

Historic Court of Appeal Decision in Dunkin' Brands: Three Lessons for Franchisors

Litigation & Dispute Resolution Bulletin

I. Context

After a 12-year legal saga, the Quebec Court of Appeal has upheld a trial Court's decision and ordered the franchisor *Dunkin' Brands* to pay millions of dollars of compensation to its franchisees for breach of contract, misrepresentation and negligence. However, the Court of Appeal reduced the initial \$16 million award to \$10 million, an amount that rises to **\$18 million** with interest and the additional indemnity. The Court of Appeal has therefore specified the intensity of the franchisor's implied obligations in what is the most significant franchise case in Québec since *Provigo* was handed down in 1998.

To read the judgment, click [here](#).

II. Franchisor's Implied Obligations

A. Obligation of means perhaps, but still an obligation

The Court of Appeal recognizes that the franchisor is bound by an obligation of means, not of results. However, this obligation is not "disembodied". The Court ruled against *Dunkin' Brands* because it believes the franchisor did not take reasonably objective measures to support its franchisees in the struggle against their competitor, *Tim Hortons*. It was shown that between 1995 and 2005, *Dunkin' Brands* waited too long before reacting against the threat posed by *Tim Hortons*, despite receiving countless warnings from its franchisees. The measures taken by the franchisor in 2000 (renovation incentive program and new global plan) were "too little, too late".

The Court pointed to the existence of the franchisor's implied obligations that flowed from the nature of the contractual relationship. But the Court went even further by recognizing that the franchisor has an obligation to the franchisees, individually, as well as to its entire network. This obligation already exists under case law, but has now been clarified and specified in this unprecedented ruling.

The practical consequence of this is that a franchisee can now, in theory, directly demand that the franchisor take reasonable measures to impose standards of quality and cleanliness throughout its network. Under some circumstances, "reasonable measures" could even include legal proceedings.

III. What Lessons to Learn?

A. The franchisor must ensure that it is able to "deliver" on the commercial

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statement made in its contract.

The damages award against *Dunkin' Brands'* conviction is based not only on the franchisor's implied obligations, but also the explicit obligations contained in its contract. The Court of Appeal rejected *Dunkin' Brands'* argument that the trial judge had "misread" the preamble and relevant clauses of the contract in order to conclude that *Dunkin' Brands* failed to protect and enhance the brand.

A review of the contractual statements alongside the franchise agreements and ancillary contracts is appropriate to ensure that the franchisor's obligations described in those documents actually reflect the franchisor's ability to "deliver" such a performance. Indeed, updating franchise agreements could substantially reduce the risk that franchisors will be found liable like *Dunkin' Brands* was.

B. Franchisors must be proactive and regularly communicate with their franchisees

It is always preferable for franchisors to maintain an open dialogue with the representatives of its franchisee community. While franchisors are not required to follow their franchisees' recommendations or demands, they can at the very least take them into consideration in the context of a partnership relationship. If a franchisee warns them of a problem, franchisors could proactively take reasonable and timely measures to support their franchisees and help them better confront the competition.

C. What are "reasonable" measures?

The Court of Appeal does not create a new level of intensity for franchisors' obligations. Franchisors must simply take the same actions that any other "reasonable" franchisor would take under similar circumstances. The decision illustrates that it is more important that the franchisors take "timely" action. In *Dunkin' Brands*, the Court of Appeal is not so much reproaching the franchisor's choice of means (such as the new global plan and renovation program) as the franchisor's delayed reaction.

We remain at your disposal to discuss this matter at greater length and what measures should be taken based on the lessons learned from this very important decision.