

THE ALBERTA COURT OF APPEAL DISCUSSES FRANCHISES IN ALBERTA

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On April 28, 2004, in *475878 Alberta Ltd. v. Help-U-Sell, Inc.* (2004) A.J. No.478, Docket No.: 0203-0383-AC (Berger, Costigan and Ritter J.J.A.), the Alberta Court of Appeal rendered a decision on a judgment by J. Wilson of the Alberta Court of Queen's Bench which discusses the interpretation and damages relating to a breach of a franchise agreement.

The interest of this case goes beyond usual franchise agreements since certain types of licences may fall under the definition of a "Franchise" under the *Franchises Act*, R.J.A., 1980, chap. F-17 (the "Act"). Such definition reads as follows:

" "Franchise" means a right to engage in a business (i) in which goods or services are sold or offered for sale or are distributed under a marketing or business plan prescribed in substantial part by the franchisor or its associate, (ii) that is substantially associated with a trademark, service mark, trade name, logotype or advertising of the franchisor or its associate or designating the franchisor or its associate, and (iii) that involves (A) a continuing financial obligation to the franchisor or its associate on the operations of the franchised business, or (B) the payment of a franchise fee, and includes a master franchise and a subfranchise. "

For example, a trademark licence agreement under which the licensee would have to sell products substantially associated with a trademark of the licensor in accordance with a business plan to be approved by the licensor in consideration of a license fee could be considered as a "Franchise" under the application of such Act.

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The facts

On October 18, 1990, Help-U-Sell, Inc., a franchising company licensing two types of franchises (i) "Real Estate Franchises" and (ii) "Master Regional Franchises", registered a prospectus with the Alberta Securities Commission to sell real estate franchise agreements in Alberta which registration was valid for a period of one (1) year unless renewed as required under the Act.

A Master Regional Franchise Agreement was entered into on December 6, 1990 between Wayne M. Cholak, as franchisee and Help-U-Sell, Inc., as franchisor (the "Franchise Agreement"), providing the franchisee with the right to sell the franchises in Alberta for an initial term of five (5) years in consideration of a franchise fee. On January 16, 1991, Mr. Cholak's rights under the Franchise Agreement were assigned to 475878 Alberta Ltd. with the consent of Help-U-Sell, Inc. The Franchise Agreement provided that: "the franchise fee is deemed to have been fully earned by the franchisor and can not be refunded to the franchisee except if the franchisor terminates the Franchise Agreement prior to the Initial Training Program". The program was indeed completed by the franchisee which began to market franchises in Alberta thereafter.

On July 16, 1991, the parent company of Help-U-Sell, Inc. entered into a rehabilitation conservatorship under the direction of the New Jersey Insurance Commission, due to financial difficulties. Help-U-Sell, Inc. applied for renewal of the franchise registration, which registration of the prospectus was not renewed by the Alberta Securities Commission because of concerns over the financial viability of the franchisor's parent corporation.

475878 Alberta Ltd. and Wayne M. Cholak (plaintiffs) sought rescission of the Franchise Agreement based on the breach of such agreement, and claimed the refund of the franchise fee and damages for loss of profit by filing a statement of claim against Help-U-Sell, Inc., MBL Holding Corporation and S & S Acquisition Corp (defendants).

Judgement

The trial judge concluded that Help-U-Sell, Inc. did not breach the Franchise Agreement since there was no obligation for Help-U-Sell, Inc. to maintain or renew the registration of the prospectus. At trial, the franchisee's evidence on damages was directed towards establishing loss of profit demonstrated by the testimony of an expert and the judge decided that the loss of profit damages had not been established and found the evidence was too speculative.

475878 Alberta Ltd. and Wayne M. Cholak (the appellants) appealed the dismissal of their action for damages for breach of the Franchise Agreement. The Alberta Court of Appeal had to rule as to whether the Franchise Agreement provided an obligation for Help-U-Sell, Inc. and als (the respondents) to renew the registration of a prospectus and if so, if the appellants incurred damages dues to such non-renewal. An argument was made by the appellants to the effect that the trial judge erred in his interpretation of the Franchise Agreement and claimed reliance damages, which were not pleaded in the statement of claim. The Court mentioned that, at trial, the appellants provided no evidence to support reliance damages and therefore, the respondents led no evidence to meet a reliance damages claim.

Since the Franchise Agreement specifically provides that the franchise fee was "fully earned and non-refundable", the Appeal Court stated that it was doubtful that the franchise fee would be recoverable in any event.

The court finally decided that it was too late to consider a claim for reliance damages. Assuming that no argument was made at trial, the appeal provided no basis and the risk of prejudice to the respondents was marked. Since damages could not be established, the Court ruled that it was unnecessary to consider the liability of the respondents issue and the appeal was dismissed.

Conclusion

This judgement is a good example of a decision relating to the interpretation of contracts and the importance to clearly draft agreements by indicating in writing the exact intentions and obligations of each party.

In order to protect a franchisee against such situation, considering that the registration of prospectus is essential for franchisees to operate in Alberta, it is recommended that franchise agreements provide an obligation for the franchisor, and also a right for the franchisee in case of failure by the franchisor, to maintain such registration. Also, since the renewal of the registration may be at the discretion of the Director of the Alberta Securities Commission and represents a risk for franchisees, franchise agreements could provide that the franchisee be indemnified in the event that the registration is not renewed for any reason, for greater protection of the franchisee.

Moreover, the decision is a reminder that all evidence for damages should be demonstrated and pleaded at trial, since no additional evidence or basis of argument may be made in appeal.

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