CITATION NO.: Ken Breau Corporation v. Dairy Queen 2025 ONSC 126
COURT FILE NO.: CV-24-189
DATE: January 6, 2025

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Ken Breau Corporation, Applicant

-and-

DQC Canada Inc., Respondent

BEFORE: MacNeil J.

COUNSEL: *D. Touesnard* – Lawyer for the Applicant

K. Byers – Lawyer for the Respondent

HEARD: October 1, 2024 (via Zoom videoconference)

REASONS FOR DECISION

1. The Applicant, The Ken Breau Corporation, a franchisee of the Respondent, DQC Canada Inc. ("DQC"), makes this application seeking a declaration that DQC has breached its statutory obligations of fair dealing and good faith as required by s. 3 of the *Arthur Wishart (Franchise Disclosure) Act, 2000*, S.O. 2000, c. 3 ("the *Wishart Act*"); and injunctive relief restraining DQC from awarding a new restaurant to a different franchisee within eight (8) kilometres of the Applicant's territory, or, in the alternative, an order directing a trial on damages.

2. The Respondent, DQC, is an Ontario corporation that acts as the Canadian franchisor of the Dairy Queen franchise system. It opposes the application on the basis that the Applicant is seeking to prevent DQC from exercising its rights to develop a restaurant/store location that is outside of the Applicant's exclusive territory and where the Applicant has no contractual rights.

3. The parties filed supporting affidavits. Cross-examinations on some of those affidavits were held; transcripts of those cross-examinations were also filed.

FACTS

3. Ken Breau ("Mr. Breau") is the President of the Applicant.

4. The Applicant has a licence to and operates three DQ Treat stores in Brantford. As well, by letter dated April 28, 2021, DQC approved a fourth location for the Applicant to operate a DQ Treat store at 989 Rest Acres Road, Paris ("the Approved Rest Acres Site"). Construction has not

yet commenced for the Approved Rest Acres Site. However, a Food Service Amendment Agreement, dated June 1, 2021, was entered into by the parties authorizing the Applicant to operate a store at this location.

The Franchise Agreement

5. The Applicant operates its licensed locations pursuant to a franchise agreement executed by predecessors in interest to the Applicant and DQC, dated July 21, 1954 (the "Franchise Agreement"). The Franchise Agreement was assigned to the Applicant in 2016, with DQC's consent. The Franchise Agreement has been amended on several occasions, including to allow the sale of certain additional food items otherwise not permitted to be sold under the terms of the original agreement.

6. By the Franchise Agreement, the Applicant has exclusive rights to use Dairy Queen freezers and the name "Dairy Queen" for the product dispensed through those freezers within the following franchise area:

> The City of Brantford, Ontario and five (5) miles in any direction from the present city limites [*sic*] of Brantford, Ontario.

(the "Territory").

7. By s. 7 of the Franchise Agreement, the Applicant pays a flat rate of 37-and-one-half cents per Imperial gallon on all mix processed through all DQC freezers.

8. Section 18 of the Franchise Agreement states that the agreement does not interfere with DQC's right to develop the area outside of the Territory. Section 18 reads:

> 18 – It is specifically agreed and understood between the parties hereto that Licensee may not use the DQC name, products, freezers or equipment at any place except within the area hereinabove described, and nothing herein shall be construed to prevent the Licensor or any person duly authorized by it, from engaging in the DQC business and from using the DQC name at any other location or area.

9. Section 20 of the Franchise Agreement provides exclusivity to the Applicant, stating:

> 20 – During the effective period of this contract or any renewal or extensions hereof the Licensor shall not lease, sell, or assign or transfer any freezer manufactured under said Patents Numbers 2080971 and 2506101 to any party other than Licensee for use within the franchise area hereinabove described, and shall not authorize the use of the trade name "Dairy Queen" in said area by any party other than Licensee.

10. Section 25 of the Franchise Agreement sets out the renewal and non-competition terms of the agreement. It reads:

> 25 – The term of this agreement shall automatically be extended for additional terms of five (5) years each, subject to all the undertakings and agreements herein provided unless the Licensee or his assigns shall give written notice to the Licensor of his election to cancel this agreement at least sixty (60) days prior to the termination of this agreement or of any subsequent extension thereof. The Licensee agrees that he will not either directly or indirectly (either as individual, partner or stockholder of any corporation), use any other type or make of ice cream or equipment or engage in any competitive ice cream or ice milk business within a radius of thirty miles from the center of the above described area at any time during the term of this franchise agreement or any renewal or extension hereof or at any time within five years from the date of the termination of this franchise agreement.

11. DQC no longer uses the form of the Franchise Agreement. New franchisees are required to enter into a contemporary standard franchise agreement ("the Standard Franchise Agreement"). The Standard Franchise Agreement requires franchisees to pay significantly more fees to DQC than the Franchise Agreement by way of royalties and an advertisement fee fund in the aggregate amount of 9% of gross sales. It also permits DQC to exert more control over its franchisees than the Franchise Agreement, for example:

(a) the Standard Franchise Agreement has a term which can only be renewed at DQC's discretion, whereas the Franchise Agreement's term renews automatically;

(b) DQC can require franchisees to modernize their stores at their own expense at DQC's direction, whereas the DQC cannot direct the Applicant to make any changes to its stores;

(c) the Standard Franchise Agreement operates on a store-by-store basis, whereas the Applicant has an exclusive territory;

(d) DQC can direct the store owners to use certain software including a point-of-sale system, whereas it has no right to direct the Applicant to do so; and,

(e) DQC can compel production of sales records and poll those records from their franchisees but cannot do so with the Applicant.

12. DQC's evidence is that there are dozens of different types or forms of franchise agreements in place between DQC and its franchise operators. Many of those forms of agreements date from the 1950s or 1960s. Approximately half of the DQC locations in Canada are subject to older franchise agreements rather than the Standard Franchise Agreement. There are currently 33 stores within the Dairy Queen franchise system in Canada whose franchise agreements require them to pay a royalty that is calculated by referencing cents per litre of mix processed through DQ freezers or other "unique arrangements".

13. The Applicant's evidence is that DQC's revenues received from the Applicant are more than $100,000.00 less for each of its full-time stores than the Applicant would pay under the terms of the Standard Franchise Agreement.

The Proposed Grand River Site

14. On February 16, 2023, Mr. Breau spoke with the Director of Franchise Development for DQC, A. Watters ("Mr. Watters"), about the Applicant's intention to develop a restaurant at 307 Grand River Street North, Paris (the "Proposed Grand River Site"). The Applicant wished to proceed with that development because construction of the Approved Rest Acres Site had been delayed. Mr. Breau advised that it was his understanding that the 307 Grand River Street North, Paris location was within the Territory.

15. As the Proposed Grand River Site was in Paris, not Brantford, DQC referred to its internal mapping software to confirm if the site was within the Territory. The evidence of DQC is that, at the time it responded to Mr. Breau about this location, there was an error within DQC's internal mapping system such that it used a Brantford map more recent than July 1954 that inadvertently broadened the applicable city limits. Erroneously applying those broader city limits, the Proposed Grand River Site appeared to be within the Territory; however, in actuality, it was not. Operating under the wrong information, on February 22, 2023, Mr. Watters replied to Mr. Breau and confirmed that the Proposed Grand River Site fell within the Territory and that, once the Applicant had an accepted offer on the property, Mr. Watters would request the operating agreement from DQC's legal department to commence the formal steps to open the location.

16. During the period February 2023 through to February 2024, the Applicant negotiated with McDonald's Restaurants of Canada Limited ("McDonald's") to acquire 307 Grand River Street North, Paris.

17. In response to inquiries made by Mr. Watters on September 22, 2023, November 3, 2023 and December 8, 2023, the Applicant informed DQC as to the ongoing status of the proposed purchase from McDonald's. During this time, the Proposed Grand River Site remained in the DQC system as conditionally approved.

18. By text communication sent on February 21, 2024, Mr. Breau advised Mr. Watters that McDonald's had decided to sell 307 Grand River Street North, Paris to a different purchaser, and indicated that he had started looking for another location in the same area.

The Proposed Hartley Avenue Site

19. Mr. Watters' evidence was that, shortly after February 22, 2023 when he conditionally approved the Proposed Grand River Site, he became aware of an existing franchisee identifying 1 Hartley Avenue, Paris as a potential site for a Dairy Queen franchise. The other existing franchisee was rejected in July 2023, in part because conditional approval had already been given for the Proposed Grand River Site. In answer to an undertaking given at Mr. Watters' cross-examination, it was clarified that DQC's first discussion with this franchisee was on April 13, 2023. Other

franchisees subsequently expressed interest in operating a franchise at the 1 Hartley Avenue location.

20. After hearing from Mr. Breau that the Proposed Grand River Site was not going to happen, Mr. Watters learned that 1 Hartley Avenue was still available. As a result, he decided to explore other opportunities for that site. By a text message sent to Mr. Breau on March 7, 2024, Mr. Watters advised the Applicant that DQC was exploring a site in Paris for a "Grill and Chill, outside of the Territory". He further indicated that, if DQC decided to move forward, it would follow its standard procedure for approval consideration, including "issuing site clearance".

21. Mr. Watters then followed up by formal correspondence, dated March 15, 2024, advising the Applicant that DQC was "currently reviewing the possibility" of developing a new DQ Grill & Chill restaurant at 1 Hartley Avenue, Paris ("the Proposed Hartley Avenue Site"). Enclosed with the March 15th letter was a copy of DQC's "Policy on Site Clearance Market Factors" ("the Site Clearance Policy"). The opening paragraph of that policy describes DQC's approach in approving new franchise locations. It reads:

> From time to time Dairy Queen Canada Inc. (DQC) is called upon to decide whether to grant a license for a new restaurant/store in proximity to an existing restaurant/store. Except for certain rights granted in older franchise agreements, DQC does not, as a rule, grant protected territories to any franchisee. DQC grants to its franchisees the right to operate a restaurant/store at a particular location only and makes no commitment that it will not establish new restaurants/stores in proximity to existing restaurants/stores. Nevertheless, there may be circumstances under which DQC, acting within its exclusive and absolute right, may choose not to establish a new restaurant/store in proximity to an existing restaurant/store.

22. Pursuant to the Site Clearance Policy, the Applicant was requested to advise in writing if it had concerns about the proximity of the proposed new store to its licensed location(s) so that DQC could consider same. By correspondence sent to DQC on March 28, 2024, the Applicant expressed its concerns about the Proposed Hartley Avenue Site as a new franchise location.

23. In response, by correspondence sent to the Applicant's lawyer from G. Beck, DQC's Vice President & Assistant General Counsel, dated May 1, 2024, DQC advised of its decision to move forward with the Proposed Hartley Avenue Site. Ms. Beck clarified that the Applicant's territory was as described in the Franchise Agreement, consisting of the city limits of Brantford as of July 1954 and five (5) miles in any direction from those city limits; a map was attached showing the area and showing the location of the Proposed Hartley Avenue Site as falling outside the Applicant's territory. Ms. Beck further advised that the Applicant did not have the right to preclude DQC from approving and licensing a DQ Grill & Chill location outside of the Territory, and that DQC had no obligation to consult further with the Applicant prior to it being finalized.

24. Mr. Watters' evidence on cross-examination was that DQC had not yet approved, conditionally or otherwise, the Proposed Hartley Avenue Site. The existing franchisee still needs to go through the approval process.

ISSUES

25. The following are the main issues to be determined on this application:

(a) Has DQC breached its statutory obligations of fair dealing and good faith to the Applicant, contrary to s. 3 of the *Wishart Act*?

(b) If DQC has breached its statutory obligations under s. 3 of the *Wishart Act*, what is the appropriate remedy?

POSITION OF THE APPLICANT

26. It is the Applicant's position that DQC's statutory obligations of good faith and fair dealing pursuant to s. 3 of the *Wishart Act* required two things: (i) that DQC disclose to the Applicant the interest of other potential franchisees that would have the impact of limiting development within the Territory; and (ii) that DQC accord the Territory the same approximate eight (8) kilometre protective radius from another DQC restaurant/store that it gives to other locations.

27. DQC never communicated to the Applicant, verbally or in writing, that other persons were interested in developing a DQC restaurant in the Town of Paris or that DQC had been receiving inquiries as early as April 2023 from other franchisees to develop a DQC restaurant in the north end of Paris, but just outside of the Applicant's territory. DQC also never communicated to the Applicant, verbally or in writing, that, if he was not able to secure the Proposed Grand River Site or another location within its vicinity, DQC would move forward with plans to develop another store in the Town of Paris with a different franchisee.

28. In the past number of years, DQC has taken steps to treat the Applicant like a standard franchisee, including: (a) polling data from the Applicant's stores for 2016 - 2018 when such polling was not permitted under the Franchise Agreement; (b) refusing to permit the Applicant to develop a DQ Grill & Chill restaurant within the Territory unless he entered into a new franchise agreement; and (c) refusing to assist the Applicant with challenges it had with its point-of-sale system.

29. It is the Applicant's position that the Territory extends as far as the intersection of Scott Avenue and Grand River Street North in Paris, Ontario. The Applicant submits that DQC has accepted, in writing, that this boundary identifies the Applicant's territory, by means of Mr. Watters' reply email communication, dated February 22, 2023, wherein he confirmed "I did speak to legal and can confirm that this site [307 Grand River Street North, Paris] does fall within your territory". From this, the Applicant asserts that DQC acknowledges that the Applicant's exclusive territory does encompass parts of the Town of Paris.

30. After hearing from Mr. Breau, on February 21, 2024, that the Applicant would not be able to purchase 307 Grand River Street North, DQC waited only ten business days before advising that it was moving forward with consideration of the Proposed Hartley Avenue Site.

31. DQC has policies in place providing that their locations should be a minimum of eight (8) kilometres apart, although that distance can be adjusted downward in a condensed, urban setting. The Town of Paris is not an urban setting. The Proposed Hartley Avenue Site is located only 450 metres outside of what DQC approved the Applicant's territory to be in February 2023, and is less than eight (8) kilometres from the smaller territory that DQC alleges the Applicant is entitled to. The Town of Paris cannot support three Dairy Queen restaurants/stores.

32. The Proposed Hartley Avenue Site will prevent the Applicant from adding a store as planned within its territory and will also compete with its to-be-built and already-approved store at the Approved Rest Acres Site. While the Applicant was prepared to split the Town of Paris's population between two (2) stores that it controlled, it will now be competing with a franchise location from which the Applicant derives no benefit whatsoever.

33. DQC's policies do not take into account their impact on territories and the rights of its franchisees to develop within territories. The Applicant will suffer irreparable harm if DQC establishes a Grill & Chill or other restaurant at the Proposed Hartley Avenue Site since the Applicant has no way of calculating the losses on its store to be built in the north end of Paris or on its store at the Approved Rest Acres Site.

POSITION OF THE RESPONDENT

34. It is the Respondent's position that the Applicant's territory is clearly defined as the City of Brantford and five miles in any direction from its city limits as of the date the Franchise Agreement was executed, which was July 21, 1954. The broad city limits the Applicant is relying on to define its territory for the purposes of this application are not the boundaries that were in place as of the date of the Franchise Agreement and, therefore, are wrong.

35. Section 18 of the Franchise Agreement specifically confirms that the agreement does not interfere with DQC's right to develop the area outside of the Territory. Nothing in the Franchise Agreement limits or purports to limit DQC's right to develop locations or do anything "in any other location or area". The Applicant seeks to enjoin DQC from exercising its rights to develop a location that is outside of the Applicant's exclusive territory and where it has no contractual rights.

36. At the time DQC approved the Proposed Grand River Site, DQC's internal mapping system wrongly defined the Territory using Brantford's modern city limits, which were broader than the city's limits in place on July 21, 1954. When the correct city limits of Brantford are applied, the site is not in the Territory.

37. When deciding whether to approve a site which is in proximity to an existing store or restaurant, DQC takes into consideration factors as outlined in the Site Clearance Policy. As part of that policy, once DQC decides to explore a new location, it notifies existing owners of locations within up to 8.05 km of the proposed new restaurant/store location or of the two closest

restaurant/store locations. But the policy is not a contractual term and it does not guarantee a protective zone to existing franchisees from new franchise locations.

38. DQC has not breached any term of the Franchise Agreement. The application should be dismissed because the Applicant has no cause of action or legal right which would support the granting of any relief, including a permanent or interim injunction or damages.

ANALYSIS

(a) Has DQC breached its statutory obligations of fair dealing and good faith to the Applicant, as required by section 3 of the Wishart Act?

The Law

39. Since this dispute involves a franchise agreement, the *Wishart Act* applies. That legislation is remedial and is intended to address the inequality in bargaining power between franchisor and franchisee. As such, it should be given "such fair, large and liberal interpretation as best ensures the attainment of its objectives": *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252, at para. 496; and *Burnett v. Cuts*, 2012 ONSC 3358, at para. 33.

40. Section 3 of the *Wishart Act* reads:

> 3 (1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.
>
> (2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement.
>
> (3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

41. A determination of whether a party has breached the duty of good faith under s. 3 requires an examination of all the circumstances of the case and is context-specific: *Fairview Donut Inc.*, at para. 498; and *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 SCR 494, at para. 69.

42. In *Spina v. Shoppers Drug Mart Inc.*, 2012 ONSC 5563, at paras. 148-150, Perell J. described the s. 3 duty in the following manner:

> [148] The duty of good faith and fair dealing is imposed to secure the performance of the contract the parties have made and it is not intended to replace that contract with another contract or to amend the contract by altering the express terms of the franchise contract: *Pointts Advisory Ltd. v. 754974 Ontario Inc.*, [2006] O.J. No. 3504 at para. 55 (S.C.J.); *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA

460 (CanLII), [2011] O.J. No. 2786 at para. 51 (C.A.); *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 2003 CanLII 9923 (ON CA), 68 O.R. (3d) 457 (C.A.).

[149] The duty of good faith and fair dealing has been considered in several cases involving claims by franchisees. These cases reveal that the duty of good faith and fair dealing requires a franchisor:

- To exercise its powers under the franchise agreement in good faith and with due regard to the interests of the franchisee: *Shelanu Inc. v. Print Three Franchising Corp.*, *supra* at paras. 66 and 69.

- To observe standards of honesty, fairness and reasonableness and to give consideration to the interests of the franchisees: *Landsbridge Auto Corp. v. Midas Canada Inc.*, [2009] O.J. No. 1279 (S.C.J.) at para. 15; *Shelanu Inc. v. Print Three Franchising Corp., supra* at paras. 5, 68-71.

- To ensure that the parties do not act in such a way that eviscerates or defeats the objectives of the agreement that they have entered into: *Transamerica Life Inc. v. ING Canada Inc., supra* at para. 53; *Landsbridge Auto Corp. v. Midas Canada Inc., supra* at para. 17.

- To ensure that neither party substantially nullifies the bargained objective or benefit contracted for by the other, or causes significant harm to the other, contrary to the original purpose and expectation of the parties: *Katotikidis v. Mr. Submarine Ltd.*, 2002 CanLII 49646 (ON SC), [2002] O.J. No. 1959 at para. 72 (S.C.J.); *TDL Group Ltd. v. Zabco Holdings Inc.*, [2008] M.J. No. 316 at para. 272 (Q.B.).

- Where the franchisor is given a discretion under the franchise agreement, the discretion must be exercised reasonably and with proper motive and not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties: *Landsbridge Auto Corp. v. Midas Canada Inc., supra* at para. 17; *CivicLife.com Inc. v. Canada (Attorney General)* 2006 CanLII 20837 (ON CA), [2006] O.J. No. 2474 (C.A.), at para. 50; *Shelanu Inc. v. Print Three Franchising Corp., supra* at para. 96.

[150] In *1117304 Ontario Inc. (c.o.b. Harvey's Restaurant) v. Cara Operations Ltd.*, 2008 CanLII 56704 (ON SC), [2008] O.J. No. 4370 (S.C.J.), Justice Kershman summarized the content of the duty of good faith in the franchise context as follows, at paras. 68-72:

- a party may act self-interestedly, however in doing so that party must also have regard to the legitimate interests of the other party;

- if A owes a duty of good faith to B, so long as A deals honestly and reasonably with B, B's interests are not necessarily paramount;

- good faith is a minimal standard, in the sense that the duty to act in good faith is only breached when a party acts in bad faith. Bad faith is conduct that is contrary to community standards of honesty, reasonableness or fairness (e.g. serious misrepresentations of material facts); and

- good faith is a two way street. Whether a party under a duty of good faith has breached that duty will depend, in part, on whether the other party conducted itself fairly.

The Applicant's Franchise Area

43. The parties do not agree on the extent of the Applicant's territory.

44. The Franchise Agreement did not include a scheduled map delineating the agreed-upon territory in image form, which would have been helpful. However, I find that the Franchise Agreement is nonetheless clear that the Applicant's contracted franchise area is the July 1954 Brantford city limits and five (5) miles – which converts to 8.05 kilometres – in any direction from those city limits. In the record before the court, DQC has filed a map showing the Brantford city limits as of July 1954 with the 5-mile radius around it (Exhibit "P" to Mr. Watters' affidavit, dated July 15, 2024). The veracity of that map was not formally disputed by the Applicant. I accept that map as showing the proper city limits to be applied in this case as representing the Territory.

45. There has been no amendment to the Franchise Agreement that changes the Territory. In my view, there is no confusion or ambiguity in the description of the Territory as found in the parties' agreement. I do not accept the Applicant's position that its exclusive territory extends further than as defined in the Franchise Agreement simply on the basis that DQC confirmed that the Proposed Grand River Site fell within the Territory when Mr. Watters conditionally approved that location on February 22, 2023. I accept the uncontroverted evidence of Mr. Watters that, in providing that conditional approval, DQC's internal mapping had erroneously used a map of the City of Brantford that showed the city limits *subsequent* to July 1954.

46. Mr. Breau, himself, has acknowledged that it is the 1954 city limits that apply to the parties' agreement. In correspondence he sent to DQC, dated October 21, 2020, respecting a "DQ Brant Inc. Expansion", he acknowledged that the Applicant's territory is as set out in the Franchise Agreement, writing: "As per page 1 of the 1954 agreement, our territory shall remain as 'The City of Brantford, Ontario and Five (5) miles in any direction from the present (1954) city limits of Brantford, Ontario.' This must be maintained." [Emphasis added.]

Sharing of Information About Other Expressed Interest

47. It is not disputed that a franchisor has a duty to disclose important and material facts that relate to the ongoing performance or enforcement of a franchise agreement under s. 3 of the *Wishart Act*. Here, however, there was no non-disclosure by DQC of an important and material fact that related to the ongoing performance or enforcement of the Franchise Agreement. DQC did not withhold any information that precluded the Applicant from making an informed financial and business decision as it relates to any of its operating locations or its efforts to open a new location in Paris, Ontario.

48. Nowhere in the Franchise Agreement does it provide that DQC has a duty to inform the Applicant of inquiries or applications received for proposed franchise locations surrounding the Territory. There is an obligation to notify set out in the Site Clearance Policy. DQC followed that policy and put the Applicant on notice of the Proposed Hartley Avenue Site when it was going to be considered for approval. There was no unfairness in this regard since the evidence is that no decision had yet been made as of that date. As the court in *Trillium Motor World Ltd. v. General Motors of Canada Limited*, 2015 ONSC 3824, at para. 243, appeal allowed on damages only 2017 ONCA 544, leave to appeal refused [2017] S.C.C.A. No. 366, held, "[t]he duty to disclose important and material facts under s. 3 of the *Wishart Act* does not extend so far as to require [the franchisor] to keep the [franchisees] abreast of every development or share the details of its restructuring plan on an ongoing basis. The duty is contextual and governed by the boundaries of reasonable conduct."

49. There is no contractual term granting the Applicant the right to be the exclusive franchisee for the Paris, Ontario area nor was there any representation made by DQC that this would be the case. It turns out that the Proposed Grand River Site is not within the Territory and so, but for DQC's incorrect internal mapping, it would not necessarily have been conditionally approved as a location for the Applicant under the Franchise Agreement's terms. However, since the Proposed Grand River Site was within 1 kilometre of the 1 Hartley Avenue location, DQC held off on formally considering that location until after February 21, 2024. By that time, it had been over a year since Mr. Breau had first indicated that the Applicant was interested in developing the Proposed Grand River Site. During that time, DQC rejected an opportunity to develop 1 Hartley Avenue in Paris while the Applicant was negotiating with McDonald's. I accept DQC's submission that this reflects its good faith in dealing with the Applicant and giving it the time needed to negotiate a purchase of the Proposed Grand River Site.

50. To imply a term that DQC was required to give notice to the Applicant of the interest received from others about developing and operating a Paris, Ontario restaurant/store is not consistent with the express term of the Franchise Agreement nor is it necessary to make the Franchise Agreement commercially effective: *Fairview Donut Inc.*, at paras. 461 and 483.

51. The Applicant is essentially claiming a "right of first refusal" to develop a store in Paris on the sole basis that it had received conditional approval for the Proposed Grand River Site. The Franchise Agreement does not provide any "right of first refusal" to the Applicant. In my view, the

conditional approval given for the Proposed Grand River Site was precisely that, conditional on the Applicant obtaining the 307 Grand River North Street, Paris location, which did not happen.

52. DQC gave due regard to the Applicant's legitimate interests. DQC purposefully held off for a year to allow Mr. Breau to negotiate the purchase of the property at 307 Grand River Street North, Paris. It did not put a timeline on that purchase. It did not pressure him. It made reasonable inquiries on three occasions asking for a status update. Nothing DQC did served to undermine or defeat the Applicant's objectives in opening a store at the Proposed Grand River Site. It was the refusal of McDonald's to sell the Applicant the property that was the determining factor in why the development of that location could not go ahead. I am satisfied that DQC acted in a commercially reasonable manner and with proper motive.

53. DQC's conduct in not disclosing to the Applicant that it had received interest from others in operating a restaurant/store in Paris, Ontario is not a departure from the standard of reasonable conduct that could be considered to be a breach of the duty of good faith. As the Supreme Court of Canada (Gascon J. for the majority) held in *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101, at para. 118:

> … the duty of good faith does not negate a party's right to rely on the words of the contract unless insistence on that right is unreasonable in the circumstances. The examples given by authors involve situations in which, exceptionally, such a stance would threaten the contractual relationship or the harmony of the contract without regard for the contracting partner's legitimate expectations; those in which it would allow one party to derive an *unwarranted* advantage from his or her situation – [Translation] "[b]ut this fault presupposes conduct that truly deviates from that of an honest, prudent contracting party"; and, finally, those in which the party who insists on adhering to the words of the contract is inflexible or is gratuitously impatient or intransigent: Lluelles and Moore, at Nos. 1984-96.

54. DQC was always entitled under the Franchise Agreement to consider its own interests in developing new restaurants/stores outside the Applicant's exclusive territory. The Proposed Hartley Avenue Site is clearly outside the Territory. DQC acted honestly and reasonably by informing the Applicant of the proposed new location at 1 Hartley Avenue, Paris on March 15, 2024, after it had heard from Mr. Breau that the Proposed Grand River Site would not be purchased and it had an alternate franchise location to consider.

55. I am satisfied that, once Mr. Breau confirmed that the Applicant's purchase of the Proposed Grand River Site would not be proceeding, DQC was entitled to explore other opportunities for the development of stores in the Paris, Ontario area.

56. The Applicant relied on the first instance decision in *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2014 ONSC 6056, in support of its argument that this is a situation where fair dealing required that DQC tell the Applicant about interest in developing another franchise location in the

Town of Paris. That case involved a class action brought against Pet Valu who then brought a motion for summary judgment on all of the common issues. Pet Valu's motion was substantially successful, but the class was permitted to proceed on one of the common issues: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2015 ONSC 29. The motion judge held, at para. 58, that, in a franchise context, a breach of s. 3 of the *Wishart Act* can be found if a franchisor fails to disclose important and material facts that relate to the ongoing performance of the franchise agreement The Ontario Court of Appeal reversed the motion judge's decision and dismissed all of the claims against Pet Valu: *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2016 ONCA 24, holding that the motion judge effectively found that Pet Valu had breached s. 3 by failing to disclose information necessary for the appellants to verify whether or not Pet Valu had breached a representation under the franchise agreement that Pet Valu received "significant volume discounts" and that this was akin to the "pre-litigation oriented duty of disclosure" rejected in *Spina*. The Court of Appeal further held that the motion judge did not imply a contractual obligation to provide ongoing disclosure regarding the level of volume discounts and there was no indication that non-disclosure once the appellants became franchisees adversely affected them in any way. Therefore, how could it be said that Pet Valu did not deal fairly or in good faith in the performance of the franchise agreement. It concluded that the motion judge "cast the net of s. 3 too widely". The Supreme Court of Canada refused to grant the plaintiff's application for leave to appeal at [2016] S.C.C.A. No. 105. In my view, *Pet Valu* does not assist the Applicant in this case.

57. Here, there was no reliance on anything said or not said by DQC that adversely impacted or disadvantaged the Applicant's rights under the Franchise Agreement or even its efforts to try and secure a location in the Town of Paris. In addition, DQC's evidence was the Applicant is able to develop as many stores as it wishes within its exclusive geographical territory, regardless of the location of any Dairy Queen restaurants/stores outside the boundaries of the Territory, as long as it first receives DQC's approval that the proposed location falls within the Territory. In his text communication of February 21, 2024, Mr. Breau advised that he had started looking for another location in the same area as the Proposed Grand River Site. The Applicant was, and is, still able to do so. However, there is no obligation on the part of DQC to wait for the Applicant to do that to the exclusion of accepting and considering other franchise development applications outside the Territory. (While the Applicant mentioned to DQC in its Site Clearance Policy response, dated March 27, 2024, that it was "working on another location at 304 Grand River Street North" in Paris, no formal request has been made to seek DQC's approval of that site.)

58. Contrary to the Applicant's assertions, I find that there was no obligation on DQC to disclose to the Applicant that others had expressed interest in opening up a franchise in Paris, Ontario prior to DQC deciding to accept a proposal for formal consideration.

59. I conclude that there was no breach of the Applicant's rights under s. 3 of the *Wishart Act* as a result of DQC not sharing with the Applicant information about interest expressed by others concerning prospective restaurants/stores in the Town of Paris.

8-kilometre Buffer Zone

60. The Applicant seeks an order that prevents any development request within 8 kilometres of its exclusive territory.

61. By s. 18 of the Franchise Agreement, DQC had retained the right to approve new licensed locations falling outside the Territory. The Applicant's contention that DQC is required to afford the perimeter of the Territory an 8-kilometre buffer zone is contrary to the express terms of the Franchise Agreement. The parties agreed to the defined Territory which already provides for an 8.05-kilometre (5 mile) buffer zone around the July 1954 city limits of Brantford.

62. There is no evidence in the record that establishes that all Dairy Queen locations are guaranteed an 8-kilometre protective buffer, as asserted by the Applicant. The only reference to 8.05 kilometres is found in the Site Clearance Policy for the purpose of determining which franchisees will be sent notice of applications for new locations. Indeed, the Site Clearance Policy makes it clear that "DQC…makes no commitment that it will not establish new restaurants/stores in proximity to existing restaurants/stores," and that any decision by DQC not to establish a new restaurant or store in proximity to an existing location is made in DQC's "exclusive and absolute right" and not as a result of any obligation to an existing franchisee. In the Site Clearance Policy, DQC also reserves the right to modify or amend (with no prior notice) its program of new restaurant/store announcement and the factors to be considered.

63. The Proposed Hartley Avenue Site falls outside of the Applicant's territory. It is a "straight line distance" of 5.76 kilometres with a "drive distance" of 12.25 kilometres away from the Approved Rest Acres Site. The closest of the Applicant's operating licensed locations to the Proposed Hartley Avenue Site is a "straight line distance" of 10.9 kilometres with a "drive distance" of 12.79 kilometres.

64. I do not accept the Applicant's argument that if DQC approves the Proposed Hartley Avenue Site, which the Applicant asserts is only approximately 450 metres outside of the boundary of the Territory, this is in breach of s. 3 of the *Wishart Act*. The five-mile perimeter from July 1954 Brantford's city limits is the "buffer zone" for the Applicant. It cannot reasonably be found, based on the clear and express language used in the Franchise Agreement or the Site Clearance Policy that the Applicant is entitled to an *additional* 8-kilometre buffer zone outside the original buffer zone. To accept the Applicant's argument in this regard would serve to create a 16-kilometre protective radius around the July 1954 Brantford city limits for the Applicant's benefit alone, without the parties agreeing on that term and with no consideration being paid.

65. In my view, the Applicant wants DQC to act in a way that benefits the Applicant's business and territory, to the detriment of DQC (and other potential franchisees). The Applicant is effectively asking that DQC be required to act in a fiduciary-like manner that protects the Applicant's interests. That is not what is required by the Franchise Agreement or by s. 3 of the *Wishart Act*: see *Trillium Motor World Ltd.*, at para. 154.

66. I conclude that there was no breach of the Applicant's rights under s. 3 of the *Wishart Act* as a result of DQC not applying an 8-kilometre buffer zone to the boundary of the Territory to protect the Applicant's interests.

Polling Data

67. The Applicant expresses concern that DQC has used the polling data collected for 2016 - 2018 pertaining to two of its locations to determine the Brantford and Paris markets and make the decision to award a store "on the border" of the Territory. The Applicant argues that this conduct is unethical and a breach of its entitlements under the Franchise Agreement.

68. There is no evidence to support the allegation that DQC has used the Applicant's polling data it obtained in relation to its decision to proceed with the Proposed Hartley Avenue Site. The evidence of Mr. Watters is that DQC does not review polling data for the purpose of making development decisions. There was no contractual obligation not to poll or collect data. When DQC became aware that two of the Applicant's stores had been subject to polling, DQC immediately caused the polling to stop, and it provided the Applicant with the information it requested to determine the extent of the information gathered. There is no evidence of any damages incurred related to the polling.

69. I conclude that there was no breach of the Applicant's rights under s. 3 of the *Wishart Act* as a result of DQC's collection of the polling data.

Point-of-sale Systems

70. The Applicant submits that, in or about 2016, he adopted and purchased a Panasonic point-of-sale system which was being implemented by DQC at the time. The Applicant experienced some challenges with the Panasonic system and sought assistance from DQC but, in March 2024, was advised that DQC was no longer supporting the system. The Applicant argues that this is evidence that DQC is acting in bad faith towards the Applicant due to it having "consistently resisted" entering into a Standard Franchise Agreement with DQC.

71. I am satisfied that DQC is not specifically withholding support from the Applicant because of the terms of his Franchise Agreement or otherwise. The evidence shows that, beginning in June 2019, DQC put its franchisees on notice of its intention to implement a new system known as the Integrated Technology Platform Par Brink ("ITP"). Cash incentives were made available to all franchisees who opted into the new ITP system. In 2021, DQC announced that, by December 31, 2023, ITP would be required at most locations, based on contract type, after which the old system (iQTouch) would no longer be supported by DQC. The Applicant was informed that it could continue to use the old system but it would have to provide its own menu and other updates to the electronic point-of-sale system. There are approximately 22 DQC store locations in Canada which continue to use the iQTouch system rather than the new ITP. DQC does not provide direct technical support to any of those franchisees who have opted to continue to use the iQTouch (or other

previously approved systems) where ITP is available. The Franchise Agreement does not impose any obligation on DQC to provide support to the Applicant regarding its point-of-sale system.

72. I conclude that there was no breach of the Applicant's rights under s. 3 of the *Wishart Act* as a result of DQC's failure to service the iQTouch point-of-sale system.

Other Stores Proposed by the Applicant

73. The Applicant also argues that DQC is holding the Applicant to "the strictest possible interpretation" of the Franchise Agreement and that it is unfair and a breach of good faith dealings for DQC to require the Applicant to otherwise enter a new franchise agreement for the sale of food for any new location to be operated by the Applicant and "grandfather" only the terms of the Franchise Agreement.

74. DQC's "grandfathering" offer made to the Applicant is the same approach that is set out in the Standard Franchise Agreement for existing franchisees and, in my view, fairly addresses the interests of both parties. The relevant paragraphs in the Standard Franchise Agreement read as follows:

> ***Conversion Programs.*** DQC offers two conversion programs, described below:
>
> Existing, qualifying franchisees that operate a qualifying Dairy Queen®/Limited Brazier® or Dairy Queen® soft-serve-only store (DQ® soft-serve-only stores are distinguishable from the DQ® Treat locations described in this disclosure document in that they are under franchise agreements entered into over 30 years ago and have no rights to carry any DQ® food items) may be allowed to convert their store to a DQ Grill & Chill® restaurant by signing a new franchise agreement and the conversion addendum included in schedule A-1 (the "DQ Grill & Chill® Conversion Addendum"), which allows franchisee to carry over certain beneficial terms from franchisee's old agreement to the new agreement, including the continuing license fee and term. Franchisees converting a Dairy Queen®/Limited Brazier® or Dairy Queen® soft-serve-only store to a DQ Grill & Chill® restaurant are referred to as "DQ Grill & Chill® conversion franchisees."
>
> Existing, qualifying franchisees that operate a qualifying Dairy Queen® soft-serve-only store may be allowed to convert their store to a DQ® Treat store by signing the food service amendment for limited system food (the "FSA") included in schedule A-6. Under this conversion program, franchisee does not sign a new franchise agreement, but instead signs the FSA, which modifies franchisee's existing DQ® franchise agreement. Franchisees converting a Dairy Queen® soft-serve-only store to a DQ® Treat store are referred to as "DQ® Treat conversion franchisees."

75. In my view, the Applicant is taking an unreasonable position expecting the granting of greater rights than are set out in the Franchise Agreement and that DQC should enter into a

"modified version" of the Standard Franchise Agreement that would allow the Applicant to continue with the autonomy that it has been operating under. It is completely within DQC's rights to decide whether to accept the Applicant's offer of a modified agreement or not. There was no bad faith in DQC declining to agree to such a modified agreement. The parties are free to contract between themselves for new franchise locations and there is no imbalance in power in this regard. In any event, Mr. Breau replied to DQC, on November 17, 2020, that he was "ok with only having that Limited Treat Store" and he "will look at setting up another food outlet in the same plaza".

76. I conclude that there was no breach of the Applicant's rights under s. 3 of the *Wishart Act* as a result of DQC's failure to agree to the "modified version" of the Standard Franchise Agreement put forward by the Applicant.

Discussion

77. The duties set out in s. 3 of the *Wishart Act* do not require DQC to forgo its own contractual rights, or to place the Applicant's interests ahead of its own. Section 3 also does not support a rewriting of a contract or implying a term that would conflict with the contract's express terms: *Churchill Falls*, at para. 118; and *Fairview Donut Inc.*, at paras. 461 and 500.

78. DQC has not "found a way to limit" the Applicant's territory. It is simply applying the clear terms of the Franchise Agreement. There is nothing unfair or in bad faith about doing so. Further, there is nothing preventing the Applicant from applying to develop a restaurant/store within the Territory in any location bordering Paris.

79. DQC did not fail to inform the Applicant of information that was expected and promised in the Franchise Agreement or otherwise. Information about other potential franchise applications is not information that would reasonably be expected to have a significant effect on the performance or enforcement of the Franchise Agreement itself.

80. In *Bhasin*, at paras. 86-87, the Supreme Court of Canada held that the common law duty of honesty in the performance of contractual agreements does not impose a "duty of disclosure or of fiduciary loyalty" and that "[a] party to a contract has no general duty to subordinate his or her interest to that of the other party." The Supreme Court further held that there is no duty to disclose information relevant to termination but there is a duty not to be actively misleading or deceiving of the other contracting party in relation to performance of a contract.

81. DQC has not misled or deceived the Applicant in relation to the performance or enforcement of the Franchise Agreement nor has it acted in a way that eviscerates or defeats the objectives of that agreement. Pursuant to s. 18 of the Franchise Agreement, it was always available for DQC to move to develop locations outside the Territory at any time. There was no policy, contractual term, or representation made by DQC that changed this.

82. There is no evidence to support the Applicant's contention that DQC's decision not to share information about the Proposed Hartley Avenue Site was intentional, tactical or motivated by DQC's preference to establish a location in the Town of Paris under the Standard Franchise Agreement. DQC approved the 989 Rest Acres Road Site which is very near Paris and it gave the Applicant a year to try and obtain the lands to develop 307 Grand River Street North in Paris.

83. There is nothing in the Franchise Agreement (or the Site Clearance Policy) that prevents DQC from awarding restaurants/stores on the Territory's border. Since there is no contractual term being performed or enforced in this regard, there is no duty under s. 3 of the *Wishart Act* triggered. The opening of the Proposed Hartley Avenue Site, if approved, cannot be construed as unfair dealing as it will open outside of the Applicant's exclusive territory as is permitted under the terms of the Franchise Agreement.

84. As the court held in *2130679 Ontario Inc. v. The Cora Franchise Group Inc.*, 2013 ONSC 3099, at para. 21: "[T]he s. 3 duty is not freestanding. It is grounded in the contractual rights and obligations of the parties and does not take away the Franchisor's ability to adhere to and rely upon the terms of the Agreements to protect its own commercial interests."

85. Once the Applicant advised DQC that McDonald's had not agreed to sell 307 Grand River Street North to the Applicant, that brought that proposed development to an end and DQC was entitled to revert to its contractual right under the Franchise Agreement to canvas other development opportunities in Paris and it provided reasonable notice of its intention to do so. Nothing it did amounts to a breach of s. 3 of the *Wishart Act* to comply with the duty of fair dealing and to act in good faith or in accordance with reasonable commercial standards. Acting on its own contractual rights does not amount to bad faith or unfair dealing. Mr. Breau's statement that he intended to find a new location in the same vicinity in Paris, Ontario is not sufficient to grant the Applicant a right to develop a Dairy Queen store there to the exclusion of any other franchisees.

Conclusion

86. Based on the foregoing, I find that the Applicant has not established that DQC breached its duties under s. 3 of the *Wishart Act* in the circumstances of this case and the dealings between the parties. There was no deliberate non-disclosure that arises clearly within the "performance" or "enforcement" of the Franchise Agreement. The Applicant is attempting to create what is effectively a "right of first refusal" and a disclosure obligation that do not exist in the Franchise Agreement or by virtue of s. 3 of the *Wishart Act* to provide itself with wider protection against competition. I conclude that the record shows that DQC at all times acted fairly, in good faith, and in a commercially reasonable manner towards the Applicant.

(b) If DQC has breached its statutory obligations under s. 3 of the Wishart Act, what is the appropriate remedy?

87. Given my conclusion that DQC has not breached its obligations under s. 3 of the *Wishart Act*, it is not necessary for the court to address what an appropriate remedy would be in the circumstances.

DISPOSITION

88. The application is dismissed.

COSTS

89. Counsel for the parties made submissions on costs at the hearing.

90. There is no conduct on the part of the Applicant that warrants costs on a substantial indemnity basis: *Bayford v. Boese*, 2021 ONCA 533, at para. 5. The application issues were important to the parties and extraordinary relief was sought by the Applicant. I accept that a sur-reply affidavit was needed to be prepared by DQC after receipt of the Applicant's reply affidavit, and that the second affiant was prepared for cross-examination but never examined. This was not an overly complicated or technical case. I accept the submissions of counsel for the Applicant that it was not necessary to have two lawyers on for DQC for all of the work claimed, especially given that their respective years of call are relatively close.

91. Considering the balancing exercise required under Rule 57.01, the guidance provided by the *Boucher* decision of the Ontario Court of Appeal, and the reasonable expectations of the parties as indicated by their respective bills of costs, I am satisfied that awarding partial indemnity costs to DQC payable by the Applicant in the amount of $35,000.00, inclusive of HST and disbursements, is fair, reasonable and proportionate in the circumstances for this application. Costs are payable within 30 days.

B. MacNeil J.

B. MacNeil J.

Release date: January 6, 2024