal. Black's Law Dictionary (5th ed. 1979) at p. 1165 defines "renewal" as "[t]he act of renewing or reviving. A revival or rehabilitation of an expiring subject; that which is made anew or re-established" while it defines "extension" at p. 523 as "[a]n increase in length of time (e.g. of expiration date of lease, or due date of note). The word 'extension' ordinarily implies the existence of something to be extended". This clearly indicates that an "extension" refers to extending an agreement which already exists, while a renewal refers to the revival of an agreement which has expired. This distinction is confirmed by The Concise Oxford Dictionary of Current English (9th ed. 1995) at p. 476, which defines "extend" as "lengthen or make larger in space or time" while "renew" is defined at p. 1164 as "revive; regenerate; make new again; restore to the original state"

[50] The heart of the distinction between “renewals” and “extensions” is a renewal rehabilitates or restores an agreement that is gone or expired while an extension continues an agreement that still exists. Using these ideas of what is a “renewal or extension,” it is my opinion that in the *Arthur Wishart Act*, the Legislature intended that any new agreement between the parties, be it a new agreement to replace the old or be it an new agreement to extend the old agreement, would satisfy the first element of the exception found in s. 5(7)(g).

[51] My interpretation of “renewal or extension” does not mean that the first element of s. 5(7)(f) will inevitably be satisfied and become meaningless. The s. 5(7)(f) exception will not be available if there is no pre-existing agreement to renew or to extend.

[52] Conversely, a problem and objection to the interpretation advanced by TAK is that its interpretation reads the s. 5(7)(f) exception out of the Act, because under TAK’s interpretation, it will always be arguable that a newly negotiated and newly signed agreement is a new agreement and, therefore, s. 5(7)(f) would, thus, never be available. This, however, cannot have been the intention of the Legislature.

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[53] Moreover, placed in the context of determining when the Legislature would have intended that a disclosure document be unnecessary, it makes sense that if the franchisee and franchisor have an existing relationship, a disclosure document should not be required unless there was either an interruption of the old arrangement or a material change to that old arrangement. A disclosure document would have a meaningful role to play in those circumstances.

[54] I, therefore, conclude that the s. 5(7)(f) exception is potentially available. This conclusion, however, is not dispositive of the motions for summary judgment because there is a genuine issue requiring a trial about whether there have been material changes to the franchise agreement.

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E. ***Does the Retailer Franchise Agreement Involve the Payment of a Non-Refundable Franchise Fee?***

[55] I move on to issues that, taken together, are dispositive of the motions for summary judgment. The first of these is does the Retailer Franchise Agreement involve the payment of a "non-refundable franchise fee"? There is no controversy about what "non-refundable means" and the matter of contention between the parties is the meaning of "franchise fee."

[56] The *Arthur Wishart Act* does not define what is a "franchise fee." The term, however, is defined in the comparable legislation in Alberta, the *Franchises Act*, R.S.A. 2000, c. F-23 as follows:

> "franchise fee" means a direct or indirect payment to purchase a franchise or to operate a franchised business, but does not include
>
> (i) a purchase of or an agreement to purchase a reasonable amount of goods at a reasonable bona fide wholesale price,
>
> (ii) a purchase of or an agreement to purchase a reasonable amount of services at a reasonable bona fide price, or
>
> (iii) a payment of a reasonable service charge to the issuer of a credit or debit card by an establishment accepting the credit or debit card, as the case may be;

[57] As noted by TAK in its factum, *Black's Law Dictionary* defines a franchise fee "as a fee paid by a franchisee to a franchisor for franchise agreements." There are, of course, many fees and many types of fee that are, or could be, payable under a franchise agreement, and as TAK also notes in its factum, some of these fees could be paid upon entering into the franchise agreement and some could be paid, perhaps periodically or continually, during the term of the franchise agreement.

[58] TAK, of course, argues that the Retailer Franchise Agreement requires the franchisee to pay a "non-refundable franchise fee," or "*redevances de franchisage non remboursables*" which is a very expansive definition because the English translation of

"redevances" includes dues, fees, and royalties and the French definition of "redevances" translates to "a sum of money that must be paid on fixed dates." Thus, in interpreting and in applying its definition of franchise fee, TAK submits the following in paragraph 59 of its factum:

> 59. The RFA requires the franchisee to pay isolated or recurring franchise fees to Suncor Products in connection with customer service and store image programs, certain training programs, and other items designated by Suncor Products from time to time. The RFA required these payments and also required TAK to pay Suncor Products a royalty of 75% of TAK's gross margin (sales less cost of goods sold) on all merchandise inventory TAK sold, a royalty of TAK's gross margin on all car wash services that TAK sold, and a royalty of 85% of TAK's gross margin all "Country Style" products TAK sold.

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[59] In my opinion, however, the expansive French definition and the definition in *Black's Law Dictionary* ultimately are not helpful in defining which of the fees, if all or any of them, were intended by the Legislature in referring to "franchise fees" in the *Arthur Wishart Act*. An immediate problem with TAK's interpretation is that it interprets what counts as a "franchise fee" so as to read the s. 5(7)(g)(ii) exception out of the *Arthur Wishart Act*. While I agree with TAK that what characterizes or identifies a franchise fee under the *Arthur Wishart Act* is not when or how often the charge is paid (be it once, periodically, in installments, continually, or occasionally), TAK's interpretation of franchise fee, which relies heavily on the French version of the Act, is essentially that any fee paid by a franchisee on fixed dates, which would include dues, fees, and royalties, is a franchise fee under the Act.

[60] I disagree. Although, the Ontario Legislature did not provide the assistance offered by the Alberta Legislature, the Ontario Legislature would not have intended, and in my opinion, did not intend that every payment by a franchisee is a franchise fee for the purposes of s. 5(7)(g)(ii) of the Act. Indeed, the Ontario Regulation set out above about disclosure documents does indicate that some fees associated with a franchise are not franchise fees. Thus, I do not find the expansiveness of the French language version of the Act helpful in resolving the problem, which is one of determining the operative scope of the term franchise fee.

[61] I think the Alberta definition, which is, in part, a definition by exclusion, offers a better understanding of what was intended by the *Arthur Wishart Act's* reference to a franchise fee. In my view, a franchise fee it is not a payment for goods or services and it is not a payment for royalties or similar fees payable under the franchise agreement. In my opinion, a franchisee fee under s. 5(7)(g)(ii) is essentially a fee paid for the right to be a member of the franchise chain.

[62] During the course of the argument of the motion, I mentioned several analogies or metaphors to describe the nature of a franchise fee, and I suggested that a franchise fee was akin to "an initiation levy" required to join a club, "key money" required to acquire a leasehold, or a "membership fee", or the surcharge that was a required to obtain the

ability to purchase tickets for seats at a sporting event, all of which provided no goods or services in and of themselves. In my opinion, in the *Arthur Wishart* Act, a franchise fee means a direct or indirect payment to obtain the right to purchase a franchise, to operate a franchised business, or to become a franchisee in a franchise chain.

[63] By this definition, in the case at bar, the Retailer Franchise Agreement does not impose a non-refundable franchise fee, and, therefore, in my opinion, the first element of the s. 5(1)(g)(ii) exception is satisfied in the case at bar.

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F. ***Is the Retailer Franchise Agreement Valid for Longer than One Year?***

[64] The last issue is whether the Retailer Franchise Agreement is valid for longer than one year. Once again, the *Arthur Wishart Act* does not provide a definition to help the analysis.

[65] At the outset of the analysis of this issue, it is significant to emphasize that s. 5(7)(g)(ii) does not focus on the duration or temporal length of the franchise agreement, as such, but rather it focuses on something different that TAK describes as the "validity" of the agreement. Thus, in its factum, TAK argues in paragraphs 43-46:

> 43. In respect of the application of [the s. 5(7)(g)(ii) exception], the Legislature chose to exempt a franchisor based on the length of the validity of the agreement ("not valid for more than one year/*n'est pas valide plus d'un an*'), not the length of the stated term of the agreement. The RAFs were valid beyond their stated terms for three independent reasons, any one of which is sufficient to exclude the application of [the s. 5(7)(g)(ii) exception].
>
> 44. First, the RFA was valid beyond its stated term by virtue of it having been executed more than one year before the end of the stated term of the agreement. The RFA became valid when TAK signed and delivered it on November 11, 2008, and continued to be valid until at least November 14, 2009 when the RFA states that the term ends, a period of least 369 days.
>
> 45. Second, the RFA was valid beyond its stated term by virtue of its extension in the October 2009 memorandum ("this extension preserves all terms and conditions [of the RFAs] until further notice is provided") and again in the Termination Letter ("further to … the extension of your Agreement is on a month-to-month basis"). The RFA was valid for more than one year by virtue of this extension.
>
> 46. Third, the RFAs provide in section 50.2 for their continuance after the stated term is over. The tendency of the retailer continues on a month-to-month basis and the terms of the RFA apply to the tenancy. The terms of the RFA thereupon remain valid for a period in excess of one year. ….

[66] Thus, TAK's argument is that the Retailer Franchise Agreement is valid for longer than one year: (a) by virtue of it having been signed more than one year before the end of the stated term; (b) by virtue of it having been extended by the October 2009 memorandum or the January 2010 Termination Letter; or (c) by virtue of s. 50.2 of the Retailer Franchise Agreement that makes the makes the terms of the agreement extend beyond one year. I do not agree with TAK's argument.

[67] As noted, the *Arthur Wishart Act* does not define "valid." The *Dictionary of Canadian Law* (2nd ed.) (Toronto: Thomson Carswell, 1995) defines "valid" as "having force legally." *Black's Law Dictionary* (9th ed.) (St. Paul: West, 2009) defines "valid" as "legally sufficient, binding." Common knowledge and a review of other dictionary definitions reveals that the idea of "validity" or of being "valid" can mean "correctness" or "soundness," as in the statement "that is a valid argument" or it can mean "not yet expired" as in the statement "my driver's licence or my vehicle licence is valid" or it can mean "legal" as in the statement "that is a valid or legally enforceable contract."

[68] In my opinion, in enacting the s. 5(7)(g)(ii) exception, the Legislature was not referring to the correctness or lawfulness of the franchise agreement but rather it was identifying franchise agreements that had an enforceable term for less than one year; that is, the Legislature was referring to franchise contracts that granted a franchisee rights and imposed obligations on a franchisee that were operative for less than one year. Pursuant to s. 5(7)(g)(ii), if that type of franchise agreement also does not involve the payment of a non-refundable franchise fee, then the franchisor is not obliged to deliver a disclosure document.

[69] In my opinion, when on November 11, 2008, TAK signed a "Retailer Franchise Agreement" with Suncor Products to continue its Sunoco franchise, TAK signed an agreement that had enforceable rights and obligations from the 15th day of November, 2008 to November 14, 2009, which is a period not longer than one year. When the Retailer Franchise Agreement was signed, it provided rights and obligations that were enforceable for precisely one year.

[70] It follows from the above that the happenstance that an agreement is signed before it becomes operational as occurred with TAK's agreement or that events after the signing of the agreement extended the operation of the original franchise agreement do not preclude the availability of the s. 5(7)(g)(ii) exception.

[71] My interpretation draws a distinction between the enforceability of the Retailer Franchise Agreement if that agreement is breached (which may occur anticipatorily before the rights and obligations become operative) and the enforceability and operation of the rights and obligations under the agreement during the defined term of the agreement. This distinction sounds more complicated than it is actually. A contract may be said to be enforceable from the date of its signing because if one side repudiates the agreement by announcing that he or she will never perform the agreement, then the innocent party may sue immediately for damages, and depending on the nature of the agreement, the innocent party may also have the alternative of suing immediately for specific performance. In the latter case, the contract would remain operative and the

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rights and obligations would be as operative as described by the contract. Under either alternative, the innocent party does not acquire any rights beyond those contracted for under the contract. In other words, there is no extension or enlargement of the rights and obligations under the contract by reason of the anticipatory breach making the contract immediately enforceable by court action. The availability of a cause of action is different from the extent of the rights and obligations under the contract.

[72] Under my interpretation, which recognizes the above distinction, while it might be possible to enforce the Retailer Franchise Agreement for a period longer than one year, if there is an anticipatory breach, the rights and obligations themselves are available only for the period defined by the contract, which is less than one year. Thus, the Retailer Franchise Agreement is not valid for longer than one year since the rights and obligations it affords are operative for less than one year.

[73] A problem in TAK's interpretative argument, which submits that Suncor Products breached the *Arthur Wishart Act*, is that these arguments rely on events or circumstances that occurred after the fact of the signing of the franchise agreement. It is a fundamental notion of justice and of statutory interpretation that conduct cannot become illegal after the fact of the conduct.

[74] In support of its argument, TAK relies on cases that call for interpretations of the *Arthur Wishart Act* that enhance the franchisee protection purposes of the Act, but, in my opinion, the Legislature did not intend to make a prospective obligation to provide a disclosure document to operate retroactively and, thereby, make conduct illegal that was proper at the time when it occurred.

[75] In *4287975 Canada Inc. v. Imvescor Restaurants Inc.* (2009), 98 O.R. (3d) 187 (C.A.), the Court of Appeal held that the purpose of the disclosure document is to provide the franchisee with at least fourteen days to consider whether to agree to the terms of the franchise agreement. In the case at bar, TAK's interpretation leads to the incongruous result that at the time of signing the Retailer Franchise Agreement a disclosure statement was not required; however, later, after the October 2009 memorandum or the January 2010 Termination Letter, it is determined that a disclosure statement was required.

[76] Further, in enacting s. 5(7), the Legislature intended that there be exceptions to the franchisor's disclosure obligations. A mutually exclusive second problem in TAK's interpretation argument is that it leaves no room for s. 5(7)(g)(ii) to operate. It will always be possible that a franchise might be extended beyond its original term or that a franchisee would overhold and extend the enforceability of the franchise agreement that would govern the franchise relationship. It is a fundamental principle of statutory interpretation that the Legislature intends that its enactments have some effect or influence. TAK's arguments would have the terms of a franchise agreement be longer than one year simply if the agreement contemplates the possibility of extension. That interpretation reads the s. 5(7)(g)(ii) exception out of the Act.

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[77] It is TAK's interpretation that the mere potentiality of the overholding provision becoming operative precludes the exception to the obligation to deliver a disclosure document being available to the Defendants. Although, it is true that the franchise agreement envisions the possibility of overholding, it is, however, equally true that the franchise agreement envisions no renewals, extensions, and new agreements. Practically speaking, TAK's interpretation means that the availability of the s. 5(7)(g)(ii) cannot be determined at the time when the obligation on the franchisee to deliver disclosure documents is imposed. TAK's position writes the s. 5(7)(g)(ii) out of the Act, which cannot have been the intention of the Legislature.

[78] I, therefore, conclude that the Retailer Franchise Agreement satisfies the element of not being valid for longer than one year.

G. ***Conclusion***

[79] For the above reasons, I dismiss the Plaintiff's and grant the Defendants' motion for summary judgment.

[80] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Defendants within 20 days of the release of these Reasons for Decision, followed by the Plaintiff's submissions within a further 20 days.

PERELL, J.

Released: December 17, 2010

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COURT FILE NO.: 10-CV-395207-CP
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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

TA & K Enterprises Inc.

Plaintiff

- and -

Suncor Energy Products Inc. and Suncor Energy Inc.

Defendants

REASONS FOR DECISION

Perell J.

Released: December 17, 2010