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Litigate in British Columbia? Yes, You Canstar! BC Court Invalidates Forum Selection Clause Based on "Reasonable Possibility" that Franchise Legislation Applies

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On May 19, 2021, the British Columbia Supreme Court rendered its decision in *Canstar Restorations Limited Partnership v DKI Canada Ltd.* (*Canstar*), finding for the first time that a forum selection and choice of law clause was void pursuant to BC's *Franchises Act*.[1]

A choice of law clause dictates the law that is to be applied to a legal relationship (e.g., BC vs. Alberta law). A choice of forum clause dictates in what jurisdiction the dispute is to be resolved (e.g., the courts of Ontario or New York).

British Columbia's *Franchises Act* (the Act), enacted in 2015, contains a provision rendering any clause in a "franchise agreement" void that "purports to restrict the "application of the law of British Columbia or to restrict jurisdiction or venue to a forum outside British Columbia." Franchise statutes in Alberta, Manitoba, Ontario, New Brunswick, and Prince Edward Island all contain similar provisions. Prior to *Canstar*, BC's provision had not been considered by its courts.

Most significantly, the Court in this case held that there is a low standard (a reasonable basis in the record) to establish that the agreement at issue is a "franchise agreement" to which the restriction on choice of law and forum clauses under the Act applies.

Background

The plaintiff, Canstar, provides property restoration services in British Columbia. The defendant, DKI, is an Ontario corporation "which contracts with companies to operate DKI restoration businesses."

The relationship between Canstar and DKI was governed by three agreements, none of which were expressly styled as a franchise agreement and all of which contained clauses dictating that disputes would be resolved in Ontario pursuant to Ontario law. Pursuant to the agreements, Canstar paid an initial fee and continuing royalties to DKI in exchange for use of DKI's name and trademarks and access to a national client base through DKI's relationships with insurers.

In May 2020, a dispute arose between the parties concerning Canstar's intention to expand its operations into Alberta, either under the DKI name or its own name. In response, DKI terminated the relationship and cut ties with Canstar. Canstar filed an action in BC, seeking, among other things, relief under the Act on the basis that the agreements between Canstar and DKI were franchise agreements. DKI applied to have Canstar's action stayed arguing that Ontario was the proper venue and that the Act did not apply to its agreements with Canstar as they did not meet the Act's definition of franchise agreements.

DKI's application gave rise to the question: does section 12 of the Act apply to void the choice of law and choice of forum clause in the agreements between Canstar and DKI?

The Court's Decision

The Court considered the validity and enforceability of the forum selection clause under the two-part analysis previously established by the Supreme Court of Canada. The party relying on the clause must establish that the clause is "valid, clear and enforceable and that it applies to the cause of action before the court." Then, the onus shifts to the party opposing the stay to show "strong cause" as to why the court should not enforce the clause. In this case, the Court determined that it was appropriate to consider section 12 of the Act at the first stage of the test.

The Court then proceeded to determine what standard should be used to determine if the agreement between the parties is indeed a "franchise agreement" for the purpose of assessing the enforceability of the forum selection and choice of law clauses. The Court held that a standard of a "reasonable basis in the record" applies, which is a relatively low bar analogous to the "arguable case" standard for preliminary applications to dismiss a claim in BC on a jurisdictional basis and the standard applicable under the similar provision in Ontario's franchise legislation.

In applying the reasonable basis standard, the Court found that there was a reasonable basis in the record to conclude that the Act applied to the parties' agreements, finding that, based on the limited record on the motion, DKI appeared to exercise significant control over and provide significant assistance to Canstar. The judge emphasized that a preliminary finding that the Act applies at this stage is not determinative and the judge expressly noted that she was not concluding "that a franchise agreement exists" at this stage.

Based on this finding, the Court concluded that section 12 invalidated the forum selection and choice of law clause in question and held that the action could be heard in British Columbia. The Court went on to consider that once a forum selection clause is invalidated, a party can nevertheless argue based on the doctrine of *forum non conveniens* that another forum is better suited to hear the dispute. In this case, the Court did not find that Ontario was the "clearly more appropriate forum".

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Key Takeaways

Canstar provides two important lessons for franchisors in British Columbia and other provinces with franchise legislation:

1. For the purposes of a jurisdictional motion under section 12 of the Act, the question of whether a franchise relationship exists will be decided on a relatively low "reasonable basis in the record"; and
2. If a "reasonable basis in the record" is established that the Act applies, an otherwise valid forum selection or choice of law clause may be rendered void without a final determination that the agreement is a "franchise agreement."

Franchisors or potential franchisors operating in BC or other provinces with franchise legislation should carefully consider the enforceability of such clauses in consultation with their counsel.

A copy of the decision can be found here.

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[1] 2021 BCSC 951.
