

CITATION: David Zwaniga v. Johnvince Foods Distribution, 2012 ONSC 5234
COURT FILE NO.: 11-CV-422868CP
DATE: 2012-09-19

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
DAVID ZWANIGA AND JENNIFER	)	<i>Darcy Merkur and Stephen Birman, for the</i>
ZWANIGA	)	Plaintiffs
	)	
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
JOHNVINCE FOOD DISTRIBUTION L.P.	)	<i>Jill M. Knudsen for the Johnvince Food</i>
AND REVOLUTION FOOD	)	Distribution L.P.
TECHNOLOGIES INC.	)	
	)	<i>Son Dhanju-Dhillon for Revolution Food</i>
Defendants	)	Technologies Inc.
	)	
	)	
	)	
	)	HEARD: September 10, 2012

REASONS FOR DECISION

PERELL, J.

A. INTRODUCTION

[1] David and Jennifer Zwaniga have commenced a proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6 against Revolution Food Technology Inc., a vending machine distributor, and Johnvince Foods Distribution L.P, which is a vendor of candies and confections and the distributor of Planters^{®/MD} peanuts in Canada.

[2] Pursuant to s.6 of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3, the Zwanigas allege misrepresentation and claim damages and rescission of an alleged franchise agreement. They also allege a breach of the statutory duty of fair dealing under the *Act*.

[3] Johnvince Foods brings a motion for summary judgment to have the action dismissed against it. It submits that its role was only as a peanut supplier to Revolution Food and it was not a partner, joint venturer, or “franchisor’s associate” of Revolution Food.

[4] The Zwanigas resist the motion for summary judgment, and in doing so, they rely, in part, on the evidence of Roderick Knight, who is the President of Revolution Food. Although, it

is the pleaded position of Revolution Food that Johnvince Foods is not its partner or joint venturer, nevertheless, Revolution Food and the principals of Revolution Food, including Mr. Knight, recently agreed to co-operate with the Zwanigas in their claim against Johnvince Foods and to assist them in resisting Johnvince Foods motion for summary judgment.

[5] In addition to resisting the summary judgment motion on the merits, the Zwanigas submit that that it is premature to decide the claims against Johnvince Foods before certification and before the examinations for discovery.

[6] For the reasons that follow, I disagree. I grant Johnvince Foods' motion for summary judgment.

B. FACTUAL BACKGROUND

[7] Johnvince Foods owns the perpetual right to exclusively distribute Planters™ nut products in Canada. Planters™ is a leading brand of nut products, and its "Mr. Peanut" character trademarks are very valuable.

[8] In the spring of 2009, Revolution Food approached Johnvince Foods about supplying products to a vending machine program. The parties had not done business previously. Revolution Food had developed a marketing scheme to recruit members to participate in the "Revolution 650™ Vending Distributorship Program," (the "Distributorship Program"). Revolution Food's idea was to sell vending machines to individual distributors who would become members associated with a buying group and who would buy product and merchandising goods from Revolution Food. Johnvince Foods would provide peanuts and confectionary products to the buying group. The distributors would keep the revenue from the vending machines.

[9] On June 26, 2009, Johnvince Foods and Revolution Food signed a Sponsorship and Supply Agreement, under which Johnvince Foods agreed to supply Planters®/MD peanuts products for the Distributorship Program. Revolution Food guaranteed that it would process all food products orders with Johnvince Foods. Under the Sponsorship and Supply Agreement, Johnvince Foods was referred to as the supplier and Revolution Food was referred to as the marketing company.

[10] Under the Sponsorship and Supply Agreement, Revolution Food would develop marketing materials subject to approval by Johnvince Foods in respect to the use of its name or trademarks.

[11] Under the Sponsorship and Supply Agreement, Revolution Food agreed to establish a product ordering (credit balance) account with Johnvince Foods and hold a minimum balance of the greater of \$10,000.00 and 50% of the total funds held by Revolution Food as deposits from the distributors. This provision meant that there was very little financial risk for Johnvince Foods in supplying its products because, practically speaking, the goods were being paid for in advance.

[12] Revolution Food agreed to achieve certain targets for membership in its Distributorship Program, including the installation of 3000 machines by the first year and 6000 machines by the second year. Revolution Food agreed to provide monthly reports including information about the

number of distributors appointed and machines sold during that month, current total balance of distributor's snack product credit accounts, and details of any consumer complaints received during that month. Revolution Food agreed to make its company records, bank statements and personnel relating to the Distributorship Program and the credit accounts of distributors available during normal business hours for inspection and audit by a representative of Johnvince Foods.

[13] For its part, under the Sponsorship and Supply Agreement, Johnvince Foods agreed to provide: a non-exclusive licence to display the Planters^{®/MD} trademarks; the right to purchase Planters^{®/MD} promotional products for giveaways; 150 Planters^{®/MD} brand products per marketing seminar; a designated contact person for Revolution Food's staff to contact; a letter describing its relationship with Revolution Food; and a letter of introduction verifying Johnvince Foods' support of the Distributorship Program.

[14] The Sponsorship and Supply Agreement had a one year term and would automatically renew at the end of the initial period for a further year, unless either party notified the other ninety (90) days before the anniversary date of that party's intention to renegotiate or cancel the agreement. Johnvince Foods could cancel for cause if Revolution Foods did not meet its vending machine targets.

[15] As noted above, under the Sponsorship and Supply Agreement, Johnvince Foods granted Revolution Food a non-exclusive licence to display the Planters^{®/MD} trademarks. This was the first instance of Johnvince Foods granting a licence, and it did so based on assurances from Revolution Food that the Distributorship Program would generate sufficient product sales to justify the grant of the licence. From the Distributorship Program, Johnvince Foods earned revenue from the sale of its products and it gained marketing and advertising exposure for its brands. The Distributorship Program presented a unique opportunity for Johnvince Foods to enter a market segment in which it had no exposure.

[16] It is to be noted that Revolution Food developed the Distributorship Program and it implemented, managed, and directed the program. It designed and manufactured the vending machine. It made the representations to distributors, and it formulated the budgets for the distributors that were described in the promotional material. Although, Johnvince Foods was involved in the settling the form of the agreement to be signed by the distributors, it did so mainly to ensure that its trademarks were protected.

[17] Johnvince Foods was not involved in the recruitment process, and it had no say in who was to become a distributor in the Distributorship Program. It had no contractual relationship with the distributors.

[18] Apart from being paid for its product, Johnvince Foods received no revenue from the Distributorship Program and all the costs of developing, marketing, managing, and administering the program were on the account of Revolution Food, which earned the profits from the Distributorship Program.

[19] On his cross-examination, Mr. Knight described the role of Johnvince Foods as follows:

Q. They [Johnvince] did not share profits with Revolution, did they?

A. No.

Q. And, in fact Johnvince's role, its business with respect to this program, was simply the supply of peanuts and Candy Guy products, right?

A. That's correct.

Q. And Revolution's business was to go out and market the program, appoint distributors, sell machines and take in membership fees. That was Revolution's business?

A. That's correct.

Q. And in fact, you were very careful with your members to ensure that they knew that you and Johnvince were independent, separate, unrelated entities, didn't you.

A. That's correct.

Q. Right. And that's why you went to the effort of including paragraphs on the Letter of Understanding ...[stating] "I understand that Revolution Food Technologies Inc. and the Revolution Buying Group are independent organizations and not owned by or affiliated with Johnvince Food Distributors L.P. and or Planters." Right?

A. Yes.

Q. And that was true?

A. Yes, the entire thing was true.

Q. And you specifically pointed out to the buying group members that Johnvince Foods could terminate the sponsorship and exclusive supply agreement and that that would bring the program to an end?

A. That's correct.

[20] Revolution Foods conducted a campaign to recruit members to the Distributorship Program. Johnvince Foods, however, was rarely present at the recruitment meetings, and it never participated in any official capacity at any of Revolution Food's presentations.

[21] Before recruiting a member, Revolution Food required the prospect to initial and sign a Letter of Understanding. With respect to Johnvince Foods, the letter stated:

I understand that Revolution Food Technologies Inc. and the Revolution Buying GroupTM are independent organizations and not owned or affiliated with Johnvince Foods Distribution LP and Planters^{®/MD} Canada.

I understand that Johnvince Foods Distribution LP and Planters^{®/MD} Canada have entered into a one year, revolving Sponsorship and Exclusive Supply Agreement with Revolution Food Technologies Inc. and the Revolution Buying GroupTM to support the marketing of The Revolution 650TM vendors. I understand that these companies may choose to discontinue this relationship with Revolution Food Technologies Inc. and the Revolution Buying GroupTM at any time. I understand that the ongoing performance and conduct of the undersigned as a Revolution 650TM vendor will have a large role in such determination.

[22] In February 2010, Mr. and Mrs. Zwaniga received a letter inviting them to attend the Planters^{®/MD}/Revolution 650TM FREE Dinner/Business Presentation and Performance, a sales presentation to be held in the City of Kitchener in March, 2010.

[23] On March 1, 2010, Mr. and Mrs. Zwaniga attended the presentation, where the Planters^{®/MD} Canada brand and logo was prominently featured. The promotional materials included sales brochures, letters, sales presentation invitations, Planters^{®/MD} Canada web site, and worksheets branded with the Planters^{®/MD} logo and trademarks. The promotional materials were drafted by Revolution Foods.

[24] The Zwanigas allege that the promotional materials misrepresented that: (a) participants in the Distributorship Program would earn income between \$300.00 and \$2,400.00 per week; (b) the vending machine produced vend sizes of 4 ounces; (c) locations for machines were to be provided to the distributors; (d) a machine could be serviced in five to ten minutes, (e) machine placements would not oversaturate a market; (f) training would be provided; and (g) and the Distributorship Program was a time-limited offer.

[25] On March 3, 2010, the Zwanigas attended a "Question and Answer" session. The Zwanigas say that the Distributorship Program was presented as a partnership between Revolution and Planters Canada. They say that a Planters Canada "Letter of Introduction" signed by Mr. Don Lock, the Vice-President of Sales and Marketing for Planters Canada and Johnvince Foods, encouraged participation in the Distributorship Program. The letter stated:

Automatic Merchandising has been a profitable and popular choice for small business people in Canada for over 80 years. With Planters Planters[®] Canada, Johnvince Foods Distribution LP participating as a sponsor and supplier to the Revolution 650TM Program, we believe you should seriously consider this opportunity for you and your family.

[26] On March 4, 2010, Mr. and Mrs. Zwaniga attended an interview with Devan Hawbolt, a representative of Revolution Food. That day they signed a "Membership Agreement." The Membership Agreement is an agreement with Revolution Food Technologies Inc. Under the agreement, "the Member shall have the right to purchase, stock, and resell Planters^{®/MD}. The Zwanigas also signed the letter of understanding describing Johnvince Foods independent status.

[27] On April 7, 2010, the Planters^{®/MD} Canada website (www.planterspeantus.ca) announced under the heading "What's New" the following:

Planters^{®/MD} Canada, JVF Foods Distribution LP are pleased to provide an update on the Revolution 650TM program launched in September 2009....To date more than 150 Canadian entrepreneurs have been appointed as Independent Revolution 650TM /Planters^{®/MD} distributors representing a combined allocation of over 4,500 machines to the market. We continue to be impressed by the advertising value and the incremental sales impact the program has created for our company.

This announcement was drafted by Mr. Knight.

[28] Mr. and Mrs. Zwaniga spent \$65,488.15 in start-up costs for the Distributorship Program. In their first 8 months of operation, they generated only \$2,100.00 in gross sales.

[29] On December 22, 2010, Mr. Zwaniga, using the pseudonym Phillip Green, sent emails to Johnvince Foods and requested details of the relationship between it and Revolution Food. He inquired whether Johnvince Foods was a "partner" in the Distributorship Program. Vito Ingrassia, the "Brand Manager," responded and advised that Johnvince Foods "partnered to provide the program."

[30] Later when cross-examined about this conversation, Mr. Ingrassia explained that he was using the word "partner" in a non-technical or colloquial sense.

[31] In early 2011, Johnvince Foods advised Mr. Knight that it wanted to change the terms of the Sponsorship Agreement. In this regard, it may be noted that the agreement envisioned renegotiation if the agreement was not automatically renewed. Mr. Lock sent Mr. Knight an email dated February 17, 2011 stating that, "until further notice do not schedule or execute any Revolution/Planters^{®/MD} trade shows beyond March 1, 2011."

[32] On February 17, 2011, Mr. Lock sent Mr. Knight an email that stated that: "in the meantime it would be in your best interest to start providing some of the ways Planters may begin to benefit in sales and profits at a level we were first led to believe."

[33] Mr. Knight proposed paying Johnvince Foods a 5% royalty on all net machine sales and other non-food items commencing on April 1, 2011, for as long as the Distributorship Program was in effect. In an email dated March 2, 2011, Mr. Lock agreed to allow Mr. Knight to continue with the spring tour to promote the Distributorship Program, on the condition that there be a continued dialogue to resolve the revenue concerns.

[34] On March 8, 2011, Mr. Lock demanded that Johnvince Foods receive a 10% royalty on machine sales and a 5% royalty on non-machine sales both moving forward and on a retroactive basis. Mr. Knight did not believe that Revolution Food could meet this demand, and he cancelled the Distributorship Program's spring promotional tour.

[35] On March 18, 2011, Mr. Knight made a counter-proposal. However, no agreement was reached, and with the commencement of the proposed class action, the discussions between Johnvince Foods and Revolution Food ended.

C. PROCEDURAL AND EVIDENTIARY BACKGROUND

[36] On March 24, 2011, the Zwanigas commenced a proposed class action against Johnvince Foods and Revolution Food. The Zwanigas allege that Johnvince Foods and Revolution Food contravened the *Arthur Wishart Act (Franchise Disclosure)*, 2000.

[37] A fundamental aspect of the action is that Johnvince Foods and Revolution Food had a partnership or joint venture.

[38] In August 2011, the Zwanigas delivered an amended Statement of Claim to add a claim that Johnvince Foods was a "franchisor's associate." The Zwanigas also delivered their motion material for the certification motion.

[39] On September 28, 2011, the Zwanigas commenced a second and companion proposed class action. This action was against the directors of Revolution Food. The Zwanigas alleged that the principals were franchisor's associates under the *Arthur Wishart Act*. The defendants included Edward Valteau, Mr. Hawbolt, and Mr. Knight.

[40] On November 30, 2011, Revolution Food delivered its Statement of Defence in the first action. It denied that the Distributorship Program was a franchise under the *Arthur Wishart Act*. It denied that it and Johnvince Foods were partners or joint venturers. It did not crossclaim against Johnvince Foods.

[41] On December 2, 2011, Johnvince Foods delivered its Statement of Defence and Crossclaim and its motion record in support of a summary judgment motion. Its position was that

it was never Revolution Food's partner or joint venturer; its only role was to grant to Revolution Food a licence to use the Planters™ trademarks and to supply product.

[42] On March 1, 2012, Johnvince Foods' deponents were cross-examined for the summary judgment motion. The deponents maintained that in approving promotional materials used in the program and the form of the contract with distributors, Johnvince Foods' only concern was the appearance of the logo and trademark. The deponents denied that Johnvince Foods was a partner of Revolution Food or a franchisor's associate.

[43] On March 5, 2012, the Zwanigas' legal counsel contacted counsel for Revolution Food, by letter and asked whether the Revolution Food Defendants were aware of information that would contradict some of the information provided by Johnvince Foods' deponents at the cross-examinations. A meeting between the lawyers followed on March 12, 2012 and copies of the transcripts of the cross-examinations were provided to Revolution Food's lawyer on March 21, 2012.

[44] On April 3, 2012, the lawyers met again. At this meeting, Revolution Food disclosed emails (discussed above) that had passed between Revolution Food and Johnvince Foods. Revolution Food, however, would not provide this evidence until and unless the Zwanigas would make concessions in relation to the companion action against Mr. Knight and the Revolution Food principals.

[45] On April 30, 2012, the Zwanigas entered into a Cooperation Agreement with Revolution Foods and Messrs. Valteau, Hawbolt, and Knight. The important terms of the Cooperation Agreement are as follows:

- Messrs. Valteau, Hawbolt, and Knight agree "to assist in confirming that [Johnvince Foods] as a partner and/or franchisor's associate by immediately filing an Affidavit confirming: (1) their true belief that [Johnvince Foods] was a partner; (2) their true belief that [Johnvince Foods] was sharing in the profits of the Revolution Program by profiting off nut and candy sales and through the advertising/marketing value; (3) the discussions and communications in relation to a revisitation (sic) of the profit sharing arrangement (re [Johnvince Foods] profiting from the sale of machines ... (5) the extent that [Johnvince Foods] reviewed and approved promotional materials ... (8) other information that will assist in confirming [Johnvince Foods's] role as a partner in the Revolution Program; and (9) any other information that will assist in confirming [Johnvince Food's] role as a franchisor's associate and/or the control that Johnvince Foods exercised over Revolution Food.
- Messrs. Valteau, Hawbolt, and Knight agree not to dispute any of the allegations in the Statement of Claim in the main action.
- Messrs. Valteau, Hawbolt, and Knight agree to consent to certification of the main action.

- The Zwanigas agree that if they succeeded in opposing Johnvince Food's motion for summary judgment, then upon the resolution of the main action, they would dismiss the action against Messrs. Valteau, Hawbolt, and Knight on consent and without costs but subject to court approval.
- The Zwingas agreed to pursue their claims against Revolution Food and Johnvince Foods.
- The parties agreed to co-operate on liability issues by agreeing to provide evidence and argue that [Johnvince Foods] is at law also responsible to the Zwanigas.

[46] The Cooperation Agreement was immediately disclosed to Johnvince Foods and later to the court.

[47] On May 7, 2012, in apparent compliance with the Cooperation Agreement, Mr. Knight swore an affidavit deposing that Johnvince Foods had an active and controlling role in the Distributorship Program.

[48] Also on May 7, 2012, there was a case conference in the main action to discuss the Zwanigas' request to deliver Mr. Knight's affidavit for use on the summary judgment motion. I ruled that there had to be a motion to decide whether to grant that request.

[49] On June 13, 2012, Mr. Knight and the Zwanigas' counsel, were cross-examined.

[50] In his cross-examination, Mr. Knight admitted that: (a) he approached Johnvince Foods with the idea of the Distributors Program, which was similar to other programs he had developed in the past; (b) Revolution Food drafted all the promotional material and Johnvince Foods' primary concern was that the materials properly displayed its logos and trademarks; (c) Johnvince Foods was not entitled to approve the budgets set out the marketing materials and had no role in creating the earnings projections; (d) Revolution Food did not provide Johnvince Foods with any financial records to assess its credit worthiness; (e) Johnvince Foods did not contribute to the expenses of the marketing program and assumed none of the risk of the program; (f) Johnvince Foods received no revenue apart from payment for its product and did not share in Revolution Foods revenue or profits; (g) Revolution Food was careful in ensuring that franchisees knew that it and Johnvince Foods were independent and unrelated entities; (h) Johnvince Foods' role was limited to supplying product; (i) Johnvince Foods was not involved in the presentations to distributors and (j) Johnvince Foods had no say in whom was chosen as a distributor.

[51] On June 26, 2012, I heard a motion seeking permission to introduce Mr. Knight's evidence for the summary judgment motion. I granted the motion. See *Zwaniga v. Johnvince Foods Distribution L.P.*, 2012 ONSC 3848.

D. DISCUSSION

1. Introduction

[52] It is a disputed point whether the agreement signed by the Zwanigas and other participants in the Distributorship Program created a franchise relationship between the Zwanigas and Revolution Food. However, for the purpose of its summary judgment motion only, Johnvince Foods conceded that Revolution Food was a franchisor with the Zwanigas and other distributors.

[53] The substantive issues for the summary judgment motion then became whether Johnvince Foods could be liable to the Zwanigas either because it was in a partnership with Revolution Food or because it was a “franchisor’s associate” as that term is defined under the *Arthur Wishart Act*.

[54] The procedural issue for the summary judgment motion was whether or not this was an appropriate case for the court to grant a summary judgment.

2. Is this Action Appropriate for a Summary Judgment?

[55] Notwithstanding the Zwanigas’ arguments to the contrary, I am satisfied that I can answer the two substantive questions and I am satisfied that there are no genuine issues requiring a trial.

[56] Having regard to the Cooperation Agreement and Revolution Food’s pleaded position, one should be sceptical about Mr. Knight’s evidence, but it is not necessary to make any credibility or reliability findings, because his pertinent evidence is confirmed by e-mails and by the evidence given on the examinations of Johnvince Foods deponents.

[57] I accept the factual component of Mr. Knight’s evidence as true. His opinion and inconsistent position as to whether Johnvince Foods was a partner or a franchisor’s associate is simply irrelevant. It is not evidence, and it is for his counsel to make legal argument about whether there is a partnership or whether Johnvince Foods is a franchisor’s associate.

[58] Similarly, the evidence of Johnvince Food’s deponents that there was no partnership is also irrelevant. As was the case with Mr. Knight’s evidence, what is relevant is what the parties said and did, not their after-the-fact legal opinions or self-serving position as to their legal positions.

[59] There are actually few if any contested factual issues. What is contested is the legal consequences of the documents and actions of the parties. There is a dispute about the application of the law.

[60] The fact that this is a proposed class action does not insulate it from a motion for summary judgment, and I perceive no unfairness to the putative class members in deciding the case against Johnvince Foods.

[61] The motion for summary judgment concerns the role and conduct of Johnvince Foods, and in my opinion, in accordance with the directives of the Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, I can fairly decide those issue now.

[62] The record is largely documentary and the material facts are largely uncontested. The principal witnesses have been cross-examined. I allowed Mr. Knight's evidence to be introduced for the motion for summary judgment so that the Zwanigas could put their best foot forward in resisting the motion.

[63] The record is more than sufficient for me to make to make dispositive findings on the substantive issues. I can achieve a full appreciation of the evidence and I can achieve a full appreciation of the issues without a trial.

[64] In my opinion, it is in the interests of justice to decide Johnvince Foods' liability on this motion for summary judgment and not give the putative class members false hope. It is clear to me that their only case is against Revolution Food and their case against Johnvince Foods is hopeless.

3. Are Johnvince Foods and Revolution Food Partners?

[65] The first substantive issue is whether Johnvince Foods and Revolution Food are partners.

[66] Section 2 of the *Partnerships Act*, RSO. 1990, c. P.5 defines a partnership as follows:

Partnership is the relation that subsists between persons carrying on a business in common with a view to profit, but the relation between the members of a company or association that is incorporated by or under the authority of any special or general Act in force in Ontario or elsewhere, or registered as a corporation under any such Act, is not a partnership within the meaning of this Act.

[67] There are three elements to a partnership: (1) a business; (2) the business is carried on in common; and (3) the common business is carried on with a view to profit: *Continental Bank of Canada v. R.*, [1998] 2 S.C.R. 298 at para 22. See also *Backman v. Canada*, [2001] 1 S.C.R. 367.

[68] In *Continental Bank of Canada v. R.*, *supra*, Justice Bastarache, in his judgment for the minority, described the criteria used to determine whether a partnership exists. The majority of the court agreed on this point; thus, the court stated at paragraphs 23 and 24:

23. The existence of a partnership is dependent on the facts and circumstances of each particular case. It is also determined by what the parties actually intended. As stated in *Lindley & Banks on Partnership* (17th ed. 1995), at p. 73: "in determining the existence of a partnership . . . regard must be paid to the true contract and intention of the parties as appearing from the whole facts of the case".

24. The *Partnerships Act* does not set out the criteria for determining when a partnership exists. But since most of the case law dealing with partnerships results from disputes where one of the parties claims that a partnership does not exist, a number of criteria that indicate the existence of a partnership have been judicially recognized. The indicia of a partnership include the contribution by the parties of money, property, effort, knowledge, skill or other assets to a common undertaking, a joint property interest in the subject-matter of the adventure, the sharing of profits and losses, a mutual right of control or management of the enterprise, the filing of income tax returns as a partnership and joint bank accounts.

[69] In my opinion, a trial is not necessary in order to determine whether or not Johnvince Foods and Revolution Food were partners. I am able to do what the Ontario Court of Appeal did in *Partners in Psychiatry v. Canadian Psychiatric Assn.*, 2011 ONCA 109, where it reversed the trial judge by reviewing the documentary record and the transcript of evidence of the trial. The

court concluded that it was in a position to reach its own conclusion by applying the correct legal test for determining the existence of a partnership.

[70] In *Partners in Psychiatry v. Canadian Psychiatric Assn.*, the Court of Appeal stated that to ascertain the existence of a partnership, the court must inquire into whether the objective documentary evidence and the surrounding facts, including what the parties actually did, are consistent with a subjective intention to carry on business in common with a view to profit.

[71] In *Partners in Psychiatry v. Canadian Psychiatric Assn.*, the Court noted that the respondent's executive director testified that the respondent conducted business with the appellant to develop and deliver continuing professional development programs with a view to a profit. The parties "partnership agreements" provided for shared responsibilities for program fund-raising, content development, program materials and on-site execution of all programming for their Institute. The revenues were kept in a separate account. Expenses paid by each party were invoiced to the Institute. Both parties were required to approve any changes to the estimated revenues and costs and each party was entitled to an equal sharing of profits as management fees after expenses were paid. The parties' course of conduct was consistent with the terms of the agreements. Each party submitted expenses and received half the profits as management fees. Both parties contributed money, knowledge and skill to the Institute. They exercised mutual control of various aspects of the Institute's operations; and they shared the profits by way of "management fee." The Court of Appeal concluded that a partnership existed.

[72] In almost every way, the legal relationship between Revolution Food and Johnvince Foods is the opposite to the partnership relationship in *Partners in Psychiatry v. Canadian Psychiatric Assn.* Johnvince Foods and Revolution Foods were independent entities and arms-length contractors carrying on separate businesses that did not share expenses or revenues. They both had a view to profit but it was not the same profit. Johnvince Foods wished to profit from supplying peanuts; Revolution Foods wished to profit by marketing distributorships and selling merchandising goods.

[73] I conclude that Johnvince Foods and Revolution Foods were not engaged in a joint venture and they certainly were not partners in the sense of forming a common business association with a view to profit.

[74] There is no legal significance to Mr. Ingrassia's colloquial use of the word partner. A search of a thesaurus or a dictionary reveals that "partner" is a word that in addition to having a technical legal meaning also denotes companions, spouses, lovers, a significant other, confreres, friends, colleagues, associates, co-workers, and collaborators, and comrades. Persons who are not legally in a partnership relationship commonly refer to being partners or to having partnered.

[75] In the case at bar, there is no genuine issue requiring a trial that Johnvince Foods and Revolution Food were not partners within the meaning of s. 2 of the *Partnerships Act* or at common law.

4. Is Johnvince Foods a Franchisor's Associate

[76] The second and last substantive issue is whether Johnvince Foods is a "franchisor's associate." For the purposes of this summary judgment motion, it is not disputed that the

Distributorship Program was a franchise as between the distributors, including the Zwanigas, and Revolution Food.

[77] The precise issue then is whether Johnvince Foods is a "franchisor's assistant" under the *Arthur Wishart Act (Franchise Disclosure)*, 2000, Section 1 (1) of the Act defines "franchisor's associate" as follows:

"franchisor's associate" means a person,

(a) who, directly or indirectly,

(i) controls or is controlled by the franchisor, or

(ii) is controlled by another person who also controls, directly or indirectly, the franchisor, and

(b) who,

(i) is directly involved in the grant of the franchise,

(A) by being involved in reviewing or approving the grant of the franchise, or

(B) by making representations to the prospective franchisee on behalf of the franchisor for the purpose of granting the franchise, marketing the franchise or otherwise offering to grant the franchise, or

(ii) exercises significant operational control over the franchisee and to whom the franchisee has a continuing financial obligation in respect of the franchise.

[78] The Zwanigas concede that Johnvince Foods is not a person "controlled by another person who also controls, directly or indirectly the franchisor." They also concede that Johnvince Foods was not "involved in reviewing or approving the grant of the franchise" and was not a person who "exercises significant operational control over the franchisee and to whom the franchisee has a continuing financial obligation in respect of the franchise."

[79] Thus, the issue to be decided narrows further and becomes a question of determining whether Johnvince Foods (a) directly or indirectly controls the franchisor (Revolution Food) and (b) was directly involved in the grant of the franchise by making representations to the prospective franchisee for the purpose of granting the franchise, marketing the franchise or otherwise offering to grant the franchise."

[80] For the purposes of this motion for a summary judgment, I will narrow the issue even further and assume without deciding that based on the letter of introduction verifying Johnvince Foods' support of the Distributorship Program, Johnvince Foods made representations to the prospective franchisees. With this narrowing of the issue, the singular issue that remains is whether there is a genuine issue requiring a trial about whether Johnvince Foods "controlled" Revolution Foods.

[81] In my opinion, Johnvince Foods did not control Revolution Foods or the Distributorship Program from any corporate perspective. Johnvince Foods is not a shareholder, parent corporation, or associated corporation of Revolution Foods. Johnvince Foods legal relationship with Revolution Foods was entirely contractual.

[82] The evidence establishes that Johnvince Foods had no legal right to exercise control over the operations of Revolution Foods or over the Distributorship Program. The management, administration, planning of both day-to-day activities and long term business planning was exercised by Revolution Food.

[83] Johnvince Foods was the most important supplier but it was not in charge. To speak colloquially, Johnvince Foods was not the boss over Revolution Food which made all the day-to-day and long term decisions for its business.

[84] The Zwanigas conflate importance with control. The Sponsorship and Supply Agreement was obviously an important part of the Distributorship Program, but Johnvince Food's role as a peanut supplier and trademark licensor did not place it in a position of *de facto* control over Revolution Food.

[85] Revolution Food knew, and the distributors also knew, that Revolution Food and Johnvince Foods were separate and independent entities and that Johnvince Foods could terminate the supply contract for cause or simply upon notice. The agreement also envisioned that the terms of renewal could be renegotiated.

[86] In my opinion, control over a franchisor under s. 1 (1) of the *Act* involves something more than being important, being influential, or having bargaining power. In the context of the *Arthur Wishart Act*, control connotes being in charge of or governing or directing or leading the franchisor.

[87] By exercising their contractual rights, a franchisor's major suppliers or its bankers or debt holders or even its franchisees may control the fate of the franchisor but controlling the franchisor's business fate is different than leading, regulating, directing, overseeing, or governing the franchisor.

[88] In the case at bar, there is no genuine issue requiring a trial that Johnvince Foods did not lead, regulate, direct, oversee, or govern Revolution Food or its Distributorship Program. Up until it indicated that it was disappointed with its own profits from its connection with Revolution Food's Distributorship Program, there is no evidence that Johnvince Foods lead, regulated, directed, oversaw, or governed Revolution Food or the Distributorship Program. In my opinion, Johnvince Foods did not control and was not controlling Revolution Food.

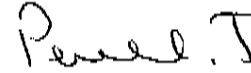
[89] Johnvince Food's direction that the Distributorship Program's spring promotional tour should be suspended was not an act of control. It was quite proper to, in effect, warn Revolution Food that it should not be recruiting new distributors who would anticipate the continuing availability of Planters^{®/MD} peanuts for the vending machines.

[90] In my opinion, a trial is not necessary for me to fully appreciate the evidence that Johnvince Foods was not a "franchisor's associate."

E. CONCLUSION

[91] For the above reasons, I grant Johnvince Foods' motion for a summary judgment dismissing the Zwanigas' action. The proposed class action continues as against Revolution Food.

[92] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Johnvince Foods' submissions within 20 days of the release of this judgment followed by the Zwanigas' submissions within a further 20 days.



Perell, J.

Released: September 19, 2012

CITATION: David Zwaniga v. Johnvince Foods Distribution, 2012 ONSC 5234

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DAVID ZWANIGA AND JENNIFER ZWANIGA

Plaintiffs

– and –

JOHNVINCE FOOD DISTRIBUTION L.P. AND
REVOLUTION FOOD TECHNOLOGIES INC.

Defendants

REASONS FOR JUDGMENT

Perell, J.

Released: September 19, 2012