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A New Vision for Franchise Releases: Ontario Superior Court Provides Clarity to the Scope of Enforceable Releases of Wishart Act Claims

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We at Cassels, and many in the Canadian franchise law bar, have long taken the position that any negotiated release of an existing and known claim under the *Arthur Wishart Act (Franchise Disclosure), 2000* (Wishart Act), where the settling franchisee had the benefit of independent legal advice, is a valid and enforceable release despite the non-waiver provision found in section 11 of the Wishart Act. In *New Vision Renaissance MX Ltd. v The Symposium Café Inc.*, the Ontario Superior Court of Justice affirmed that view, providing clarity to the law on what constitutes an enforceable release of Wishart Act claims.¹

Background

The plaintiff entered into a franchise agreement with the defendant for a new restaurant franchise in February 2015 and opened for business in June 2015 in Stouffville, Ontario. A number of amending agreements to the franchise agreement were executed prior to the opening of the restaurant. One of these amending agreements arose from a dispute regarding the franchisee's ability to close the transaction for the opening of the restaurant. The amendment resolving this dispute provided for a short term loan to the franchisee permitting them to bridge a shortfall in funds and close the transaction. In exchange for this loan, the franchisor received a release of any claims arising from the disclosure provided to the franchisee including any rescission claims.

After roughly one year of operation, the franchisee delivered a notice of rescission in May 2016 seeking to rescind the franchise agreement on the basis of several alleged deficiencies in the disclosure document it received. In response, the franchisor denied the plaintiff's entitlement to rescind and terminated the franchise agreement alleging it had been wrongfully repudiated. The franchisor further took the position that the franchisee had released any rescission claim it may have had pursuant to the amending agreement which provided the loan. The plaintiffs took the position that the release was void pursuant to section 11 of the Wishart Act, which prohibits franchise parties from contracting out of or waiving their obligations under the Wishart Act. Litigation was commenced, and both parties sought summary judgment on their respective claims.

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It's Tutor Time: Release Found Valid and Enforceable

In granting summary judgment to the defendant franchisor, the Court found that the release executed as part of the amending agreement fell within the established exception to section 11 of the Wishart Act known as the “*Tutor Time* Exception.” The exception comes from a case called *1518628 Ontario Inc. v Tutor Time Learning Centres, LLC*, where the Court found that section 11 did not apply to void a release given with the benefit of independent legal advice in the context of a settlement of a known, existing claim.²

The plaintiff took the position at summary judgment that, in order to meet the “*Tutor Time* Exception” to section 11, the release must arise from a settlement of the same dispute being released. In this case, the Court acknowledged that the dispute being settled was of a different nature, and related to the franchisee’s inability to meet its payment obligations upon closing to open the restaurant. The Court rejected the plaintiff’s position that a release of disclosure claims could not be given in settlement of this dispute, finding that it is sufficient that the release be given in the context of any dispute or potential dispute regardless of whether that dispute relates to the claims being released.

The plaintiff further argued that the release was invalid as it purported to release future claims that could not have been known at the time it was entered into. The Court similarly rejected this, noting that the release was limited to claims arising from the disclosure provided prior to the execution of the franchise agreement. The Court further clarified that it is sufficient that the claims be “knowable” to the franchisee and that actual, subjective knowledge is not required.

The Court further rejected the argument that an “ILA Certificate” was required to meet the requirement that the franchisee have the benefit of independent legal advice when executing the release. In this case, there was ample evidence that the franchisee had consulted with a lawyer who participated in negotiations regarding the terms of the amending agreement and release. The evidence went so far as to show that the franchisee’s counsel requested changes that would have narrowed the release language, that were not accepted by the franchisor.

Accordingly, the Court concluded that it would be inequitable to permit the franchisee to rely on section 11 of the Wishart Act to resile from the release given in exchange for the loan in the amending agreement and that the release was not void pursuant to section 11. This finding was especially important given that the Court also found that, had the release not been enforceable, the plaintiff would have been entitled to rescission based on the lack of a signed disclosure certificate. Thus, instead of being held liable for rescission, the franchisor’s termination of the franchise agreement was upheld and it was allowed to pursue its claim for damages arising from the termination.

Key Takeaways

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New Vision is a helpful case for franchisors that provides needed clarity to the scope of enforceable releases of Wishart Act claims. It confirms the view that many in the franchisor-side bar have held for some time that, so long as a release is negotiated as part of the resolution of a dispute, relates to known, existing claims, and is given by the franchisee with the benefit of legal advice, it can be enforced despite section 11. This permits franchisors to bargain for releases of existing or potentially existing Wishart Act claims in resolution of any dispute that arises in the course of the franchise relationship and not just in resolution of a settlement of the claim being released. Such concessions can be especially important when a live disclosure issue, such as the unsigned certificate in this case, exists and can be inoculated through the negotiation of a valid, *Tutor Time* release. Franchisors should always consult with their legal advisors to ensure the proper steps are taken to meet the *Tutor Time* exception.

1 *New Vision Renaissance MX Ltd. v. The Symposium Café Inc.*, 2020 ONSC 1119 (CanLII), <<http://canlii.ca/t/j5m44>> [*New Vision*].

2 *1518628 Ontario Inc. v. Tutor Time Learning Centres, LLC*, 2006 CanLII 25276 (ON SC), <<http://canlii.ca/t/1p0mb>>, at para. 108.

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