

Franchising - Canada

Ontario Court of Appeal upholds analysis of statutory disclosure exemption

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The Ontario Superior Court's decision in *TA & K Enterprises Inc v Suncor Energy Products Inc* was the first to consider the application of the exemption in the Arthur Wishart Act (Franchise Disclosure) whereby a franchisor is not required to deliver a disclosure document in circumstances where the franchise agreement is not valid for more than one year and does not involve the payment of a non-refundable franchise fee (for further details please see

["Will important clarifications to disclosure document exemptions stand?"](#)). On appeal by the franchisee, the Ontario Court of Appeal has confirmed the superior court's decision and has further elucidated the two requirements which must be met in order for the exemption to apply.

Facts

TA & K Enterprises Inc, the franchisee, entered into a retail franchise agreement with Suncor Energy Products Inc, the franchisor, on November 11 2008. The agreement term was one year, which commenced on November 15 2008 and expired on November 14 2009. The franchisor did not provide a disclosure document before execution of the agreement.

In August 2009 the franchisor's parent company merged with Petro Canada. The franchisor notified the franchisee that on when the agreement expired, it would be extended on a rolling monthly basis with the same terms and conditions. The franchisee sought the rescission remedy and damages and commenced a proposed class action on the basis that the franchisor had not provided a disclosure document. The franchisor brought a motion for summary judgment seeking dismissal of the action, as a disclosure document was not required.

The superior court held that the franchisor had established that the requirements for the exemption were met – namely, the franchise agreement was not valid for longer than one year and it did not involve the payment of a non-refundable franchise fee.

Proceedings

On appeal, the franchisee argued that the franchisor had met neither requirement of the exemption. The franchisee maintained that while the agreement was valid for one year, the term was in fact longer due to several factors which served to extend it:

- The agreement was signed on November 11 2008 and bound the parties between November 15 2008 and November 14 2009;
- Either party could sue for anticipatory breach of contract as of signing;
- The indemnity and confidentiality provisions of the agreement survived termination;
- The terms of the agreement provided that should the franchisee remain in possession of the premises beyond the term, the tenancy would continue on a rolling monthly basis; and
- The monthly extensions of the agreement after November 14 2009 served to make the agreement valid beyond the one-year term.

The franchisee then argued that it was required to pay a franchise fee and, as such, the franchisor did not meet the second requirement of the exemption. To support its allegation that the second requirement of the exemption had not been met, the franchisee argued that payments for intangibles (eg, royalties) must be considered

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franchise fees.

The Ontario Court of Appeal was firm in its rejection of this argument and held that such an analysis would prevent any franchise agreement from meeting this requirement of the exemption, which could not have been the legislature's intent. The court of appeal agreed with the motions judge that a franchise fee is a fee paid for the right to become a franchisee, rather than a payment for goods services or royalties.

Decision

The court of appeal was not persuaded by the franchisee's arguments to the effect that the term of the agreement was extended beyond one year. The court held that the legislative purpose behind the requirement that disclosure documents be provided in the context of franchise agreements with terms of more than one year is to protect franchisees by ensuring that they receive a disclosure document before committing to an agreement, unless the period of their commitment is short and therefore 'low risk'. The Arthur Wishart Act fixes this 'low-risk' period at one year or less.

The court of appeal found that the agreement term was one year, as the franchisee was bound by rights and obligations for a one-year period. It agreed with the motions judge and held that the availability of a cause of action is not what the term requirement of the exemption attempts to capture, which is the duration of rights and obligations under the agreement.

The court of appeal also found that the survival of the indemnity and confidentiality provisions does not extend the agreement itself, and that the over-holding provision does not extend the entirety of the agreement, but rather provides solely for the over-holding of the tenancy. The court of appeal held that the month-to-month extensions of the agreement merely created new monthly agreements. As per the court, the franchisee's argument was contrary to the scheme of the disclosure document sections of the Arthur Wishart Act, which provide that the disclosure obligation must be assessable when the agreement is signed so that a franchisor is in a position to determine whether disclosure is required.

Comment

The court of appeal's analysis and support of the motion judge's decision provide franchisors wishing to avoid the disclosure requirement with guidance on how the exemption from disclosure is applied. Should a franchisor wish to avail of this exemption, the term of a proposed franchise agreement should be carefully drafted so as to be limited to 12 months or less, and the franchisor cannot require the payment of a franchise fee. As such, it would seem that courts will uphold franchise agreements that are carefully drafted so as to take advantage of the disclosure exemption.

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