

# Newsletter



Robinson Sheppard Shapiro  
Avocats • Lawyers

May 19, 2015

## Is franchising becoming tougher in Quebec?

*Franchising, just like any other contract, consists of a blend of rights and obligations between the parties. A recent decision of the Quebec Court of Appeal provides an extensive analysis of the franchisor's obligations.*

Franchisors and franchisees would be well advised to take note of the decision rendered by the Quebec Court of Appeal in *Dunkin' Brands Canada Ltd. c. Bertico inc.* (2015 QCCA 624 (CanLII), <<http://canlii.ca/t/gh6db>>). In this decision, the Court condemned the Dunkin' Donuts franchisor to pay close to \$11 million in damages, plus interest, costs and a special fee, to a group of franchisees who had filed a suit claiming that the franchisor had failed to respect its obligations as franchisor.

### The facts

The facts of the case are summed up in the first paragraph of the October 2012 Superior Court decision, which was essentially confirmed by the Court of Appeal:

Twenty-one (21) Quebec Dunkin Donuts Franchisees, who had operated thirty-two (32) Dunkin Donuts stores in Quebec, seek

the formal termination of their leases and franchise agreements plus damages of \$16.4 million from their Massachusetts based Franchisor, ADRIC. These damages they say arise from the latter's repeated and continuous failure between 1995 and 2005 to fulfill its obligations, notably to protect and enhance the Dunkin Donuts brand in Quebec, in virtue of its franchise and ancillary agreements with the Franchisees.

### How the decision impacts on franchisors and franchisees

From a legal point of view, this is a very complex case. Focusing on the business perspective, certain conclusions have to be highlighted:

- While the terms of the franchising agreement are certainly important, the Franchisor's obligations are not restricted to the words of the contract. The Franchisor is also bound by a duty of good faith and



Herbert Z. Pinchuk  
514 393-4023  
[hzipinchuk@rsslex.com](mailto:hzipinchuk@rsslex.com)



Rhona Luger  
514 393-4001  
[rluger@rsslex.com](mailto:rluger@rsslex.com)



Sharon G. Druker  
514 393-4014  
[sgdruker@rsslex.com](mailto:sgdruker@rsslex.com)

Our newsletters aim to bring to your attention the contemporary legal issues which we believe are and should be of interest to the public at large and under no circumstances are they to be considered as legal opinions. The newsletters are merely intended to alert readers to interesting topics and/or new developments in law. © 2015 – RSS. No part of this newsletter may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, unless the identity of the RSS newsletter is mentioned in writing on the face of the reproduction.



“implied obligations”. In particular, there was “a duty owed to the Franchisees collectively to take reasonable measures to support and enhance the brand.” [para. 77] For instance, among the obligations incumbent on the Franchisor was the duty to eliminate “bad apples”, namely, Franchisees who failed to live up to the standards of cleanliness and quality required by the brand.

- Both the Superior Court and the Court of Appeal recognized that Dunkin’ Donuts had failed to recognize and to react to the severe threat that Tim Horton represented. Facing such a fierce competitor, Dunkin’ Donuts should have reacted swiftly and vigorously.
- While the Court did agree with the Franchisor that “the contract did not impose an obligation on it to guarantee the Franchisees’ success or insulate them from competition”, it also declared that it had “to meet the reasonableness standard or intensity of means of the obligation.” [paras. 92 and 93].
- The Court awarded the plaintiff Franchisees compensation for lost profits as well as for the loss of value of their investment in the franchises, denying that this was “double dipping”.
- In 2002, the Franchisor amended the franchise agreement to offer its Franchisees compensation if they agreed to renovate their stores. However, to receive this compensation, they had to sign a release that was “a complete bar to the right of the Franchisees to bring any suit or action against [the Franchisor] for whatever reason from the dawn of creation to the day it was signed” [para. 23, Superior Court]. This clause was set aside by the Court, which declared that the Franchisees who had signed it had done so as a result of the Franchisor’s misrepresentations.
- While the Superior Court had awarded some \$16.4 million in damages, the Court

of Appeal reduced the amounts awarded for loss of profits and investment by 25%, to reflect imponderables that are part of business reality.

- The mere costs of the litigation were surely very substantial: “The trial was something of a marathon: there were 71 days of hearings, punctuated by a reopening of the case after it had initially been taken under advisement; some 478 exhibits were filed; and upwards of 30 witnesses, including four expert witnesses, were heard by the judge.” [para. 27]

### How should you react?

Both the decisions of the Superior Court and Court of Appeal are complex, adding up to a total of over 100 pages. While the conclusions were pretty harsh for the Franchisor, the judges have issued very articulated and well-motivated decisions.

As a result, all parties to a franchise agreement should take the time to discuss with their legal advisor the impact of this case on the way they conduct their business.

To know more about this decision, or about franchising contracts generally, please contact:

**Herbert Z. Pinchuk**  
(514) 393-4023  
hzipinchuk@rsslex.com

**Rhona Luger**  
(514) 393-4001  
rluger@rsslex.com

**Sharon G. Druker**  
(514) 393-4014  
sgdruker@rsslex.com