

Notable decisions in Alberta and British Columbia

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While recent Alberta and British Columbia jurisprudence is decidedly pro-franchisor, it highlights that care must be taken to ensure (i) clear and precise contractual drafting and (ii) fair dealing with franchisees. The decisions described below represent notable developments in defending against claims of duress and vicarious liability for the conduct of master franchisees.

Franchisee's duress claim dismissed

In *Dairy Queen Canada, Inc v MY Sundae Inc*, 2017 BCCA 442, the franchisor became concerned that certain quality standards were not being maintained by the franchisee. The franchisor was entitled to terminate if the issues were not remedied within seven days. However, it gave the franchisee 60 days during which the franchisee failed to address the issues. The parties then entered into a mutual cancellation and release agreement (the Release), which provided that although the franchise agreement could be terminated immediately, the franchisee would have six months to sell the business to an approved buyer. The business was never sold and the parties proceeded to litigation.

At trial, the franchisee disputed the validity of the Release on the basis that it was signed under duress. The judge found that the Release was valid and enforceable, in part because the franchisee had been fully aware of its contents and implications.

The Court of Appeal dismissed the appeal, noting that the franchisee had ample time to obtain legal advice, understood the Release and signed a written acknowledgment to close the restaurant. The Court of Appeal agreed with the trial judge that the grant of extra time to sell the business in exchange for the Release was legitimate commercial pressure, and not duress.

Claims of duress will succeed only when supported by the facts. This decision reinforces the importance of (i) keeping a careful record of all events and communications with franchisees, in particular in the termination context; (ii) documenting all extensions in time; (iii) drafting clear terms and conditions and (iv) recommending that the franchisee seek independent legal advice with sufficient time to do so.

Vicarious liability for the actions of a master franchisee

In *1738937 Alberta Ltd v Fair Waves Coffee Inc (Waves Coffee House)*, 2017 ABQB 714, the Court declined to hold a parent franchisor liable for the fraudulent actions of a master franchisee.

The plaintiffs entered into a franchise agreement with Abraham Alhusin, the master franchisee for Fair Waves Coffee in Alberta. The plaintiffs paid a \$225,000 construction fee to

Alhusin, who then absconded with the funds. The franchise never opened. The plaintiffs sued the parent franchisor, Fair Waves, arguing that it should be vicariously liable for Alhusin's actions.

The Court dismissed the claim against Fair Waves on the basis that the evidence did not support the allegation that M&M and Alhusin were agents of Fair Waves. In particular, (i) payment was made to M&M, and (ii) the disclosure clearly specified that the franchise was offered by M&M and (iii) that the franchisee could sue M&M but not Fair Waves.

To avoid vicarious liability in similar situations, parent franchisors should be cautious in how they represent their relationship with master franchisees to subfranchisees and the broader community, and should, at a minimum, take the following steps:

- indicate clearly in disclosure materials that the parent franchisor and master franchisee operate separately
- avoid language that may give the impression that the parent franchisor and master franchisee operate as a team or in a principal-agent relationship
- have separate contact information for the parent franchisor and master franchisee

It is important to note that this decision turned on the terms of the relevant agreement and the facts of the case; certain facts may be critical in determining outcomes. For example, in this case, the Court was mindful that the plaintiffs were experienced franchisees. Therefore, the foregoing measures are even more important when dealing with less experienced franchisees.