Cassels

A Blizzard of Allegations But No Liability: Dairy Queen Decision Confirms Scope of the Duty of Good Faith and Fair Dealing

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The Ontario Superior Court of Justice's recent decision in *Ken Breau Corporation v Dairy Queen,* 2025 ONSC 126 confirms key principles associated with the duty of good faith and fair dealing under the *Wishart Act*. The decision reinforces that the duty cannot be used to rewrite the agreement between the parties, including by implying a term that would conflict with its express terms, and that allegations of a breach must be tied the performance or enforcement of a franchise agreement.

In this case, the franchisor had no duty to disclose that other franchisees had expressed interest in opening a new location in proximity to the applicant franchisee's exclusive territory, no duty to provide the franchisee with a 'buffer zone' outside of its exclusive territory, and no obligation to forgo its own contractual rights or to place the franchisee's interests ahead of its own.

Overview

The applicant, a Dairy Queen franchisee (the Franchisee), owned and operated three Dairy Queen locations in Brantford, Ontario. The Franchisee had the exclusive right to develop locations within the territory of Brantford and a five-mile (approximately 8.05 km) radius from its "present" city limits (the Territory). The date of the franchise agreement, and therefore the date for determining the "present" city limits for the purposes of the Territory, was July 1954. The franchisor, Dairy Queen Canada Inc. (DQ) had the exclusive right to develop locations outside the Franchisee's Territory.

After DQ advised the Franchisee that it was considering granting a location just outside the Territory to another franchisee, in an area that the Franchisee had expressed interest in developing, the Franchisee brought an application for (i) a declaration that DQ had breached its statutory obligations of fair dealing and good faith and (ii) injunctive relief restraining DQ from awarding a new restaurant to another franchisee within 8 km of the Franchisee's territory.

DQ argued that the application was an attempt to prevent it from exercising its rights to develop a new restaurant/store outside of the Franchisee's territory, where the Franchisee had no contractual rights, and that the Franchisee was not entitled to any relief under either the franchise agreement or the *Wishart Act*.

Facts

Ken Breau, the President of the Franchisee, operated three DQ stores in Brantford, Ontario. Mr. Breau was interested in opening a new location in Paris, Ontario, at the outer edge of the Territory. He sought DQ's approval to pursue a site which was then operating as a McDonald's location (the First Proposed Site) and which he believed was in his Territory. DQ approved the First Proposed Site, but the site was eventually sold to a different purchaser. Mr. Breau advised DQ that the First Proposed Site fell through but that he was looking for another location in the same area.

In the intervening period, another franchisee had brought a proposed site elsewhere in Paris (the Second Proposed Site) to DQ for approval. The Second Proposed Site was outside of the Territory. After approving the First Proposed Site, DQ had learned that it too was outside of the Franchisee's Territory, and that its approval had been based on its internal mapping software's erroneous reliance on broader Brantford city limits that were not in place as of July 1954. Despite this discovery, DQ honoured its approval of the First Proposed Site and did not pursue the Second Proposed Site while Mr. Breau was still pursuing his approved site in Paris.

However, after the First Proposed Site fell through, DQ decided to pursue the Second Proposed Site with another franchisee. Following its internal policies, which dictated that DQ would advise proximate franchisees of proposed new locations (but also confirmed that it made no commitments not to establish proximate stores), DQ informed the Franchisee and invited Mr. Breau to express any concerns in writing. Mr. Breau expressed concerns, but DQ decided to proceed, confirming that since the location was outside of the Territory, the Franchisee had no right to preclude it from doing so. Notably, the Franchisee's franchise agreement specifically confirmed that the agreement did not interfere with DQ's right to develop the area outside of the Territory.

The Franchisee claimed that:

- DQ violated its obligations of good faith and fair dealing by failing to inform the Franchisee that there were other parties interested in developing a DQ location in Paris, which it argued would limit its development of his Territory;
- The Franchisee should be provided with an additional radius of 8km from the perimeter of his Territory; and
- DQ had otherwise breached its duty of good faith and fair dealing by treating the Franchisee like a 'standard' franchisee whose franchise relationships were governed by more recent franchise agreements that involved a higher degree of control.

Analysis

The application judge's analysis began with an overview of the general principles applicable to the obligations of fair dealing and good faith under the *Arthur Wishart Act (Franchise Disclosure)*, *2000*, SO 2000, c 3 (the *Wishart Act*), including that all of the circumstances of each case must be considered and that its analysis would be context specific.

The judge outlined the key case law defining the duty of good faith and fair dealing as it applies to franchisors, including that a franchisor must ensure that it: has due regard to the interests of the franchisee; observes the standards of honesty, fairness and reasonableness; does not act in a way that is contrary to the objectives of the franchise agreement; does not cause significant harm to the other; and exercises its discretion reasonably and with proper motive.[1]

After laying that groundwork, the judge applied it to the facts underlying the dispute, making six key findings that confirmed that DQ had not breached its duty of good faith and fair dealing.

Exclusive Territory Is As Described in the Franchise Agreement

First, the judge held that the scope of the Territory was clearly expressed in the original franchise agreement: no amendment had impacted that description, and Mr. Breau himself had acknowledged that the 1954 city limits delineated the Territory.

Accordingly, the judge did not accept the Franchisee's position that DQ's conditional approval of the First Proposed Site, which had been based on an error, extended its exclusive Territory beyond how it was defined in the franchise agreement.

No Obligation to Disclose Interest from Other Franchisees

Second, the judge evaluated the Franchisee's claim that DQ was obliged to inform him that other franchisees were interested in developing a site in Paris.

The judge held that while the franchisor has a duty to disclose important and material facts related to the ongoing performance of a franchise agreement, DQ did not withhold any information that would have prevented the Franchisee from making informed financial and business decisions regarding its current locations or a potential new location in Paris. The agreement did not require DQ to provide the Franchisee with information about possible new locations outside the delineated Territory, and the judge refused to imply such a term simply because DQ had previously approved the First Proposed Site. The Franchisee's arguments in this regard were akin to seeking a "right of first refusal" not contemplated by the agreement.

DQ was entitled to consider its own interests and to explore other opportunities in developing a new restaurant in Paris. DQ acted honestly and reasonably when it notified the Franchisee of the new location. It was not obligated to wait for the Franchisee to find a new location, to the exclusion of considering other

applications, simply because he indicated he was interested in developing a location in Paris.

No Obligation to Provide a 8 km ‘Buffer Zone’

Third, the judge rejected the Franchisee's request for an order preventing any development within 8 km of its exclusive territory, which she held was contrary to the express terms of the franchise agreement. The parties had agreed to a defined Territory, which already provided for a 5 mile (8.05km) ‘buffer zone’ around the July 1954 city limits of Brantford.

While the Franchisee argued that all Dairy Queen locations were guaranteed an 8-kilometre ‘protective buffer’, the judge found that the only reference to this distance was from DQ’s site clearance policy. That policy confirmed that DQ would notify franchisees within that distance of a planned new location of its plans to pursue a new location, and provide them with an opportunity to express any concerns (as it did with Mr. Breau in this case). However, that policy also stated that DQ “makes no commitment that it will not establish new restaurants/stores in proximity to existing restaurants/stores” and that its decisions in that regard were made in DQ’s “exclusive and absolute right” and no obligation. DQ also reserved its right to modify the policy without notice.

The judge determined that it “cannot reasonably be found” based on the franchise agreement and site clearance policy that the Franchisee was entitled to an additional ‘buffer zone’ outside of the exclusive Territory. To find otherwise would serve to create a broader protective radius around the Territory for the Franchisee’s sole benefit, without the parties agreeing on that term and with no consideration being paid. The judge found that the Franchisee’s position was tantamount to asking for DQ to treat it in a “fiduciary-like manner” that would protect its interest, which was not required by either the franchise agreement or the *Wishart Act*.

No Breach of Rights as a Result of Polling Data or Point-of-Sale Systems

The Franchisee’s remaining complaints related to allegations that DQ was trying to treat it like a ‘standard’ franchisee with a modern franchise agreement involving a higher degree of control, despite his more bare-bones franchise agreement dating from 1954.

The Franchisee’s fourth and fifth allegations were that DQ had ‘polled’ data from its stores and used it to make the decision to award a store on the border of the Territory and had failed to provide it with requisite support for his point-of-sale system, both of which it claimed constituted a breach of the duty of good faith and fair dealing.

The judge noted DQ had no contractual obligation not to poll data and accepted its evidence that it immediately stopped its limited polling once the Franchisee had flagged it. The judge was satisfied that DQ did not specifically withhold point-of-sale system support from the Franchisee because of the terms of its

franchise agreement or otherwise, and found that the franchise agreement did not require DQ to provide the Franchisee with that support.

No Breach of Rights for Failure to Agree to "Modified" Standard Franchise Agreement

The Franchisee's sixth and final complaint was that DQ unfairly held it to the "strictest possible interpretation" of its franchise agreement when, in the course of negotiations for the Franchisee to open a new type of Dairy Queen location not permitted by its existing agreement, it required the Franchisee to enter a new standard form of agreement that applied to aspects of that type of location.

The judge rejected this argument, finding that DQ's offer to grandfather the terms of the existing franchise agreement to a new agreement but to otherwise impose its standard form agreement fairly addressed the interests of both parties. The judge noted that the Franchisee was taking an "unreasonable position expecting the granting of greater rights than are set out in the Franchise Agreement". While he was entitled to seek such an agreement, so too was it completely within DQ's rights to decide whether to accept it or not. Its decision not to do so did not constitute bad faith. The judge noted that the parties were free to contract amongst themselves for new locations and found there was no imbalance in power in this regard.

Conclusion

The judge dismissed the application and granted DQ its costs. While some of the allegations made by the Franchisee were specific to the facts of this case, the application judge's well-reasoned decision is a good overview of the contents of the duty of good faith and fair dealing under the *Wishart Act* and confirms a number of key principles, including that the duty: (i) does not require a franchisor to forgo its own contractual rights, or to place the franchisee's rights ahead of their own; (ii) does not support a rewriting of a contract or the implication of a term that would conflict with its express terms; and (iii) is only engaged when a contractual term is being performed or enforced. In other words, the decision confirms that while the *Wishart Act* is broad and remedial legislation, the duty of good faith and fair dealing is grounded in the contractual rights and obligations of the parties and cannot be used to expand them.

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[1] The application judge relied on the decision in *Spina v. Shoppers Drug Mart Inc.*, 2012 ONSC 5563 at paras. 148-150, which summarized and cited to leading case law on section 3. Cassels previously wrote about the motion judge's decision in *Spina* here and about the Court of Appeal's decision overturning the motion judge on the issue of section 3 here.