



THINKING OF TERMINATING A VERBAL (FRANCHISE) AGREEMENT?

STEVEN BENTO*

ROBIC, LLP

LAWYERS, PATENT AND TRADE-MARK AGENTS

Recently, the Ontario Superior Court of Justice ruled on the sensitive issue of the termination of a verbal franchising agreement which, at first glance, made no provisions in this regard.

The Cases of *France v. Kumon*

The case of *France v. Kumon* [2014 ONSC 5890] pitted Ms. France (hereinafter "France"), who ran a franchise of mentoring programs for nearly 20 years, starting in 1991, against Kumon Canada Inc. (hereinafter "Kumon"), the franchisor. France was a reading and math teacher, and therefore had the skills to provide Kumon programs, which she did throughout the verbal franchise agreement. In 1994, Kumon began requiring that all franchisees bound by oral contracts sign a written agreement. France refused to sign one, on the pretext that the financial provisions contained therein were unfavorable to her. For nearly 16 years, both parties pursued negotiations, ultimately failing to produce a signed written agreement. On December 23, 2010, after providing 12 months' notice, Kumon ended the oral franchise agreement between the parties.

An analysis of the good faith of each party within the contractual franchisor-franchisee relationship led the Court to assess whether there had been interference in the oral contractual relationship between Kumon and France. First, the Court analyzed the obvious inequality of the relationship between a stronger party, Kumon, and a far weaker party, France. Their analysis concluded: "The court will typically look to specific terms of the contract as well as the relationship between the parties to determine whether the contract is perpetual or not." The Court held that even if the contractors are two companies who are both well-informed in business matters, it may still be necessary to intervene when a contract has an ill-defined provision for termination, so that it does not continue in perpetuity. In this case, the Court cited 1397868 Ontario Ltd. v. Nordic Gaming Corp.:

When the term of a contract is not fixed and there is no provision for termination on reasonable notice, a court may treat a contract as either perpetual in nature or as an indefinite term contract into which

© CIPS, 2015.

* From ROBIC, LLP, a multidisciplinary firm of Lawyers, and Patent and Trade-mark Agents. Published in the Winter 2015 (Vol. 18, no. 3) Newsletter of the firm. Publication 068.188E.

ROBIC, LLP
www.robic.ca
info@robic.com

MONTREAL
1001 Square-Victoria - Bloc E - 8th Floor
Montreal, Quebec, Canada H2Z 2B7
Tel.: +1 514 987-6242 Fax: +1 514 845-7874

QUEBEC
2828 Laurier Boulevard, Tower 1, Suite 925
Quebec, Quebec, Canada G1V 0B9
Tel.: +1 418 653-1888 Fax.: +1 418 653-0006

the court implies a provision of unilateral termination on reasonable notice.

In light of the evidence submitted, Judge Goldstein held that the oral franchise contract between the parties was not perpetual but rather an indefinite term contract into which the Court implied a reasonable notice term. In order to determine what would constitute reasonable notice in the case at hand, the Court asked that additional submissions be made by the parties.

In a subsequent decision on the issue of reasonableness of the notice given by Kumon to France (France v. Kumon) the Court found that the franchisor-franchisee relationship was more akin to an employer–employee relationship than to one in a distributorship context. Nevertheless, the Court nuanced this comparison by stating that although there are some similarities, the franchisee is not an employee (he is very much so an independent contractor) and the franchisor does not have a fiduciary duty towards said franchisee

The Court then set out, certain factors that it deemed important when considering a reasonable notice period in a franchise context:

- The length of the relationship between the franchisee and the franchisor;
- Whether there was a history of oppressive conduct or bad faith on the part of the franchisor;
- Whether there was a history of poor performance by the franchisee;
- Whether the franchisor or franchisee, as the case may be, has acted in good faith throughout the course of the relationship; and,
- Whether there have been violations of the Wishart Act.

In taking these factors into account, the Court decided that the 12 months' notice given to France were not sufficient under the circumstances and that the appropriate notice period that should have been given to France is 18 months.

Finally, the Court felt it was important to make it clear that this award should not be interpreted as a “rule of thumb”.



ROBIC, LLP
www.robic.ca
info@robic.com

MONTREAL
1001 Square-Victoria - Bloc E - 8th Floor
Montreal, Quebec, Canada H2Z 2B7
Tel.: +1 514 987-6242 Fax: +1 514 845-7874

QUEBEC
2828 Laurier Boulevard, Tower 1, Suite 925
Quebec, Quebec, Canada G1V 0B9
Tel.: +1 418 653-1888 Fax.: +1 418 653-0006

ROBIC, LLP
www.robic.ca
info@robic.com

MONTREAL
1001 Square-Victoria - Bloc E - 8th Floor
Montreal, Quebec, Canada H2Z 2B7
Tel.: +1 514 987-6242 Fax: +1 514 845-7874

QUEBEC
2828 Laurier Boulevard, Tower 1, Suite 925
Quebec, Quebec, Canada G1V 0B9
Tel.: +1 418 653-1888 Fax.: +1 418 653-0006

ROBIC, LLP
www.robic.ca
info@robic.com

MONTREAL
1001 Square-Victoria - Bloc E - 8th Floor
Montreal, Quebec, Canada H2Z 2B7
Tel.: +1 514 987-6242 Fax: +1 514 845-7874

QUEBEC
2828 Laurier Boulevard, Tower 1, Suite 925
Quebec, Quebec, Canada G1V 0B9
Tel.: +1 418 653-1888 Fax.: +1 418 653-0006

ROBIC, LLP
www.robic.ca
info@robic.com

MONTREAL
1001 Square-Victoria - Bloc E - 8th Floor
Montreal, Quebec, Canada H2Z 2B7
Tel.: +1 514 987-6242 Fax: +1 514 845-7874

QUEBEC
2828 Laurier Boulevard, Tower 1, Suite 925
Quebec, Quebec, Canada G1V 0B9
Tel.: +1 418 653-1888 Fax.: +1 418 653-0006