



The Franchise Valuations Reporter



Featured Expert: Ned Levitt



In this issue we are pleased to feature Ned Levitt's timely paper on the issue of the duty of good faith. Edward (Ned) Levitt is a partner at Dickinson Wright LLP, Toronto, Canada, providing legal services to Canadian and international clients on all aspects of Canadian franchise law. As a member of the Ontario Franchise Sector Working Team, Ned was instrumental in the creation of Ontario's franchise legislation and has had significant input in the franchise legislative process throughout Canada. Ned can be reached at 416.646.3842 or nlevitt@dickinsonwright.com.

Our Expertise

Within the franchise, distribution and dealership context, we are experts in:

- Damages, Valuations & Expert Testimony
- Finance, Accounting and Tax
- Cyber Security and E-discovery of Electronically Stored Information



Duty of Good Faith and Fair Dealing

Courts Weigh Circumstances In Two Donut Cases

In a paper presented earlier this month at the Lexpert Conference on the Implied Obligation of Good Faith held in Toronto, Ned Levitt analyzes several cases where courts have interpreted the meaning of the duty of good faith and fair dealing. The full text of Ned's paper may be found [here](#).

Among the cases highlighted are two that involve doughnut franchises where franchisees alleged breach of the duty of good faith. The circumstances of the two cases were different as were the outcomes.

In *Fairview Donut Inc. v. TDL Group Corp.* [1] a group of Tim Hortons franchisees contended that by introducing system-wide changes to the baking protocol and menu offerings that adversely affected the franchisees' profitability, Tim Hortons had breached their contracts, breached the franchisor's common law obligation of good faith and breached the statutory duty of good faith and fair dealing under the Ontario Act. The Ontario Court of Appeal affirmed the trial court's findings that "franchisors are free to introduce system-wide changes, even where such changes do not result in financial benefits to the franchisees."

Overall, the trial court held that it is not the court's responsibility "to recalibrate the financial terms of the agreement made by the parties." As long as the franchisor's discretion was not exercised arbitrarily, capriciously or for an improper motive, it had every right to implement what it considered to be reasonable commercial decisions.

In an opposite result, in *Dunkin' Brands Canada, Ltd.* [2], the trial court ruled against the franchisor holding it liable for failing to take reasonable measures to protect its brand against obliteration by Tim Hortons under three theories: the express terms of the contract, the implied obligations under the contract and under the duty of good faith.

The Quebec Court of Appeal rejected the franchisor's argument that the trial judge had imposed a new unintended obligation to protect and enhance the brand, outperform the competition and maintain market share. The point was not that the franchisor's actions failed; it was that the franchisor failed to take active measures in support of the brand.

As Ned notes in his conclusion:

Continuing to adopt a business as usual approach in the face of a competitive threat is not sufficient to satisfy the franchisor's contractual obligations. The franchisor did not take reasonable measures, in particular, to protect and enhance the brand in the face of the competition. Had the franchisor taken proper measures to protect and enhance the brand and, notwithstanding those efforts, a competitor had encroached on some of the franchisees' market share, the latter would have had no basis for complaint.

[1] 20120 CarswellOnt 2223, 2012 ONSC 1252, [2012] O.J. No. 834, 212 A.C.W.S. (3rd) 20

[2] 2015 CaraswellQue 3066, 2015 QCCA 624, J.E. 2015-692, EYB 2015-250660

We offer a free initial consultation. If any readers have questions, you are welcome to email or phone us and we will provide our best answer as quickly as possible.

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Franchise Technology Risk Management



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The Art of Successful Presentations

The Four B's According to Franklin Delano Roosevelt

FDR was elected to four terms as President of the US and served longer than any other chief executive in the history of the republic. During his tenure he was provided with more briefings and presentations on more important topics than anyone else in our country's history. As such he developed the following rules for successful presentations - the four B's:

1. Be Punctual
2. Be Prepared
3. Be Brief
4. Be Seated

Wisdom to live by!

Valuations

Business Valuation Resources Names Top 10 Valuation Cases of 2014

Among BVR's Top 10, we've covered many of those that apply to our practice areas in past issues.

1. *Estate of Richmond*, 2014 Tax Court Memo LEXIS 26 (Feb 11, 2014). We discussed this case in our update of "[Franchise Regulation and Damages](#)" published by CCH.
2. *Chatree v Chatree*, 2014 Ohio App. LEXIS 479 (Feb. 13, 2014). A divorce case not within our review.
3. *Sloan Valve Company v Zurn Industries, Inc.* 2014 U.S. Dist. LEXIS 39678 (March 26, 2014). A patent infringement case where an expert's analysis was excluded for not using the proper revenue base.
4. *Laidler v Hesco Bastion Environmental, Inc.* 2014 Del. Ch. LEXIS 75 (May 12, 2014). We discussed this case in the [August 2014 issue of Franchise Valuations Reporter](#).
5. *Brave v Brave*, 2014 Ark. LEXIS 232 (April 17, 2014). Another divorce case not within our review.
6. *Adelphia Recovery Trust v FPL Group (In re Adelphia Corp.)*, 2014 Bankr. LEXIS 2011 (May 6, 2014). Where an expert's projections were filled with uncertainties and rejected.
7. *Estate of Adell v Commissioner*, 2014 Tax Ct. Memo LEXIS 155 (Aug. 4, 2014). We discussed this case in the [September 2014 issue of Franchise Valuations Reporter](#).
8. *In re LightSquared Inc*, 2014 Bankr. LEXIS 2984 (July 11, 2014). We discussed this case in the [October 2014 issue of Franchise Valuations Reporter](#).
9. *Ferolito v AriZona Beverages USA LLC*, 2014 N.Y. Misc. LEXIS 4341 (Oct 14, 2014). This is a shareholder oppression "fair value" case concerning the company behind AriZona Iced Tea.
10. *Zelouf International Corp. v Zelouf*, 2014 N.Y. Misc. LEXIS 4341 (Oct 6, 2014). This is another shareholder oppression "fair value" case.

Nexus

State Must Give Full Credit For Out-Of-State Income Taxes

The U.S. Supreme Court has held that the state of Maryland must give full credit for out-of-state income taxes. Maryland residents who earned pass-through income from an S corporation that earned income in several states had not been allowed to claim a full income tax credit against county taxes on their Maryland income tax return for taxes paid to those other states. The court ruled that the state's treatment violated the dormant Commerce Clause of the Constitution.

Writing for the majority in *Comptroller of the Treasury of Maryland v. Wynne* (US S.Ct., May 18, 2015), Justice Alito explained that the dormant Commerce Clause precludes states from discriminating between transactions on the basis of some interstate element. "If every state adopted Maryland's tax structure, interstate commerce would be taxed at a higher rate than intrastate commerce," Alito wrote.

Cybersecurity

Beyond Business Losses, Liability Looms

John Chambers, the soon retiring CEO of Cisco Systems Inc. (after more than two decades at the helm) is famous for saying, "[t]here are two types of companies: those who have been hacked and those who don't yet know they have been hacked." In this newsletter we have repeatedly emphasized the vulnerabilities of all types of companies to cyber-attacks which have increased threefold in the past two years.

Companies' exposure falls into three main categories: 1) **Regulatory Liability**: there are many laws which impose duties to investigate and notify potential victims of data-breaches; 2) **Civil Liability**: this is an area of unknown exposure and insurance, though absolutely necessary, may not cover all liabilities; 3) **Criminal Liability**: it has not happened yet but it's a monstrous potential (viz: banks).

Upcoming Article in June Issue of Franchising World

Be sure to see our upcoming article in the June issue of the IFA's *Franchising World*: "**Identify What's Missing From Your Current Cyber-Security Posture**," by Bruce Schaeffer and Henry Chan. We'll provide a link to the article in this space once it is posted.
