

OPA! The British Columbia Supreme Court Grants An Injunction For The Breach Of A Post-Term Non-Competition Provision

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In a recent decision (*OPA! Souvlaki Franchise Group Inc. v Tiginagas*¹), the British Columbia Supreme Court granted an injunction to prevent a franchisee's post-term non-competition breach of a franchise agreement. Specifically, the franchisor, OPA! Souvlaki Franchise Group Inc. (the "Franchisor"), sought the injunction against a corporation and three individuals who were directors and shareholders of the corporation (collectively, the "Franchisee") for breaching the post-term non-competition clause by operating a competing restaurant after their franchised business. In this case, the Court held that the non-competition clause was clear and had a well-defined scope that was capable of enforcement.

Overview

The Franchisee, through a holding corporation, operated two Greek restaurant franchises under the Franchisor's "OPA!" brand. The Franchisee sold its holding corporation to a new franchisee, who continued operations. After selling this corporation, the Franchisee opened a new competing restaurant that also served Greek-style food within five kilometers of the previously sold franchise location.

The franchise agreement contained a restrictive covenant that prohibited the Franchisee, including its officers, directors, and shareholders, from operating a competing business within five kilometers of a franchise location (the "Restrictive Covenant"). Competing businesses included "any business in connection with the operation of a quick-service or fast-casual restaurant having Mediterranean and/or Greek-style food items as primary menu items."²

The Franchisor filed a notice of civil claim for violation of the Restrictive Covenant and subsequently sought an injunction to enforce this covenant.

Granting Injunctive Relief

In determining whether injunctive relief should be granted, the Court applied the three-part test described by the Supreme Court of Canada in *RJR-MacDonald*:³

Cassels

1. Do the merits of the case demonstrate a serious question to be tried?
2. Will the applicant suffer irreparable harm if the application were refused?
3. Which party will suffer greater harm from the granting or refusal of the remedy?

The Court noted that if a plaintiff makes a strong *prima facie* case for the issue being a serious question to be tried, the second element may have reduced importance and may assist in establishing which party will suffer greater harm.

The Franchisor met all three elements of the *RJR-MacDonald* test:

- The Franchisor's claims for breach of contract, unjust enrichment, and conspiracy were found to be serious questions to be tried;
- Damage to the integrity of the Franchisor's franchise system and continuing negative impacts to the new franchisee operating within five kilometers were examples of irreparable harm; and
- The balance of convenience lay with the Franchisor, since damages would not be an adequate remedy if the injunction is not granted and the Franchisee's concerns were mainly financial.

The Restrictive Covenant was found to be unambiguous because it is both clear and narrow in scope. The nature of the prohibited activities was within the scope and the five-kilometer range was sufficiently narrow. Further, the covenant only restricted a specific format of restaurant and a particular type of cuisine, not the operation of restaurants generally.

The Court did not find sufficient reasons to withhold the injunctive relief. The Franchisee suggested that relief should be withheld because there are only five months left in the covenant and the Franchisor had not been diligent in pursuing relief. However, the Franchisor provided early notice to the Franchisee and the delays were largely due to the Franchisor accommodating the Franchisee's requests.

Takeaways

The Court provided valuable advice for drafting enforceable restrictive covenants in franchise agreements, as well as steps franchisors should take in seeking an injunction, including:

- Enforcement of a non-competition provision is more likely in the commercial context, such as a franchise relationship, than a non-commercial context where there is greater inequality of bargaining power.
- Restrictive covenants that are clear and sufficiently narrow are easier to enforce. A narrow, defined enforceable distance, as well as specifying a defined type of business increase this clarity.
- It is "at least a serious question to be tried" regarding whether a restrictive covenant in the franchise context is enforceable against individual shareholders of a corporate franchisee and subsequent

Cassels

corporations used to breach the restrictive covenant.⁴

- Employee impact and the ability for defendants to make a living should be considered in the *RJR-MacDonald* analysis, but this consideration should be based on evidence and not be speculative.
- Evidence from other franchisees can be relied on as evidence of irreparable harm to the plaintiff.

The author gratefully acknowledges the contributions of articling student [Devon Campbell](#).

¹ [2024 BCSC 1318](#) [OPA! Franchise Group Inc].

² *Ibid* at paras 11-12.

³ *RJR-MacDonald Inc v Canada (AG)*, [1994 CanLII 119](#) (SCC) [RJR MacDonald].

⁴ *OPA! Franchise Group Inc*, at para 37.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.