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Franchise Law
Dealing With and Litigating Disputes Involving Franchises

Other Remedies and Dispute Resolution Mechanisms

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Injunctions & Summary Judgment

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1 Injunctions

1.1 Equitable Remedy

Whether proceeding by action or application, the parties have available the remedy of the interim and/or interlocutory injunction. An injunction is an *in personam* remedy (*i.e*., involving or determining the personal rights and obligations of the parties) which commands or forbids an action.

It emerged out of the English High Court of Chancery the jurisdiction of which was complementary to the formalism of the medieval system of common law. The Lord Chancellor, as 'keeper of the King's conscience', could be petitioned to have recourse to principles of justice – what is fair and right - to correct or supplement the common law to see that equity was done between the parties. These separate jurisdictions of common law and equity merged long ago in our courts, but the distinction remains as reflected in section 96(1)[1] of the *Courts of Justice Act*.

1.1.1 Clean Hands

Over time the equitable concept of an injunction has been incorporated into statute[2] and the *Rules of Civil Procedure*[3], but there are two equitable concepts – the 'clean hands doctrine' and laches - that are frequently raised in injunction cases and bear some discussion.

The 'clean hands doctrine' is the principle that a party cannot seek equitable relief or assert an equitable defence if that party has violated an equitable principle, such as good faith. Given that the duty to act in good faith is imposed on both franchisor and franchisee by section 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000*[4], the

[1] Courts shall administer concurrently all rules of equity and the common law.
[2] Section 101 of the Courts of Justice Act – "In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted … by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so."
[3] Rule 40 engrafts various procedural restrictions. 40.01 requires that it be sought by motion to a judge in an existing or intended action or application. 40.02 limits the length of an initial *ex parte* order to 10 days. 40.03 requires the party seeking the order to give an undertaking to compensate the party against whom the order is sought if they suffer damages unnecessarily.
[4] S.O. 2000, c.3

principle that a party seeking equitable relief "must come to equity with clean hands"[5] is clearly relevant.

It is not, however, a licence for the court to scrutinize all aspects of a party's behaviour to ensure that it has led a blameless life: "[W]rongdoing will not deprive the plaintiff of a specific performance or an injunction unless it bears directly upon the appropriateness of the remedy."[6] As stated by the Court of Appeal in *Toronto (City) v. Polai*[7], "The misconduct charged against the plaintiff as a ground for invoking the maxim against him must relate directly to the very transaction concerning which the complaint is made, not merely to the general morals or conduct of the person seeking relief."

1.1.2 Laches

The doctrine of laches provides that if delay is unreasonable and prejudicial, it is a bar to equitable relief. It is an expression of the more general principle that it is unjust to grant relief against a party who will be prejudiced because of their change in position occasioned by the acts or omissions of the party seeking relief.

The equitable defence of laches has been described by the Supreme Court of Canada in *M.(K.) v. M.(H.)*[8] as follows:

> A good discussion of the rule and of laches in general is found in Meagher, Gummow and Lehane, supra, at pp. 755-65, where the authors distill the doctrine in this manner, at p. 755:
>
> > It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the *status quo*, or otherwise permitted a situation to arise which it would be unjust to disturb…
>
> Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether

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[5] *BMO Nesbitt Burns Inc. v. Wellington West Capital Inc*. (2005), 77 O.R. (3d) 161 (C.A.)

[6] Robert J. Sharpe, "Injunctions and Specific Performance" (2008 looseleaf ed.), Canada Law Book at ¶1.1070.

[7] (1969), [1970] 1 O.R. 483 at ¶25. See also *Silverberg v. 1054384 Ontario Ltd*., 2008 CarswellOnt 6772 (S.C.J.) at ¶120-121; *Singh v. 3829537 Canada Inc.*, 2005 CarswellOnt 2391 (S.C.J.)

[8] [1992] 3 S.C.R. 6 at 77-78. See also *Parker v. Canadian Tire Corp*., 1998 CarswellOnt 1633 (Gen. Div.) and Robert J. Sharpe, "Injunctions and Specific Performance" (2008 looseleaf ed.), Canada Law Book at ¶1.820-1.850.

> the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

The equitable remedy of injunctive relief and the equitable principles surrounding it have evolved through centuries of case law. The Supreme Court of Canada relieved us of the burden of reviewing that history by defining the modern test in *RJR-MacDonald v. Canada (Attorney General)*[9] as adapted from the House of Lords' decision in *American Cyanamid Co. v. Ethicon Ltd.*.[10]

1.2 The Modern Three-Part Injunction Test

In *RJR-MacDonald v. Canada (Attorney General)* the Supreme Court of Canada defined the familiar three-part test for an interlocutory injunction: (i) strength of the case; (ii) irreparable harm; and (iii) balance of convenience. However, it bears some brief review before turning to its application specifically within the franchise context.

1.2.1 Strength of the Case

Prior to *American Cyanamid Co. v. Ethicon Ltd.*, a party moving for either a prohibitory or mandatory interlocutory injunction was required to show a "strong *prima facie* case". However, Lord Diplock revised this for the prohibitory injunction, in most circumstances, to being a requirement merely to show a "serious question to be tried" – that the proceedings were not frivolous or vexatious.

Accepting the foregoing, the Court in *RJR-MacDonald v. Canada (Attorney General)* set out the court's task as follows:

> There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. … Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.[11]

There is, however, an important exception to the "serious question to be tried" element of the test. It arises when the practical result of granting the interlocutory injunction will be the determination of the action, in which case the party seeking the relief must show a "strong *prima facie* case". Examples noted by the Court in *RJR-MacDonald v. Canada (Attorney General)* were, "when the right which the applicant seeks to protect can only be

[9] [1994] 1 S.C.R. 311.
[10] [1975] 1 All E.R. 504.
[11] [1994] 1 S.C.R. 311 at ¶54-55.

exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial."[12]

Therefore, for the purposes of obtaining interlocutory relief, it must be borne in mind that there remain two branches to the "strength of the case" element of the test – "serious question to be tried/not frivolous or vexatious" and "strong *prima facie* case".

The party seeking relief has the higher burden of "strong *prima facie* case" if (a) they are seeking a mandatory rather than a prohibitory injunction[13]; or (b) granting a prohibitory interlocutory injunction will have the practical effect of a premature determination of the dispute[14]. The party seeking a mandatory injunction must establish to a high degree of assurance that the injunction will appear to have been properly granted at the conclusion of the trial or that they have a significant likelihood of success. Otherwise, in the case of the party seeking an interlocutory prohibitory injunction, they need only meet the standard of "serious question to be tried" or "not frivolous or vexatious".

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[12] [1994] 1 S.C.R. 311 at ¶56.

[13] See *Struik v. Dixie Lee Food Systems Ltd.*, 2006 CarswellOnt 4932 (S.C.J.); *1460904 Ontario Inc. v. MDG Computers Canada Inc.*, 2006 CarswellOnt 6744 (S.C.J.); *Sumlach Enterprises Ltd. v. Oil Changers Inc.*, 2006 CarswellOnt 1842 (S.C.J.); *Esmail v. Petro-Canada*, 1995 CarswellOnt 4375 (Gen. Div.); *Parker v. Canadian Tire Corp*., 1998 CarswellOnt 1633 (Gen. Div.); *TDL Group Ltd. v 1050284 Ontario Ltd.*, 2001 CarswellOnt 3304 (Div. Ct.); *Ticketnet Corp. v. Air Canada*, 1987 CarswellOnt 473 (H.C.J.) at ¶14-15: "The application to require Air Canada to deliver the research material, all counsel agree, is a request for a mandatory injunction, and the law dealing with that subject is reviewed by Megarry J. in *Shepherd Homes Ltd. v. Sandham*, [1970] 3 All E.R. 402 (Ch. D.) and his comments are endorsed by the Court of Appeal in the *Locabail International Finance Ltd. v. Agroexport, The Sea Hawk*, [1986] 1 All E.R. 901, [1986] 1 W.L.R. 657, case. The applicable law is stated by Megarry J. at p. 412 [All E.R.]:

> Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, *inter alia*, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction. Fourth, it follows that the statement in 21 Halsbury's Laws (3rd Edn) p. 369, para. 774, founded on *Morris v. Grant*, namely:
>
> > ... if the defendant, after express notice, has committed a clear violation of an express contract ... a mandatory injunction will be granted on an interlocutory application,
>
> is too wide. Both the case itself and the statement founded on it have to be qualified in the light of the other authorities to which I have referred, especially *Bowes v. Law* and *Kilbey v. Haviland* (which, although decided earlier, do not seem to have been cited) and *Sharp v. Harrison*. No doubt a mandatory injunction may be granted where the case for one is unusually sharp and clear; but it is certainly not a matter of course.

I am of the view that the law, as referred to by Megarry J., applies and in the absence of my being able to find that there was a binding software development agreement between Air Canada and Ticketnet that I cannot have a "high degree of assurance that at trial it will appear that the injunctions was rightly granted". So, the application for a mandatory injunction brought by Ticketnet fails."

[14] *Second Cup Ltd. v. Niranjan*, 2007 CarswellOnt 5285 (S.C.J.)

In *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*[15], Justice Perell described what is entailed by the test of a "strong *prima facie* case":

> The strong *prima facie* case standard involves a more intensive examination of the merits of the plaintiff's case. Since a "*prima facie* case" is established when on the balance of probabilities it is likely that the plaintiff will succeed, I understand a "strong *prima facie* case" to involve a higher level of assurance at the interlocutory stage that it is likely that the plaintiff will succeed at the trial. …
>
> I do not, however, understand the requirement of showing a strong *prima facie* case to go so far as to require the plaintiff to actually prove his or her case. If this were true, a trial would be superfluous and the interlocutory motion would move from being an examination of the strength of the case to an actual determination of the merits of the case.[16]

The fact that the courts have made a distinction between mandatory and prohibitory injunctions for the purpose of determining the test to be applied has been the focus of considerable dispute. The courts have recognized that virtually any relief sought can be framed in either mandatory or prohibitory language and they have chosen to consider "function" rather than "form" in determining what test to apply.[17]

> A mandatory injunction is one which requires the defendant to act positively. A mandatory injunction may be given to remedy wrongs and require the defendant to undo some wrong he or she has committed. Such orders are restorative in nature, requiring the defendant to take whatever steps are necessary to repair the situation in a manner consistent with the plaintiff's rights. In other cases, mandatory injunctions look to the future and require the defendant to carry out some unperformed duty to act.[18]

1.2.2 Irreparable Harm

The next element of the test is the requirement for evidence supporting the contention that the party seeking the injunction will suffer irreparable harm if it is not granted. The Court in *RJR-MacDonald v. Canada (Attorney General)* was of the view that consideration of any harm that might be done to the party against whom the injunction was sought should be left to consideration under the balance of convenience element of the test. Therefore, the only question is whether the moving party's interests would be harmed so irrevocably that no remedy at trial would be satisfactory.

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[15] 2009 CarswellOnt 2280 (S.C.J.)
[16] 2009 CarswellOnt 2280 (S.C.J.) at ¶39-40
[17] See *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793 (S.C.J.) at ¶5-10
[18] Robert J. Sharpe, "Injunctions and Specific Performance" (2008 looseleaf ed.), Canada Law Book at ¶1.10

The irreparable nature of the harm is of more import than its magnitude. Irreparable harm, "is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."[19] By way of example the Court referred to instances where one party will be put out of business by the court's decision or where one party will suffer permanent market loss or irrevocable damage to its business reputation.

In *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*, Justice Perell summarized the analysis to be undertaken by the court: "In determining whether the plaintiff would suffer irreparable harm, the court will consider whether damages awarded after a trial will provide the plaintiff with an adequate remedy without the need for an interlocutory remedy … If damages or some other trial remedy would come too late or be inadequate to repair the harm or to do justice, then the harm may be said to be irreparable." [20]

It is important to note, however, the Court's qualification that the impecuniosity of the party against whom the injunction is sought, such that the party seeking the injunction would be unable to collect on a money judgment, although a relevant consideration, is not determinative of the issue.

1.2.3 Balance of Convenience

What is referred to as the "balance of convenience" element of the test might more accurately be referred to as the "balance of inconvenience" as did the Court in *RJR-MacDonald v. Canada (Attorney General).* It is an assessment of which of the parties will suffer the greatest harm if the relief sought is granted or refused pending trial.

In discussing the application of this part of the test, the Court accepted the essence of what Lord Diplock's comments in *American Cyanamid Co. v. Ethicon Ltd.* – the factors to be considered are numerous and will vary in each individual case.

> In *American Cyanamid* , Lord Diplock cautioned, at p. 408, that:
>
> > [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.
>
> He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."[21]

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[19] [1994] 1 S.C.R. 311 at ¶64
[20] 2009 CarswellOnt 2280 (S.C.J.) at ¶44
[21] [1994] 1 S.C.R. 311 at ¶68.

In *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*, Justice Perell stated:

> In considering the balance of convenience, it is appropriate to reconsider the comparative strength of the parties' cases. If the plaintiff's case seems weak, then the undoubted convenience of an injunction may not balance the inconvenience of the defendant suffering the interference with his or her rights based on a doubtful claim. Conversely, if the merits of the plaintiff's case seem quite strong then the plaintiff's inconvenience of being denied an interlocutory remedy may seem to outbalance the inconvenience of the defendant having to suffer a restraint on his or her rights.[22]

1.2.4 Not Water-Tight Compartments

Finally, it must be borne in mind that, as the three-part test forms the basis for an equitable remedy, it is flexible. It is not a series of hurdles, or boxes to be ticked off. must be overcome. As stated by Justice Sharpe in "Injunctions and Specific Performance", "[T]hey ought not to be seen as separate, water-tight categories. These factors relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness on another."[23] This approach as been widely accepted by the courts in the franchising context in cases such as *Osiris Inc. v. 1444707 Ontario Ltd.*[24], *Struik v. Dixie Lee Food Systems Ltd.*[25], *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*[26] and *Paul Sadlon Motors Inc. v. General Motors of Canada Ltd.*[27]

1.3 Application of the Three-Part Test in the Franchise Context

Aside from *RJR-MacDonald v. Canada (Attorney General)*, there are several cases which are repeatedly referred to in the injunction cases concerning franchises: *Esmail v. Petro-Canada*[28], *Parker v. Canadian Tire Corp.*[29] and *TDL Group Ltd. v 1050284 Ontario Ltd.*[30]. We will not discuss those cases directly in this paper. Instead we will review how *RJR-MacDonald v. Canada (Attorney General)* and those cases have been applied more recently in three particular contexts – restrictive covenants, terminations and system changes.

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[22] 2009 CarswellOnt 2280 (S.C.J.) at ¶46
[23] Robert J. Sharpe, "Injunctions and Specific Performance" (2008 looseleaf ed.), Canada Law Book at ¶2.600
[24] 2004 CarswellOnt 376 (S.C.J.)
[25] 2006 CarswellOnt 4932 (S.C.J.)
[26] 2009 CarswellOnt 2280 (S.C.J.)
[27] 2011 ONSC 4432
[28] 1995 CarswellOnt 4375 (Gen. Div.)
[29] 1998 CarswellOnt 1633 (Gen. Div.)
[30] 2001 CarswellOnt 3304 (Div. Ct.)

1.3.1 Restrictive Covenant Injunctions

There is a body of case law suggesting that if the party seeking prohibitory injunctive relief can show a clear breach of a negative or restrictive covenant – in effect, a strong *prima facie* case then the Court disposes the requirement for the party to demonstrate irreparable harm and balance of convenience.[31] If they cannot, then they revert to the regular three-part *RJR-MacDonald v. Canada (Attorney General)* test.[32]

In *Singh v. 3829537 Canada Inc.*[33], Justice Horkins stated that, "There is a principled basis for the modified approach. It flows from the fact that, unlike typical injunction cases, by issuing injunctive relief in these circumstances, the court is simply enforcing a contractual provision, which is not the product of an inequality of bargaining power, by which the responding party has already agreed to be bound."

In *Canpark Services Ltd. v. Imperial Parking Canada Corp.*[34], the court held that a negative covenant will give rise to a presumption of irreparable harm and an injunction will issue unless the responding party can satisfy the burden of proving that the covenant is itself invalid.

However, in *J.G. Collins Insurance Agencies v. Elsley*[35], the Supreme Court of Canada pointed out that there is a distinction to be made between an ordinary commercial agreement for, perhaps, the sale of a business, which may contain a restrictive non-competition covenant, and an employment agreement, which may also contain such a covenant. In the latter case, an employer seeking to enforce a non-competition covenant against an employee would be required to satisfy the three-part test.

> The distinction made in the cases between a restrictive covenant contained in an agreement for the sale of a business and one contained in a contract of employment is well-conceived and responsive to practical considerations. A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to assure the purchaser that he, the vendor, would not later enter into competition. Difficulty lies in definition of the time during which, and the area within which, the non-competitive covenant is to operate, but if these are reasonable, the courts will normally give effect to the covenant.
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> A different situation, at least in theory, obtains in the negotiation of a contract of employment, where an imbalance of bargaining power may

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[31] See *Rothmans, Benson & Hedges v. Hard Rock Café*, [2002] O.J. No. 3117 and *Bell Canada v. Manitoba Telecom Services Inc.* (2004), 49 B.L.R. (3d) 17 (Ont. S.C.J.).
[32] Bell Canada v. Manitoba Telecom Services Inc. (2004), 49 B.L.R. (3d) 17 (Ont. S.C.J.) at ¶102
[33] 2005 CarswellOnt 2391 (S.C.J.)
[34] (2001), 56 O.R. (3d) 102 (S.C.J.). See also *Montreal Trust Co. of Canada* (1988), 48 D.L.R. (4th) 385 (B.C.C.A.) and *Gulf Islands Navigation Ltd. v. Seafarers International Union of North America (Canadian District)* (1959), 18 D.L.R. (2d) 216 (B.C.S.C.)
[35] [1978] 2 S.C.R. 916

> lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in his own interest, knowledge and skills obtained during employment. Again, a distinction is made. Although blanket restraints on freedom to compete are generally held unenforceable, the courts have recognized and afforded reasonable protection to trade secrets, confidential information and trade connections of the employer.[36]

The Court of Appeal in *Shelanu Inc. v. Print Three Franchising Corp.*[37] held that the circumstances giving rise to a duty of good faith in an employer-employee relationship are equally present in a franchisor-franchisee relationship – they are relational contracts - and therefore, analogizing from *Wallace v. United Grain Growers Ltd.*[38], a franchisor has an obligation to have regard to a franchisee's legitimate interests and to deal promptly, honestly, fairly and reasonably with them. This brings us back to the common law concept of duties of good faith and fair dealing arising from the inequality of bargaining power associated with an imbalance of means, information, experience or control.

> The relative position of the parties as outlined by Iacobucci J. in [*Wallace v. United Grain Growers Ltd.*[39]] also exists in the typical franchisor-franchisee relationship. First, it is unusual for a franchisee to be in the position of being equal in bargaining power to the franchisor. … The second characteristic, inability to negotiate more favourable terms, is met by the fact that a franchise agreement is a contract of adhesion. As I have indicated, a contract of adhesion is a contract in which the essential clauses were not freely negotiated but were drawn up by one of the parties on its behalf and imposed on the other. Further, insofar as access to information is concerned, the franchisee is dependent on the franchisor for information about the franchise, its location and projected cash flow, and is typically required to take a training program devised by the franchisor. The third characteristic, namely that the relationship continues to be affected by the power imbalance, is also met by the fact the franchisee is required to submit to inspections of its premises and audits of its books on demand, to comply with operation bulletins, and, often is dependent on, or required to buy, equipment or product from the franchisor.[40]

In light of such findings, it is not surprising that the distinction set up by the Supreme Court of Canada in *J.G. Collins Insurance Agencies v. Elsley* in the employer-employee relationship context, would be applied to the franchisor-franchisee relationship, at least insofar as the franchisor seeks to enforce a restrictive, negative covenant. This is particularly so, given franchising's entrepreneurial business model, with franchisees

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[36] [1978] 2 S.C.R. 916 at ¶15-16
[37] [2003] O.J. No. 1919 (Q.L.) (C.A.) at ¶118
[38] [1997] 3 S.C.R. 701
[39] [1997] 3 S.C.R. 701
[40] [2003] O.J. No. 1919 (Q.L.) (C.A.) at ¶66

investing their own capital, taking a significant financial risk and effectively creating their own employment. Bearing this in mind, we turn to several cases.

***Second Cup Ltd. v. Niranjan*, 2007 CarswellOnt 5285 (S.C.J.)**

A husband and wife owned and operated a Second Cup coffee franchise through a holding corporation. They entered into a franchise agreement with an approximate four year term which concluded on May 30, 2007. The franchisees were notified by letter in February 2007 that the franchise agreement would not be renewed, confirming discussions in late 2006.

They were reminded of the non-competition and confidentiality provisions of the franchise agreement. In particular, they were prohibited from being involved in any business which is the same or similar to their Second Cup franchise for a period of 15 months after termination of the franchise agreement within a three mile radius of their former franchise premises.

In late April 2007, even before the expiry of the Second Cup franchise agreement, the husband, through a different holding corporation, opened a new specialty coffee shop, “Urbana Coffee” within the prohibited three mile radius.

Second Cup sought a prohibitive injunction to enforce the non-competition covenant. It encountered difficulties with the strength of its case branch of the test. Justice Lederman determined that the “strong *prima facie* case” version of the test applied because it involved the enforcement of a negative covenant and because if the injunction were granted it effectively disposed of the issues, the 15-month non-competition period having expired before trial could ever take place.

Applying the “strong *prima facie* case” analysis, Justice Lederman found it problematic that none of the parties, and particularly the franchisor, was able to produce an executed copy of the various franchise agreements. Further, the husband was not even named as a signatory to the draft agreements produced.

Justice Lederman noted that, “Second Cup, through its solicitor, made it clear and expressly represented that no parties would have any rights nor would there be approval under any of the franchise documentation including the franchise agreement and assignment agreement except upon execution of all documents by all of the parties. In essence, Second Cup expressly required acceptance of its offer by execution of all documents by all parties. There is no evidence that this ever occurred.”[41]

Nevertheless, Justice Lederman acknowledged that the parties had conducted themselves for four years as if there was a properly executed franchise agreement and that in those circumstances the courts will enforce the *de facto* contract’s terms, because the parties’ conduct represents an assent to its terms. This did not resolve the difficulty of the lack of signed agreements, however, because in carrying on the business over four years, none of

[41] *Second Cup Ltd. v. Niranjan*, 2007 CarswellOnt 5285 (S.C.J.) at ¶15

the parties' conduct was directed towards the non-competition provisions, such that it could be suggested that they clearly assented to those particular terms of the franchise agreement.

In the circumstances, Justice Lederman determined that the franchisor had not been able to make out a "strong *prima facie* case" and therefore turned to the question of irreparable harm. He found there to be material differences in the businesses carried on by Second Cup and Urbana Coffee and therefore he discounted the suggestion that there would be any material adverse effect on Second Cup's franchise system. Further, he was of the view that, to the extent that Second Cup suffered direct competitive losses, they were readily calculable in terms of money damages. Therefore, Second Cup could not demonstrate irreparable harm.

Finally, with respect to the balance of convenience element, Justice Lederman concluded that, "[G]iven that the Draconian effect of an interlocutory injunction would be to shut down the business of Urbana Coffee at premises on which it has a lease, the adverse effect of an interlocutory injunction upon the defendants would be much greater than the prejudice to Second Cup."[42]

The motion was dismissed.

***W.A.B. Bakery Franchising Ltd. v. Canam Advertising Ltd.,* 2007 CarswellOnt 8989 (S.C.J.)**

This case arose out of the continued operation, after the expiry of the franchise agreement, of what had been a "What A Bagel" franchise. The franchisees continued to operate a full-service bakery in the same premises under the trade name "Bagel Nash". The franchisor sought an injunction to enforce the non-competition covenant, as well as to prevent the continued use of its business system.

The franchisor took the position that, because it was seeking to enforce a negative covenant, it was not required to demonstrate either that it would suffer irreparable harm or that the balance of convenience favoured granting the injunction. Justice Wilton-Siegel disagreed, relying on the principle that, in order for this exemption to be available to the moving party, they had to show a "strong *prima facie* case" – a "clear breach" of the negative covenant.

Justice Wilton-Siegel had two issues with the non-competition covenant. First, it was structured with five alternative time periods and four different radii of restraint from the former franchise premises, with possible combinations ranging from five years and 50 miles to one year and 5 miles. Presumably this was done in order to assist the court if it ultimately sought to 'read down' the restraint of trade provision.

Justice Wilton-Siegel considered that the covenant may have been unenforceable as being too vague or as being contrary to public policy, or that a court may accept its least

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[42] 2007 CarswellOnt 5285 (S.C.J.) at ¶32

restrictive parameters. In any event, it was not clearly enforceable and therefore it could not be the subject of a "clear breach".

The second issue with the non-competition covenant is that it referred to "termination" and not "expiration". The agreement was structured in several places to distinguish between its termination and expiration. Justice Wilton-Siegel concluded, "There is, therefore, a good argument that the restriction of section 14.2 to circumstances involving the termination of the Agreement is intentional and evidences an understanding that the non-competition covenant would not operate after expiration of the Agreement."[43]

Thus the franchisor was required to satisfy the regular three-part *RJR-MacDonald v. Canada (Attorney General)* test. In that regard, Justice Wilton-Siegel was content that the franchisor had met the "serious question to be tried" threshold with respect to the non-competition covenant as well as with respect to whether the former franchisee was continuing to use the franchisor's business system.

Turning then to the irreparable harm aspect of the test, Justice Wilton-Siegel largely accepted the principle of the franchisor's argument, that permitting the former franchisee to continue to carry on business would undermine the integrity of the franchise system, because other franchisees would do the same upon the expiry of their franchise agreements and prospective franchisees might be reluctant to join. There was also the potential loss of goodwill associated with a failure to maintain product quality. His Honour's difficulty with this argument was simply that there was no evidence supporting it.

With respect to the balance of convenience, Justice Wilton-Siegel was of the view that it favoured maintaining the *status quo* – *i.e.*, allowing the former franchisee to continue to operate pending trial. His Honour felt that the problems associated with both the enforceability and applicability of the non-competition covenant weighed heavily against the franchisor. Further, he considered that if the covenant was ultimately held to be both applicable and enforceable, that would mitigate any concerns with respect to other franchisees' conduct, and the calculation of damages should be relatively straightforward.

With respect to the former franchisees, "[T]he consequences of an injunction … are immediate and probably irreversible. An injunction would result in a shut-down of the full-service bakery currently run under the name Bagel Nash … [T]here will be a loss of employment to third party employees, … [E]ven if the respondents are ultimately successful, they would have to start over again building up the Bagel Nash business after any period of shut-down … [T]here is a serious risk to the respondents of an irreparable loss of business."[44]

The motion was dismissed.

[43] *W.A.B. Bakery Franchising Ltd. v. Canam Advertising Ltd.*, 2007 CarswellOnt 8989 (S.C.J.) at ¶12
[44] 2007 CarswellOnt 8989 (S.C.J.) at ¶26

1.3.2 Termination Injunctions

***Struik v. Dixie Lee Food Systems Ltd.*, 2006 CarswellOnt 4932 (S.C.J.)**

This was a motion by a franchisee for an interlocutory injunction to restrain the franchisor from interfering with the operation of a master franchise agreement and offsetting amounts alleged to be owed by the franchisee against the area franchise income.

The franchisee was a master franchisee for Northern Ontario, with an individual franchise agreement for Angus, Ontario. He had been involved in the business for almost 30 years and had negotiated uniquely favourable terms on the renewal of the master franchise agreement. These terms included the right to add products if a store was underperforming, for franchise royalties to be paid directly to him, and he would distribute the franchisor's share to the franchisor and the franchisor's agreement not to set-off against or withhold monies owed to him under the master franchise agreement.

Aside from his obligations as master franchisee to promote and supervise the operation of the franchise system in his territory, he also had the exclusive right to find new franchisees and was responsible for their training. He was in negotiations with prospective franchisees at the time the master franchise agreement was purportedly terminated.

The dispute arose around the franchisee's decision to change the type of potato products sold in his territory restaurants from frozen to fresh under his right to add products. The franchisor was unenthusiastic, although it permitted tests of the fresh potato products to be carried out at the franchisee's Angus restaurant.

The franchisee subsequently learned that the franchisor was profiting on the rebates from the frozen potato supplier. He raised this with the franchisor, purportedly as a concern that it reflected a misrepresentation in the franchise disclosure document with respect to volume rebates benefiting individual franchisees through group purchasing, although he may have considered it leverage with the franchisor.

With this background dispute, the franchisor demanded payment of $5,674.96 in royalties claimed to be owed from the Angus franchise. The franchisee disputed that any amount was owed. When the amount was not paid, the franchisor advised that it would set-off the amount claimed to be owed against the franchisee's master franchise income. The franchisee responded by collecting royalties under the master franchise agreement directly and passing on the franchisor's share. The franchisor purported to terminate the master franchise agreement half an hour later on the basis of failure to operate the business consistent with its standards and reasonable expectations.

Perhaps attempting to take advantage of the implications of *Shelanu Inc. v. Print Three Franchising Corp.*[45], the franchisor sought to characterize its relationship with the franchisee as akin to employer-employee. The franchisee was, in effect, seeking a mandatory interlocutory injunction, returning him to his role as master franchisee. Therefore, he would have to meet the "strong *prima facie* case" test.

Justice Whalen dismissed this out of hand, holding that the relationship between the parties was "a commercial one – not an employment or personal service arrangement." Moreover, he referred directly to the following provision of the master franchise agreement:

> The Area Franchisee is and will at all times remain an independent contractor and is not and shall not represent himself to be the agent, joint venturer, partner or employee of the Franchisor or to be related to the Franchisor other than as its independent area franchisee. No representations will be made or acts taken by the Area Franchisee which could establish any apparent relationship of agency, joint venture, partnership or employment...

It does not appear that Justice Whalen was referred to *Shelanu Inc. v. Print Three Franchising Corp.*[46]

Justice Whalen easily found that the franchisee met the "serious question to be tried" element of the test. His responses to the allegations supporting termination of the master franchise agreement – failure to provide adequate training, monitor standards or attend to customer complaints - were neither frivolous nor vexatious.

> [I]t is difficult to imagine that JS would not have encountered some difficult, contrary-minded or inept franchisees and numerous equally difficult customers in his many years as area franchisee. In his role, JS must be teacher, mentor, inspector and enforcer. His overall track-record of selling and maintaining 16 franchises in this less populated and less developed region of Ontario suggests success. So many of Dixie's complaints are so dated they will be difficult to prove one way or another, and they are probably beside the point by now in any event.[47]

Moreover, there was compelling evidence that no monies were owed with respect to the Angus franchise and that the franchisee was within his rights to have royalties owed under the master franchise agreement for Northern Ontario paid directly to him.

With respect to "irreparable harm", the franchisor took the position that this was clearly a case where the franchisee was compensable by quantifiable monetary damages calculated with relative ease and precision – there was a balance of a term of years with a share of

[45] [2003] O.J. No. 1919 (Q.L.) (C.A.)
[46] [2003] O.J. No. 1919 (Q.L.) (C.A.)
[47] 2006 CarswellOnt 4932 (S.C.J.) at ¶47

royalties and other fees that could be projected, adjusted actuarially and capitalized for present value at trial.

Again, Justice Whalen dismissed this out of hand as well:

> JS's age was not stated, but he was introduced to the court at the hearing. He is obviously a man of at least 60 years. He has therefore devoted the better part of his working life to this franchise. He now finds himself cut out completely, with the result that he has lost the majority of his income. His other income is also related to the individual franchises under his supervision — apparently with Dixie's knowledge and approval. The circumstance of his termination can only disrupt his relationship with the franchisees in respect of these secondary relationships. The issue is the loss of long-established means to pursue a rewarding livelihood, not proving financial hardship or destitution.
>
> If the termination has not deprived JS of his livelihood, I do not know what deprivation of livelihood is. JS will not likely, or easily, find another livelihood of a comparable nature or magnitude given his age and the fact of having focused exclusively for so many years on Dixie's commercial enterprise. I also note that Section 10.02 of the Area Franchise Agreement imposes a non-competition obligation. If the termination is effective, JS is prohibited for two years post-termination from any involvement (direct or indirect) "in any restaurant business competitive with or similar to the Franchised Business within the Exclusive Territory". It is not just the finite number of dollars involved, but as importantly, the broad generic loss of JS's usual means of earning a living. This is the work JS has invested himself in for so long.[48]

In light of the foregoing, it is not surprising that Justice Whalen had no difficulty finding that the "balance of convenience" favoured the franchisee's injunctive relief. While the franchisor would only be required to abide by the terms of a long-standing agreement, if the injunction was not granted the franchisee would be deprived of his livelihood. It is somewhat surprising, however, that Justice Whalen seems not to have applied his conclusion that the relationship was purely commercial to this aspect of the test.

The motion was granted.

***674834 Ontario Ltd. v. Culligan of Canada Ltd.*, 2007 CarswellOnt 1564 (S.C.J.)**

The plaintiff had been a distributor of Culligan bottled water and water coolers in the Greater Toronto Area under a one year written trade mark licence agreement. After expiry the plaintiff and defendant continued to do business with each other for another 12 years without a further written agreement.

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[48] 2006 CarswellOnt 4932 (S.C.J.) at ¶73-74

Although the plaintiff was the *de facto* exclusive distributor for the Greater Toronto Area, it did not fit within the bifurcated sales and distribution model of the defendant – company-owned and franchised. However, over the years, it appeared as though the defendant had treated the plaintiff as if it was a franchisee.

For instance, it had received information and access to an intranet site pertaining to litigation with franchisees in the United States. Settlement of this litigation resulted in the development of a new form of franchise agreement to which both American and Canadian franchisees were to become parties. Copies of this franchise agreement and related documents were provided to the plaintiff who advised the defendant that it agreed to its terms. Moreover, the defendant's franchise disclosure document listed the plaintiff as a franchisee. The plaintiff's position was simply that all of the foregoing was done in error.

In February 2006, the defendant advised the plaintiff that it intended to terminate their business relationship effective May 2006 and any rights under the licence agreement were at an end. The termination date was extended on a without prejudice basis to November 2006.

The defendant's explanation for the termination was simply that the plaintiff's operations no longer fit into its business plan. Thus the plaintiff sought an interim and interlocutory injunction maintaining the *status quo* of their pre-existing business relationship with the defendant pending trial to determine whether a franchisor-franchisee relationship had been established. The defendant brought a cross-motion to restrain the plaintiff's use of its trademarks.

With respect to the strength of the case aspect of the test, the defendants argued that what the plaintiff was seeking, in effect, was a mandatory injunction requiring them to continue to do business with the defendant after termination of their relationship. Therefore, the plaintiff ought to be held to the standard of a "strong *prima facie* case".

Justice Pattillo held that, "In order to determine whether what is being sought is a mandatory order it is necessary to look at the factual matrix of the case. An order that establishes a new right never agreed to is mandatory, while an order requiring the parties to act in accordance with an agreement is prohibitive and not mandatory."[49]

Based on the foregoing, Justice Pattillo had no difficulty reaching the conclusion that at the time of the termination there was an existing agreement of some indeterminate nature and content, and that the defendant was merely seeking to continue rights already the subject of agreement for many years. The fact that the defendants had already terminated the agreement was of no moment.

He therefore concluded that the appropriate test was whether there was a "serious issue to be tried" and that the plaintiff had met that test.

[49] 2007 CarswellOnt 1564 (S.C.J.) at ¶33

With respect to "irreparable harm", the evidence before the court was that approximately 90 percent of the plaintiff's sales derived from the defendant's product and, absent being able to supply that product, the plaintiff would go out of business. Justice Pattillo accepted this as adequate evidence of irreparable harm.

Turning to "balance of convenience" the principal argument advanced by the defendant was that it too would suffer irreparable harm because the plaintiff did not sell its full line of products and its market presence and sales would therefore be compromised. Justice Pattillo did not accept that the defendant would suffer irreparable harm, largely because of the relatively unproblematic 13-year business relationship and that the defendant's business model provided for it to market directly its full line of products to customers in the Greater Toronto Area.

The motion was allowed.

***1323257 Ontario Ltd. v. Hyundai Auto Canada Corp.*, 2009 CarswellOnt 88 (S.C.J.)**

In this case, the franchisee sought to enjoin its franchisor from terminating its temporary dealer agreement, which had arisen from the settlement of a prior dispute, as well as interfering with its business relations by opening another dealership in the plaintiff's market area.

Justice Brown gave short shrift to the franchisor's argument to apply the more strenuous strength of case test – "strong prima facie case" – as there was no creation of a new right, but rather preservation of the status quo. Therefore the applicable standard was whether the franchisee's case gave rise to a "serious issue to be tried".

The franchisee's case revolved around two principal issues. First, the validity of the Minutes of Settlement under which the temporary dealer agreement was established. Second, if the Minutes of Settlement were valid, whether the termination of the temporary dealer agreement had been carried out in accordance with its terms. Justice Brown concluded that there were serious questions concerning whether the Minutes of Settlement should be set aside by reason of misrepresentation and, although weaker, that the claim relating to the termination was not frivolous or vexatious. Therefore, the strength of test aspect of the *RJR-MacDonald v. Canada (Attorney General)* was met.

With respect to "irreparable harm", Justice Brown found quite simply that, "If an injunction is not granted in this case, Thornhill will close its doors. Not only will the company lose the opportunity to earn a profit, but its 25 employees risk losing jobs at a time when it is common knowledge that the Canadian economy, particularly the automotive industry, is in real trouble."[50] The "irreparable harm" test was met.

The franchisor argued that the franchisee could rely on a decade of earnings history to facilitate the quantification of damages at trial. Justice Brown rejected this for two primary reasons. First, being forced to close its doors, the franchisee would suffer the

[50] 2009 CarswellOnt 88 (S.C.J.) at ¶114

most extreme loss of market share, one of the examples cited in *RJR-MacDonald v. Canada (Attorney General)* as a harm that cannot be quantified in monetary terms. Second, if the franchisee succeeded at trial, the appropriate time horizon for calculating its damages would be difficult to determine.

Turning to the "balance of convenience" aspect of the test, having already found that the franchisee would suffer irreparable harm if the injunction was not granted, what remained was for Justice Brown to consider whether the potential harm to the franchisor and the other prospective dealer would be greater if the injunction was granted.

He concluded that the harm to the franchisor was speculative at best. This franchise was one of 172 dealers nationwide and it met its sales targets. While it may have hoped to have greater success with the new dealer, there was no evidence to support this conclusion, particularly in light of the poor economic climate for the automotive industry. With respect to the new dealer itself, it had secured contractual protection of its financial and legal interests from the franchisor in light of the known litigation risks and there was scant evidence with respect to projected lost profits, which Justice Brown discounted in any event because of the challenges faced by the automotive industry.

The motion was allowed.

***Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*, 2009 CarswellOnt 2280 (S.C.J.)**

This case involved the franchisor bringing a motion for mandatory injunctive relief to close three franchises and prohibitory injunctive relief to restrain the franchisees in accordance with their non-competition covenants.

The franchisor alleged that the franchisees had breached their franchise agreements in three principal ways. First, by selling under-portioned sandwiches. Second, by failing to participate in promotions. Third, by failing to provide delivery service. Therefore, it was within its contractual rights to terminate the franchises and enforce the negative covenants.

The franchisees brought a cross-motion for an injunction restraining the franchisor from interfering with their businesses pending trial. It is worth noting that this proceeding was commenced during the currency of the franchisee class action against the franchisor.

Justice Perell first considered what the appropriate tests should be. With respect to the relief sought by the franchisor, His Honour determined that it would be required to satisfy the more challenging, "strong *prima facie* case" test for three reasons.

First, part of the relief being sought was mandatory in nature and, therefore, "Given the very intrusive nature of a mandatory injunction, there must be a high degree of assurance that the injunction would be rightly granted."[51] Second, practically speaking, granting

[51] 2007 CarswellOnt 8989 (S.C.J.) at ¶39

the injunction would make proceeding to trial pointless for the franchisees. Third, "The strong *prima facie* test standard is the measure used for determining whether it is appropriate to enforce a restrictive covenant by an injunction that would restrain an individual's cherished ability to make a living and to use his or her knowledge and skills obtained during employment."[52]

Applying the tests, Justice Perell concluded that the franchisor had met the evidentiary standard of a "strong *prima facie* case" that the franchisees had breached their franchise agreements by unilaterally implementing their own promotional programs which did not follow the specifications of the franchisor as to product and pricing and refusing to implement the delivery program.

Justice Perell did not feel that the quality of the franchisor's evidence with respect to under-portioning was sufficient to meet more that the "serious issue to be tried" standard. However, he did conclude that the franchisees had met that evidentiary burden that the franchisor had wrongfully terminated their franchise agreements, based on their interpretation of the franchise agreements and the effect of the *Arthur Wishart Act (Franchise Disclosure), 2000*.

Justice Perell was also satisfied that both the franchisor and the franchisees had demonstrated that they would suffer irreparable harm if their respective injunctions were not granted.

On the part of the franchisor, "It would appear that the franchisees would not be able to satisfy a damages award against them and, in any event, the irreparable harm suffered by the franchisor goes to its goodwill, its reputation, and its responsibility to the franchisees of the chain to maintain the integrity of the franchise system. Damages would not adequately address these harms."[53]

On the part of the franchisees, Justice Perell accepted that granting the franchisor's injunction would terminate their businesses, with a concomitant loss of reputation and goodwill. However, he was also of the view that, "[I]f the interlocutory injunction is granted and Quizno's Canada fails at trial, although the franchisees will have suffered irreparable harm, an award of damages and the enforcement of the undertaking as to damages would go some distance in providing a worthwhile remedy for the wrongful termination of their franchise agreements."[54]

With respect to the balance of convenience, Justice Perell's comments are very instructive:

> If the case at bar were just about alleged breaches of a franchise agreement with respect to the amount of meat, etc. on submarine sandwiches, then notwithstanding the franchisor's arguments that any under-portioning by a

[52] 2007 CarswellOnt 8989 (S.C.J.) at ¶41
[53] 2007 CarswellOnt 8989 (S.C.J.) at ¶93
[54] 2007 CarswellOnt 8989 (S.C.J.) at ¶97

franchisee(s) goes to the heart of its goodwill, reputation, and enterprise, nevertheless, I would have found that the franchisor would not suffer irreparable harm if an injunction were not granted, and I further would have found that the balance of convenience did not favour the franchisor. A zero-tolerance to perhaps inadvertent or only occasional harm caused by a breach of a franchise agreement by an individual franchisee or a small number of franchisees in a national franchise chain sets the bar much too low for irreparable harm and the balance of convenience.

…

By notoriously deciding to go its own idiosyncratic way in participating in promotions and by not participating in the delivery system, the franchisees challenge who has control over: the methods and systems of the franchisor (section 2.2); the content of and compliance with the operations manual (section 8.1); compliance with business operations (section 11.1) and the specifications of advertising and promoting the restaurants (section 12.1). These are matters fundamental to the integrity of the franchise system, and as noted in *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.*, [1997] O.J. No. 3773 (Ont. Gen. Div.) at p.15, rev'd on other grounds, [1998] O.J. No. 4368 (Ont. C.A.); *1017933 Ontario Ltd. v. Robin's Foods Inc.*, [1998] O.J. No. 1110 (Ont. Gen. Div.) at para. 43:

> The most precious possession of a franchisor is its trademark and systems. The practice is to protect those interests in the terms of contracts with the franchisees for the benefit of the franchisor and other franchisees.

In *Second Cup Ltd. v. Ahsan*, [2001] Q.J. No. 1763 (Que. S.C.), Justice Zerbisias stated at para. 60:

> Where a member of the franchise chain fails to uphold the policies, standards, and operating methods and system to which all of the franchisees have subscribed by executing their franchise agreement, and upon which they rely to advance their mutual interests, it is incumbent upon the franchisor to take measures against the infringing party to force it to cease from tarnishing the reputation of the chain and from diminishing the value of the trademark and the banner. The franchisor must act to protect the integrity of the chain.

…

The dispute in this case is not a localized dispute. It is about the franchisor's management rights across the chain of franchises, and this circumstance influences the calculus of irreparable harm and the balance of convenience. In my opinion, given the matters at stake and the strength of their comparative cases and the ineffectiveness of a damages award at trial should the franchisor succeed, the balance of convenience favours

> granting the franchisor an interlocutory injunction subject to the usual undertaking as to damages.[55]

The franchisor's injunction was granted. The franchisees' was not.

It is also worth pointing out an *obiter* procedural suggestion by Justice Perell. In his view, the dispute between the franchisor and franchisees was fundamentally one of interpretation of the franchise agreements that had gotten out of hand. The evidence of the factual matrix was not so complex that it could not be handled within the affidavit and examination context of an application. Therefore, the parties could have proceeded by way of application to have a definitive, binding court ruling concerning their pertinent rights and obligations without the risk of either party breaching their franchise agreements.

Justice Perell observed that, "An early judicial or arbitral determination avoids either party having to suffer irreparable harm by the granting or the refusing to grant an interlocutory injunction. Other franchisees and other franchisors might take a lesson from what happened in the case at bar and if they find themselves with a similar type of problem, they might consider obtaining a court ruling before taking steps that may be found to be breaches of the franchise agreements."[56]

Justice Perell's comments are somewhat at odds with Justice Wilton-Siegel's comments in *Invescor Restaurants Inc. v. 3574423 Canada Inc.*[57]. In that case, the defendants had brought a motion under Rule 21.01(1)(a)[58] of the *Rules of Civil Procedure* for the determination of the enforceability of the non-competition covenant in the franchise agreement. Justice Wilton-Siegel considered this properly to be a matter of mixed fact and law but the motion lacked the evidentiary context of the actual operation or proposed operation of a potentially competitive business.

> Except with respect to issues of contractual interpretation that are pure questions of law, I think this approach is wrong as a matter of law. Because the enforceability of a restrictive covenant can only be considered in the specific factual context in which a party seeks to enforce it, the issue of the enforceability of a restrictive covenant is inherently a matter of mixed fact and law. Indeed, while it is easy to identify the legal principles, the determination of the enforceability of any restrictive covenant is, as this proceeding amply demonstrates, very heavily influenced by the relevant factual matrix.[59]

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[55] 2007 CarswellOnt 8989 (S.C.J.) at ¶99-104
[56] 2007 CarswellOnt 8989 (S.C.J.) at ¶110
[57] 2011 ONSC 1609
[58] A party may move before a judge for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs.
[59] *Invescor Restaurants Inc. v. 3574423 Canada Inc.*, 2011 ONSC 1609 at ¶19

***Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793**

This case is in some respects the opposite of *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.* The franchisor was seeking an interlocutory injunction restraining 17 of a total of 20 franchisees from terminating and breaching their franchise agreements.

The franchisees' position was that the franchisor had fundamentally breached their agreements. The franchisees had stopped paying royalties and advised that they intended to remove all branded products and to de-identify and continue to operate as independent businesses, although they had not done so at the time of the motion.

Justice Karakatsanis first addressed the question of whether the relief sought by the franchisor was prohibitory or mandatory. The franchisor's position was that it simply sought to maintain the *status quo* without requiring any positive act by the franchisees or establishing any new right. The "essence of the matter"[60] was prohibitory not mandatory.

From Justice Karakatsanis's perspective:

> Obviously, almost any relief can be framed in the negative, as a prohibition against breaching the terms of the contract. However, whether or not an injunction is mandatory should not simple be a matter of semantics. The import of an order that the respondents comply with contract provisions that each party interprets differently is dependent upon the outcome of this litigation. Adherence to those provisions, in particular those that are not monetary, may well require supervision of the court and may be inherently difficult to supervise, especially in a relationship of mistrust. Fundamentally, the franchisor seeks to require the franchisees to take steps to restore this broken franchise relationship. The restorative nature of the order sought and the positive actions required to comply suggests to me that for the most part, this may well be a mandatory injunction.[61]

Therefore, the franchisor was required to meet the standard of a "strong *prima facie* case". While the franchisees were admittedly not abiding by the terms of the franchise agreement, the question remained whether it had been fundamentally breached and thus repudiated by the franchisor, thereby relieving the franchisees of an obligation to abide by its terms.

The franchisees alleged numerous improprieties on the part of the franchisor, imposing onerous and commercially unreasonable terms for its own benefit contrary to the franchise agreements and the duty of fair dealing set out in section 3 of the *Arthur*

[60] *TDL Group Ltd. v. 1060284 Ontario Ltd.*, [2001] O.J. No. 3614 (Div. Ct.) at ¶9: "An order preventing the denial of a right previously agreed to is very different from an order establishing a new right never agreed to and requiring a party to act accordingly."
[61] 2010 ONSC 1793 at ¶9

Wishart Act (Franchise Disclosure), 2000, such as misuse of the advertising fund, delisting popular products in favour of own-brand products at greater cost, setting arbitrary inventory levels, imposing handling and delivery charges, and failing to remit rebates. These, taken together, they said deprived them of the benefit of the franchise system.

Referring to *Shelanu Inc. v. Print Three Franchising Corp.*[62], Justice Karakatsanis held:

> The crux of a franchise agreement is the use of the name and trademark in exchange for royalty payments and its exclusive territory. … As well, consistent quality and advertising and promotion are also critical benefits to a franchise agreement.
>
> …
>
> I do not find that these claims are capable of amounting to a fundamental breach by the franchisor, even if proven and taken together. They do not deprive the franchisees of substantially the whole benefit of the agreement. The franchisees continued to operate with the brand, logo, marketing recognition and exclusive territory. While these claims may amount to set-off, that is relevant only to the issue of the balance of convenience.[63]

Therefore, Justice Karakatsanis concluded that the franchisor had met the higher onus of a strong *prima facie* case.

Justice Karakatsanis had no difficulty finding that the franchisor would suffer irreparable harm if the injunctive relief was not granted. If the 17 franchisees abandoned the system as proposed, there would remain two corporate stores and three franchises in the system. In that scenario the franchisor's evidence was that it would go bankrupt within two months – the franchise system would not survive pending trial, harming both the franchisor and the remaining franchisees.

With respect to the balance of convenience aspect of the test, however, Justice Karakatsanis was not satisfied that it favoured the full order sought by the franchisor. Her principle concern was that maintaining the *status quo* may cause financial hardship to the franchisees. She therefore invoked, although not expressly, the maxim "one who seeks equity must do equity" – the court has the jurisdiction to grant relief on terms[64]:

> I have a broad discretion to fashion a remedy that would be fair and equitable in the circumstances to preserve the legal rights being asserted until trial. The franchisees themselves are at some financial risk and should receive some relief relating to the core products pending a

[62] [2003] O.J. No. 1919 (Q.L.) (C.A.) at ¶118
[63] 2010 ONSC 1793 at ¶15-20
[64] Robert J. Sharpe, "Injunctions and Specific Performance" (2008 looseleaf ed.), Canada Law Book at ¶1.1090

> determination of their set-offs and their ongoing obligations in relation to the products.
>
> …
>
> I am prepared to fashion an order that balances the interests of both parties in a way that does not threaten their financial survival, that minimizes the need for court supervision pending trial and that can be undone depending upon the outcome at trial.[65]

Justice Karakatsanis therefore ordered that, pending trial, the franchisees not terminate their franchise agreements and pay all advertising and royalty fees and that the franchisors not impose a mark-up on products supplied to the franchisees. Further, because there was some concern with respect to the enforceability of the franchisor's undertaking as to damages, 20 percent of the royalties were to be paid into court or counsel's trust account.

***C.M. Takacs Holdings Corp. v. 122164 Ontario Ltd.*, 2010 ONSC 3817**

The plaintiffs had been in business for approximately 24 years and had four franchises. The defendant, in addition to being franchisor, was the sub-landlord of each franchise premises. For more than three years the franchisees had not paid rent, franchise fees or other creditors on a timely basis.

The precipitating event for the termination of their franchise agreement and subleases was the delivery of a $17,000 cheque in respect of outstanding royalties, which was returned NSF. This prompted the franchisor to conduct searches for Writs of Seizure and Sale as well as *Personal Property Security Act*[66] searches.

These searches revealed serious arrears of Provincial Sales Tax and a writ filed by the Workplace Safety and Insurance Board. The franchisees had also granted security interests to a related corporation, a private mortgage lender and a restaurant supplier, all without obtaining the franchisor's prior consent, as required by the franchise agreements.

The franchisees moved for injunctive relief requiring the franchisor to return possession of their restaurants, relief from forfeiture, an accounting of profits made by the franchisor while in possession, and delivery of the gross revenues generated by the restaurants since termination.

With respect to the strength of the franchisee's case, the franchisor argued that they should be required to meet the higher standard of "strong *prima facie* case", because what they were seeking was mandatory relief, "to require the defendant to reinstate the plaintiffs' Franchise Agreements, return possession of the franchise location to the plaintiffs, reinstate the sublease agreements and continue in its business relationship. In other words, the plaintiffs were seeking an order that requires the defendant to take a

[65] 2010 ONSC 1793 at ¶38-40
[66] R.S.O. 1990, c. P.10

positive action."[67] Justice Leitch rejected this because the essence of the matter was not to create a right never agreed to, but to determine whether there was a right to continue a relationship. Therefore, the appropriate test was the lower one of whether there was a "serious issue to be tried".

Notwithstanding having decided to apply the lower threshold, Justice Leitch determined that the franchisees did not meet it. She stated:

> I am mindful of the lengthy relationship between the parties, however, the plaintiffs' assertion that the defendant has breached their contract and terminated the franchise is not factually correct. I do not find that the defendant has acted unfairly or in bad faith or commercially unreasonably in enforcing the terms of the Franchise Agreement. The explanations for the events of default do not cure the defaults. For example, seeking a meeting to discuss the franchise fee cannot be said to be a payment arrangement. The assertion that the financing, which led to the registration of the security interest replaced bank financing, does not reflect the prior consent of the franchisor to this financing arrangement.[68]

With respect to "irreparable harm" Justice Leitch concluded that the franchisees' difficulties had arisen from their cash flow problems, which had nothing to do with the franchisor. Further, the restaurants would be operated by the franchisor with existing employees, so the change in control would be invisible to the public, avoiding any risk of loss of good will or customers. Moreover, if the franchisees were ultimately successful at trial, damages would be easily quantifiable with a store by store accounting and any profits easily traceable. There would be no irreparable harm if the injunctive relief were not granted.

Justice Leitch also concluded that the balance of convenience favoured the franchisor because it was ultimately liable for unpaid rent with the legitimate prospect of significant rent arrears, as well as other risks to their ongoing operation, if the franchises remained in the franchisees' control.

The motion was dismissed.

***1318214 Ontario Ltd. v. Sobeys Capital Inc.*, 2010 ONSC 4141**

The franchisees in this case commenced an action against the franchisor with respect to the operation and administration of the programme under which they had acquired their franchises, alleging breach of contract, breach of the duty to act in good faith under section 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, breach of fiduciary duty and negligence.

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[67] 2010 ONSC 3817 at ¶28
[68] 2010 ONSC 4771 at ¶33

The franchisees funded this litigation by each withdrawing $82,000 from their franchises. Their franchise agreements restricted annual legal and accounting expenses to $2,000 without the franchisor's consent. The franchisor issued notices of default requiring the return of the funds, failing which their franchise agreements would be terminated. The franchisees sought an interlocutory injunction restraining termination of their franchise agreements pending resolution of the underlying litigation.

In this case, there was no dispute that the regular *RJR-MacDonald v. Canada (Attorney General)* test applied. Therefore, the franchisees were required to establish that there case was not frivolous or vexatious but there was a serious issue to be tried. In that regard, Justice Conway agreed that there were serious issues to be tried on three fronts. First, with respect to the interpretation and enforceability of the provision restricting the franchisees' ability to withdraw funds from the business for legal and accounting expenses. Second, concerning whether the franchisor breached its common law and statutory duties of good faith in issuing the notices of default considering the timing of events related to the underlying litigation. Third, with respect to whether the restriction in the franchise agreement and the notice of default issued pursuant thereto amounted to interference with the franchisees' right to associate provided for in section 4 of the *Arthur Wishart Act (Franchise Disclosure), 2000*.

With respect to "irreparable harm", the franchisor submitted that actual operating results would be available for the stores after termination and therefore damages could be readily quantified if the franchisees were ultimately successful at trial. Moreover, it was prepared to waive the non-competition covenant in the franchise agreements so as not to impede the franchisees' ability to work elsewhere, and to forego enforcement of its security on their homes. Justice Conway did not accept that this adequately addressed the matter in issue.

> The Franchisees have been Price Chopper franchisees for many years. Sobeys marketed the business as one which was ideal for the involvement of the store owners' families. Most of the owners have spouses or children who work with them at their stores. This family business was reinforced by Sobeys' requirement of spousal guarantees and collateral mortgages on the family homes.
>
> If the injunction is not granted, the remaining four Franchisees will lose their businesses. Regardless of whether Sobeys continues to operate the stores, those Franchisees will lose the business that they had purchased, that they were operating, that their families worked in and that they expected to develop over the term of the franchise. That opportunity cannot be restored to them with a payment of monetary damages.
>
> Even with the waiver of the non-competition agreements, the Franchisees will likely become employees of another store, rather than operating their own businesses. That change is not compensable in damages.[69]

[69] *1318214 Ontario Ltd. v. Sobeys Capital Inc.,* 2010 ONSC 4141 at ¶37-39

Turning to the "balance of convenience" aspect of the test for interlocutory injunctive relief, Justice Conway concluded that it clearly favoured the franchisees. While the franchisor argued that it should not be forced to continue in business with franchisees with whom the relationship of trust had broken down, other franchisees would no longer respect the terms of their franchise agreements, and the withdrawal of funds meant that less money was available to satisfy its accounts payable for inventory purchases, this could not balance the inconvenience that would be suffered by the franchisees if their businesses were taken away from them.

> Sobeys does not dispute that the Franchisees are good operators. They are not in default under their Franchise Agreements (apart from the alleged default with respect to the withdrawn funds). There is no reason that they cannot continue to operate their stores within the system pending the outcome of their dispute with Sobeys. Mr. Adams acknowledged that in his cross-examination.
>
> The inconvenience to the Franchisees is that they will lose their family businesses, their employment and future prospects for their stores.
>
> The main inconvenience to Sobeys is that funds have been withdrawn for legal fees when, perhaps, they should not have been. However, I can restrict any future exposure to Sobeys by imposing restrictions on further withdrawals of funds until such time as the issue has been decided.[70]

The motion was granted.

1.3.3 System Change Injunction

***Paul Sadlon Motors Inc. v. General Motors of Canada Ltd.,* 2011 ONSC 4432**

This could almost be considered an encroachment case, however, the agreements at issue did not grant exclusive territories. Rather, it would more accurately be considered in the context of the implementation of franchise system changes.

The franchisor, General Motors, was planning to restructure its dealerships in the Barrie, Ontario area, where there had been two franchisee dealerships for some time in relative competitive parity. The plaintiff franchisee had been a Chevrolet, Oldsmobile and Cadillac dealer. The other franchisee had been a Pontiac, Buick and GMC truck dealer. As part of General Motors's internal restructuring, it had eliminated the Pontiac brand which had accounted for approximate 70 percent of that franchisee's sales. Therefore, the decision was made to divide the Barrie market area into north and south sectors, allowing the former Pontiac dealer to sell Chevrolet vehicles and the plaintiff franchisee

[70] 2010 ONSC 4141 at ¶43-45

to sell Buicks and GMC trucks. The plaintiff franchisee sought to enjoin this market restructuring.

The dealership agreement at issue provided for a geographical area of market responsibility within which a dealer should have an advantage but not exclusivity. It provided that the franchisor would consult with its dealers before modifying its distribution network policy, but General Motors retained final decision making authority in accordance with its business judgment. This policy provided that the number of dealers in a market area must be appropriate to ensure that products are represented competitively and that each dealer had the opportunity to make a reasonable return on investment.

There was no dispute that the regular *RJR-MacDonald v. Canada (Attorney General)* test applied and that the first condition for the plaintiff franchisee to meet was that its claim was not frivolous or vexatious and that there was a serious issue to be tried. Justice Perell concluded that it had done so concerning interpretation of key provisions of the dealership agreement, whether General Motors had breached its duty of good faith under section 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, and the enforceability of the provisions in the dealership agreement with respect to General Motors's right to unilaterally change the vehicles that a dealer could order from time to time.

With respect to "irreparable harm", Justice Perell acknowledged that, "If an interlocutory junction is not granted, Sadlon Motors will suffer the loss of the competitive advantage of an excluded or neutered competitor, but I do not see this lost advantage as leading to an inevitable or irreparable or permanent loss of market share or of its business goodwill given that Sadlon Motors' market area is unchanged and it is entitled to compete for sales in the market for lower priced fuel-efficient non-luxury vehicles in all of Barrie."[71]

Further, it would be more difficult to calculate the proposed Chevrolet dealer's damages if it was enjoined from entering the market, than the plaintiff franchisee's damages should an injunction not be granted and it be determined at trial that it should have been. The latter should be quantifiable based on projections of historical performance and recorded sales by the new Chevrolet dealer.

On the other hand, looking to the "balance of convenience", Justice Perell noted that, "[I]f an interlocutory injunction is granted, Georgian cannot compete at all for a business it once had to sell lower priced fuel-efficient non-luxury vehicles. Because Georgian is excluded from the marketplace of lower priced vehicles, its loss of business from returning customers would be irreparable."[72]

With respect to General Motors, Justice Perell concluded that it would suffer irreparable harm if the injunction was granted, by deferring its plans to have two Chevrolet dealers in the Barrie area and, referring to his prior decision in *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*, "I think that the irreparable harm is intensified by the

[71] *Paul Sadlon Motors Inc. v. General Motors of Canada Ltd.*, 2011 ONSC 4432 at ¶79
[72] 2011 ONSC 4432 at ¶81

interference with General Motors' rights under the Dealership Agreement to shape its dealership network."

Justice Perell therefore dissolved the interim injunction granted by Justice Whitaker and continued by Justice Spence and refused to grant the plaintiff franchisee's requested interlocutory injunction. However, he did so on terms that the interim injunction should remain in place for a further two weeks in order for the original Chevrolet dealer to prepare for the entry into the market of another dealer of Chevrolet vehicles, and that the original Chevrolet dealer should be allowed to sell Buick vehicles without prejudice to its legal position, with a view to ensuring that the plaintiff franchisee was not ultimately competitively disadvantaged.

2 Summary Judgment

2.1 Background

There may have been no more challenging procedural issue for litigators in recent years than the application of Rule 20 of the *Rules of Civil Procedure* – summary judgment. There emerged a clear tension between the requirement for a means of disposing of meritless proceedings without incurring the time and expense of a full trial and the principle that parties ought not to be deprived of the opportunity to have their cases fully heard in court. The argument in favour of access to justice could be made in either case.

The principle applied to motions for summary judgment evolved such that the court could grant judgment if it was satisfied that there was no genuine issue requiring a trial with respect to a claim or a defence. However, in making this determination, the judge should not find facts, weigh evidence, assess credibility or decide questions of law.[73]

2.2 New Summary Judgment Rule

Effective January 1, 2010, Rule 20 was amended to its current form, with the intention of improving access to justice. Conceptually, the litigation system was to be made more accessible and affordable, by overcoming the limits to the rule's utility created by prior jurisprudence, in particular permitting a judge to weigh evidence, assess credibility and draw inferences from the evidence. The pertinent part of the Rule is 20.04:

> *General*
>
> 20.04(1) [Repealed O. Reg. 438/08, s. 13(1).]
>
> 20.04(2) The court shall grant summary judgment if,

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[73] See *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.), *Irving Ungerman Ltd. v*. Galanis (1991), 4 O.R. (3d) 545 (C.A.), *Dawson v. Rexcraft Storage & Warehouse Inc.*, [1998] O.J. No. 3240 (C.A.) and *Aguonie v. Galion Solid Waste Material Inc.*, [1998] O.J. No. 459 (C.A.)

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

Powers

20.04(2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

Oral Evidence (Mini-Trial)

20.04(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

Only Genuine Issue is Amount

20.04(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

Only Genuine Issue is Question of Law

20.04(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

Only Claim is for an Accounting

20.04(5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

Despite the significant amendments to the Rule, the courts continued to adopt the view that it was not the judge's role to make findings of fact or to conduct a summary trial, only to take a "hard look" at the evidence based on the parties "putting their best foot forward" to determine whether there was a genuine issue requiring trial.[74]

Finally, the Court of Appeal determined to recast the case law interpreting the summary judgment rule by convening a five member panel to hear the appeal of four matters over three days in June 2011. On December 5, 2011, the Court of Appeal released its reasons in *Combined Air Mechanical Services Inc. v. Flesch*[75].

2.3 A Fresh Approach

***Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764**

The Court of Appeal's introduction to its reasons is instructive. Referring to the January 1, 2010 amendments to the *Rules of Civil Procedure*, the Court states:

> Simply put, the vehicle of a motion for summary judgment is intended to provide a means for resolving litigation expeditiously and with comparatively less cost than is associated with a conventional trial. Although such motions have long been available in this province, their utility had been limited in part by a line of jurisprudence from this court that precluded a judge on a summary judgment motion from weighing the evidence, assessing credibility, or drawing inferences of fact. These powers were held to be reserved for the trial judge.
>
> The 2010 amendments to Rule 20 effectively overruled this line of authority by specifically authorizing judges to use these powers on a motion for summary judgment unless the judge is of the view that it is in the interest of justice for such powers to be exercised only at a trial. One of the objectives behind enhancing the powers available to judges on a summary judgment motion was to make this form of summary disposition of an action more accessible to litigants with a view to achieving cost savings and a more efficient resolution of disputes. Indeed, the principle of proportionality is advanced by the expansion of the availability of summary judgment.[76]

However, the Court is careful to emphasize that the purpose of summary judgment is to eliminate unnecessary trials – actions in which there is no factual or legal issue that requires a trial for its fair and just resolution, but not all trials.

The Court then proceeds to enumerate three types of cases that are amenable to summary judgment. First, where it is agreed by the parties, although one suspects that Rule

[74] See *Cuthbert v. TD Canada Trust*, 2010 CarswellOnt 867 (S.C.J.)
[75] 2011 ONCA 764
[76] 2011 ONCA 764 at ¶2-3

20.04(2)(b) may be underutilized. Second, claims or defences that have no chance of success at trial. The third category is the one which is of most interest – where there is no "genuine issue *requiring* a trial". This is where the Court of Appeal begins to put its own new gloss on the summary judgment rule.

2.3.1 Genuine Issue Requiring Trial

The Court of Appeal states that the change of language from the old rule – no "genuine issue for trial" – to the new rule – no "genuine issue *requiring* trial" - "now permit the motion judge to dispose of the case on the merits where the trial process is not required in the 'interest of justice'."[77]

The Court of Appeal states that the phrase "interest of justice" operates as "limiting language" on whether the judge hearing the motion for summary judgment should exercise their powers. Thus, while the weighing of evidence, evaluating of credibility and drawing of reasonable inferences from evidence were almost entirely circumscribed under the former case law regime, those powers are now merely qualified by whether it is in the interest of justice to exercise them. Thus one must determine what is meant by the "interest of justice".

2.3.2 Interest of Justice

The Court of Appeal provides guidance in its discussion of the primary difference between a trial and a summary judgment motion – it is evidentiary. A trial will often provide a judge with a more comprehensive evidentiary record than the written record of a motion for summary judgment.

However, referring to the Supreme Court of Canada's decision in *Housen v. Nikolaisen*[78], the Court extracts certain pithy phrases as to when it may be in the "interest of justice" for a motion judge to weigh evidence, to evaluate credibility and to draw inferences from the written evidentiary record. That is when the judge is satisfied that they have "total familiarity with the evidence", "extensive exposure to the evidence", and "familiarity with the case as a whole", beyond merely mastering what is in the written evidentiary record.

2.3.3 Full Appreciation Test

The Court of Appeal defines this as the "full appreciation test":

> In deciding if these powers should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: can the full appreciation of the evidence and issues that is required to make dispositive findings be

[77] 2011 ONCA 764 at ¶44
[78] 2002 SCC 33 at ¶14 and 18

> achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?[79]

Thus, the paradigm case that is not apt for summary judgment is one that requires multiple findings of fact, based on conflicting evidence, from several witnesses, in a voluminous record. On the other hand, cases susceptible to summary judgment would be those that are "document-driven" with limited testimonial evidence, where there are limited contentious facts or where the written evidentiary record can be supplemented by hearing oral evidence on discrete issues, such that the judge has a "full appreciation of the evidence and the issues".

> The point we are making is that a motion judge is required to assess whether the attributes of the trial process are necessary to enable him or her to fully appreciate the evidence and the issues posed by the case. In making this determination, the motion judge is to consider, for example, whether he or she can accurately weigh and draw inferences from the evidence without the benefit of the trial narrative, without the ability to hear the witnesses speak in their own words, and without the assistance of counsel as the judge examines the record in chambers.
>
> Thus, in deciding whether to use the powers in rule 20.04(2.1), the motion judge must consider if this is a case where meeting the full appreciation test requires an opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first-hand.[80]

2.3.4 Ordering Oral Evidence

Another interesting gloss placed on the summary judgement rule by the Court of Appeal is with respect to the motion judge's discretion to order that oral evidence be given at the hearing under Rule 20.04(2.2).

The Court emphasizes that this Rule is not intended to supplement the written evidentiary record and, in effect, convert a summary judgment motion into a trial. Rather, it is "no more than another tool to better enable the motion judge to determine whether it is safe to proceed with a summary disposition rather than requiring a trial."[81] In other words, the judge may order oral evidence on discrete issues where it will facilitate weighing evidence, evaluating credibility and drawing inferences from the written evidentiary record.

The Court of Appeal suggests a three-part, but non-exhaustive, test for when an order for oral evidence would be appropriate.[82] First, where it can be obtained expeditiously from a limited number of witnesses. Second, the issue with respect

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[79] 2011 ONCA 764 at ¶50
[80] 2011 ONCA 764 at ¶54-55
[81] 2011 ONCA 764 at ¶60
[82] See 2011 ONCA 764 at ¶103

to which evidence is given is likely to have a significant impact on the motion. Third, the issue is narrow and discrete.

2.3.5 Timing

The Court of Appeal also cautions against bringing summary judgment motions prematurely. While the proposition that all parties to a summary judgement motion have the obligation 'to put their best foot forward'[83] continues to apply, it will not be in the interest of justice to proceed "in cases where the nature and complexity of the issues demand that the normal process of production of documents and oral discovery be completed before a party is required to respond to a summary judgment motion."[84]

At the time of writing, the author was able to identify only six cases referencing the Court of Appeal's "new departure and a fresh approach", none of which are related to franchising. Therefore, it remains to be seen whether it will have as profound an effect on the law surrounding summary judgment as *RJR-MacDonald v. Canada (Attorney General)* did on the law surrounding injunctions.

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[83] *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.)
[84] 2011 ONCA 764 at ¶57