

Cassels Successful in Upholding Disclosure Exemption on Behalf of Hotel Brand Franchisor

Stefanie Holland, Geoffrey B. Shaw

July 8, 2019

On May 31, 2019, the Ontario Superior Court of Justice granted judgment in favour of Radisson Hotels Canada Inc., formerly known as Carlson Hotels Canada, Inc., (Radisson), by enforcing arbitration awards and dismissing its former licensees' (the Former Licensees) application for leave to appeal/set aside the arbitration awards.

The decision is a welcome development for franchisors, as it confirms the application of an unlitigated large franchise transaction exemption under the *Arthur Wishart Act (Franchise Disclosure) 2000*, SO 2000 c 3 (the Wishart Act) and that section 7 of the Wishart Act does not apply when the underlying disclosure document was provided voluntarily, and therefore exempt from the Wishart Act's disclosure requirements.

Background

In September 2017, the Former Licensees commenced an arbitration against Radisson claiming over C\$4 million in damages arising out of their purported rescission of the parties' License Agreement for the operation of a Radisson branded hotel. The Former Licensees sought statutory rescission and damages in accordance with section 6, and damages for misrepresentation under section 7 of the Wishart Act.

In September 2018, the arbitrator granted Radisson summary judgment in respect of the claim for statutory rescission and related damages, concluding that Radisson was exempt from any obligation to provide disclosure pursuant to the investment exemption set out in section 5(7)(h) of the Wishart Act. The exemption stipulates that where a franchisee has invested more than C\$5 million in acquiring and operating a hotel within the first year, the franchisor is exempt from the disclosure obligations of the Wishart Act. The arbitrator concluded that the Former Licensees had invested over C\$8 million in the first year of operating the hotel.

The parties delivered further written submissions regarding the impact of the arbitration award on the Former Licensees' claim for statutory misrepresentation, which was subsequently dismissed by the arbitrator. In December 2018, the arbitrator rendered a supplementary award concluding that a claim for statutory misrepresentation relating to a disclosure document cannot survive an applicable exemption under section 5(7) of the Wishart Act (the Supplementary Arbitration Award).

Former Licensees Denied Leave to Appeal

Cassels

Following the dismissal of their section 7 misrepresentation claim, the Former Licensees sought leave from the Ontario Superior Court of Justice to appeal the Supplementary Arbitration Award. In turn, Radisson sought an order to enforce the arbitration awards.

The first issue that the Court considered was whether the Supplementary Arbitration Award could be appealed. The arbitration clause between the parties provided that the arbitrator's decisions are "final, conclusive, and binding," which the Court determined was an intention by the parties to exclude a right of appeal. As such, the Court found that the Former Licensees had no right to appeal.

The Court also considered whether it *should* grant leave to appeal. The sole question raised by the Former Licensees was whether a franchisee is entitled to statutory damages when a franchisor, that is exempt from its statutory disclosure obligations, voluntarily provides a disclosure document containing alleged misrepresentations. The Court found that the Former Licensees did not meet the threshold issue of proving that the matters at stake were of sufficient importance to the parties to warrant granting leave to appeal. In fact, the Court noted that the evidentiary record demonstrated that the Former Licensees continued to operate the hotel profitably.

Finally, the Court confirmed that even if leave to appeal were granted, the arbitrator's awards were both reasonable and correct. Specifically, the Court confirmed that section 7 of the *Wishart Act* should not be broadened so as to capture voluntary disclosure that was found to be exempt pursuant to section 5. The Court noted that to broaden the application of section 7 would be contrary to the purposes of the *Wishart Act*. It would effectively extend statutory misrepresentation remedies beyond prospective franchisees with insufficient bargaining power, to the commercially sophisticated parties enumerated in, and specifically excluded by, section 5 of the *Wishart Act*.

Following its decision to deny the Former Licensees' leave to appeal, the Court granted judgment and enforced the arbitration awards.

Key Takeaway

This decision provides a precedent for cases in which a franchisee is claiming statutory damages for alleged misrepresentations in a disclosure document that was not only voluntarily provided to the franchisee, but was also found to be exempt under section 5. Prior to this decision, there was little, if any, commentary by the courts regarding the application of the large investment exemption and the impact its application would have on a claim for statutory misrepresentation. The Court's reasons further provide guidance as to the overall underlying purpose of the *Wishart Act* – specifically, that it is not intended to apply to commercially sophisticated prospective franchisees, captured by the section 5 exemptions.

Radisson was represented by Geoffrey B. Shaw, Stefanie Holland, and Alexandra Murphy of the Cassels Franchise Group's litigation team.

Cassels

A copy of the decision can be found [here](#).

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.