

Franchising in Alberta: The Duty of Fair Dealing (Part I of II)

By Robert Wilson

Entrance into franchise agreements can be an excellent means by which franchisors can expand their business through external capital investment. At the same time franchisees gain the benefit of operating a business which trades in products which are already affiliated with the franchisor's brand and goodwill. That said, being a party to franchise agreements in Alberta, and in other provinces in Canada, can be more complicated than dealing with other commercial agreements in light of the supplemental requirements imposed by the *Franchises Act* ("Act"), and specifically, the duty of "fair dealing" imposed by section 7.

The Act itself can be a pitfall for parties due to the fact that regardless of the parties' intent, if the agreement in question meets the Act's three-part definition of a "franchise agreement"¹ then the Act will apply. Once the Act applies the parties to the agreement are obligated to comply with the duty of "fair dealing" in the performance of their contractual obligations.² But what is the scope of the duty of fair dealing? And practically speaking, what kinds of obligations does the duty of fair dealing impose? This issue has been contemplated by a number of courts and some general conclusion can be drawn from past legal decisions.

The 2006 British Columbia Supreme Court decision of *362041 B.C. Ltd. v. Domino's Pizza* ("Domino's") considered whether a franchisor had breached the duty of fair dealing by attempting to open a new franchise that would service a delivery area infringing on territory already serviced by an existing franchisee. While the Court stopped short of making a ruling on

whether the actions of the franchisor constituted a breach of the duty of fair dealing, an injunction was granted against the franchisor opening the new location. In this context the Court noted that the duty of "fair dealing" was akin to the duty of good faith, and required a party to give consideration to the concerns of the other party before taking unilateral steps that could negatively impact their interests.³ Further, the Court noted that consultation by the franchisor, and offering the existing franchisee a right of first refusal would have fulfilled the franchisor's minimum requirements of fair dealing.⁴

The Ontario Superior Court of Justice also considered the duty of "fair dealing" in the 2011 *3574423 Canada Inc. v. Baton Rouge Restaurants Inc.* decision again in the context of a franchisor's attempt to open a new franchise location in close proximity to an existing franchise. In this case the Court again noted the similarity between the duty of fair dealing and the duty of good faith and, while noting that issues of whether a party has breached the fair dealing duty will be fact-specific in each case, held that in the case at-hand the franchisor's repeated consultation with the existing franchisee in regard to the new location, fulfilled the fair dealing duty.⁵

Most recently the Supreme Court of Canada in the 2014 *Bhasin v. Hrynew* ("Bhasin") decision held that the underlying facet of all contract law is a general principle of good faith requiring parties to be candid, forthright, and reasonable in the performance of their contractual obligations,⁶ to not knowingly mislead each other,⁷ to have regard for the contractual interests of the other party, and to not seek to

¹ *Franchises Act*, RSA 2000, c F-23 - Section 1(1)(d)(i)

² *Ibid* - Section 7

³ *362041 B.C. Ltd. v. Domino's Pizza*, 2006 BCSC 792 para. 18

⁴ *Ibid* - para. 18 and 24

⁵ *3574423 Canada Inc. v. Baton Rouge Restaurants Inc.*, 2011 ONSC 6697- para 270 and 308

⁶ *Ibid* - para. 93

⁷ *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 495 para. 73

undermine those interests in bad faith.⁸ The *Bhasin* decision was a landmark ruling as it effectively raised the bar for the conduct of all parties in commercial agreements, but whether the *Bhasin* decision will similarly raise the bar on the duty of fair dealing for parties to franchise agreements remains to be seen.

Overall, practically speaking, franchisors and franchisees can ensure compliance with the duty of fair dealing by conducting themselves honestly, reasonably, and by giving consideration to the other party's contractual interests. Further, before taking unilateral steps that will impact the contractual interests of the other party, such as the opening of a new franchise location, parties should ensure that they take the time to consult with their contractual counterpart.

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⁸ *Ibid* - para. 65