

# **Business Franchise Guide - Explanations, Laws, cases, rulings, new developments, The Second Battle of the Canadian Donut Wars - Bertico v. Dunkin' Donuts: Lessons Learned About Franchisors' Duties, Lost Profits Calculations and the Credibility of Expert Testimony**

The Second Battle of the Canadian Donut Wars - *Bertico v. Dunkin' Donuts*: Lessons Learned About Franchisors' Duties, Lost Profits Calculations and the Credibility of Expert Testimony

By Edward (Ned) Levitt and Bruce S. Schaeffer <sup>1</sup>

On June 21, 2012, the Honourable Daniel H. Tingley of the Quebec Superior Court ordered Dunkin' Brands Canada Ltd. (the "Franchisor") to pay 21 of its franchisees in Quebec (the "Franchisees") an aggregate sum of almost \$16.5 million, plus interest and costs, for having failed "to protect and enhance the Dunkin Donuts brand in Quebec."<sup>2</sup> The decision was a resounding victory for the Franchisees, with Tingley, J.S.C. finding "that the Franchisees' damages are, to the dollar, what their experts have determined them to be."<sup>3</sup> In coming to its decision, the Court employed a "comparable" method in accepting the expert testimony of the Franchisees. The method adopted used "comparable sales" to calculate "lost profit", which is far from the orthodoxy.

The outcome in *Dunkin' Donuts* contrasts sharply with that of another Canadian franchise case, recently examined by these writers,<sup>4</sup> where Tim Hortons Inc. obtained summary judgment in the Ontario Superior Court of Justice against efforts by franchisees to certify a class action.<sup>5</sup> Though "franchise law" does not exist at common law,<sup>6</sup> the decision in *Dunkin' Donuts* and *Tim Hortons* come close to establishing a set of principles that could lead the way for the evolution of "franchise law" as a discrete area in Canadian common law.

## **Factual Background**

The *Dunkin' Donuts* franchise system experienced substantial success in the Province of Quebec for over half a century, resulting in Dunkin' Donuts becoming the dominant coffee and donut fast food purveyor in the province. Despite its historical success, Dunkin' Donuts market share in Quebec was all but wiped-out in a single decade.<sup>7</sup> Between 1998 and 2008, the

number of outlets in Quebec dramatically contracted from 210 to 41.<sup>8</sup> By the time Tingley, J.S.C. wrote his decision in 2012, less than 13 outlets remained.<sup>9</sup> In the eight years between 1995 and 2003, Dunkin' Donuts saw its market share in Quebec plummet from 12.5% to 4.6%, notwithstanding "inflation over this decade aggregating some 21% and a growing fast food market."<sup>10</sup> Foreshadowing this spectacular decline were repeated warnings by the Franchisees to the Franchisor, beginning in 1996, of what would eventually be known as the "Tim Hortons' phenomenon."<sup>11</sup>

According to Tingley, J.S.C., "[l]ittle was done that was effective to combat this 'phenomenon',"<sup>12</sup> and when the Franchisor eventually proposed a remodel incentive programme in late 2000, it "required a huge investment on the part of those Franchisees who committed to it, notwithstanding the negative views of the accountants retained by the Franchisees to advise them as to the feasibility of the programme."<sup>13</sup> Participation in the programme was also contingent upon the Franchisees signing a general waiver, designed to serve "as a complete bar to the right of the Franchisees to bring any suit or action against [the Franchisor] for whatever reason from the dawn of creation to the day it was signed."<sup>14</sup> The incentive programme "never got off the ground,"<sup>15</sup> and the situation failed to improve.

As Dunkin' Donuts fell, Tim Hortons rose. Between 1995 and 2005, the number of Tim Hortons outlets in Quebec grew from 60 to 308, and Tim Hortons captured a 70% sales increase in Quebec for the decade.<sup>16</sup> As Tingley, J.S.C. remarked in his decision, "Tim Hortons had captured the lions' share of growth in the coffee/donut fast food market and at the very least materially contributed to the precipitous collapse of the 'Dunkin Donuts System' in Quebec during this period."<sup>17</sup> He further lamented "how [many] of the best Dunkin Donuts Franchisees in Quebec lost their franchise business, for some their livelihoods, in a very short period of time due to factors largely out of their control."<sup>18</sup>

Meanwhile, with Dunkin' Donuts Franchisees struggling for their very livelihoods in Quebec, those at Tim Hortons were complaining to the Ontario Courts of franchisor-mandated initiatives that were eating into potentially higher profit margins.<sup>19</sup>

A comparison of the disparate facts and judicial outcomes in *Dunkin' Donuts* and *Tim Hortons* suggests that Canadian franchise disputes are subject to similar legal analyses, notwithstanding the fact that Canada has two distinct legal systems.

### **Quebec versus English-Canada**

As *Dunkin' Donuts* was decided in Quebec, which follows the civil law tradition for private law matters, the case is not binding at common law on the rest of Canada; correspondingly, *Tim Hortons* is not binding in Quebec. In practice, however, "there is no denying the influence of the common law ... in [Quebec's] civil matters,"<sup>20</sup> and common law principles are also shaped by Quebec jurisprudence.<sup>21</sup> As a result, the Supreme Court of Canada has held that "if the rules in the two systems are similar, precedents may be of some relevance."<sup>22</sup> Specifically, "similar or identical principles may be useful for the purpose of explanation and illustration."<sup>23</sup> When it comes to franchise disputes, we believe that similar principles exist within the two legal systems, and that cases resembling *Dunkin' Donuts* and *Tim Hortons* could receive similar

adjudication, be it in Quebec or elsewhere in Canada.

### **Reasonable Profits**

At issue in both cases was the extent to which franchisees are entitled to earn a reasonable profit. In *Tim Hortons*, Mr. Justice G.R. Strathy commented that the “real complaint is not that they don’t make a reasonable profit as Tim Hortons franchisees - but rather that they don’t make more profit.”<sup>24</sup> We therefore cautioned in our previous article that “[h]ad this been a franchise system with a lot of failing franchisees or franchisees earning little profit, the result could have been very different.”<sup>25</sup> As if on cue, *Dunkin Donuts* provides that alternative set of facts, where the Franchisees “have lost their business; their livelihoods,”<sup>26</sup> and the adjudicated result is indeed very different.

That is not to say, of course, that the result *will* be different in the case of failing franchisees or those earning little profit. Even in *Dunkin’ Donuts*, where Tingley, J.S.C. ultimately awarded the Franchisees every dollar they sought, he nonetheless cautioned that the Franchisor was neither “the insurer of the Franchisees nor a guarantor of their success.”<sup>27</sup> Inevitably, the starting point for any analysis in similar disputes is the franchise agreement itself.

### **Franchise Agreement**

At issue in both *Tim Hortons* and *Dunkin’ Donuts* was the language of the respective franchise agreements. In regard to *Tim Hortons*, we commented on “the deference which a franchisor can earn by properly structuring its franchise agreements,”<sup>28</sup> observing that “Tim Hortons succeeded with [the] extraordinary remedy of dismissal on summary judgment because the language of its franchise agreement provided wide discretion.”<sup>29</sup> We also warned that “[w]here franchise agreements are structured and worded differently, different conclusions might be reached.”<sup>30</sup> *Dunkin’ Donuts* represents that different case, in which the Franchisor specifically in its written franchise agreement “assigned to itself the principal obligation of protecting and enhancing its brand.”<sup>31</sup> According to Tingley, J.S.C., the Franchisor in *Dunkin’ Donuts* failed to meet this contractual responsibility, “thereby breaching the most important obligation it had assumed in its contracts.”<sup>32</sup>

The lesson is not new, but bears repeating: contract law looms large in franchise disputes, and a vigilant franchisor will cloak itself in the protection of a carefully-worded agreement. Meticulous planning *before* disputes arise is the key. However, a meticulous planner and careful drafter must still operate within the confines of good faith.

### **Good Faith**

The judgments in both *Tim Hortons* and *Dunkin’ Donuts* characterised good faith as a limiting control on a franchisor’s freedom to contract as it sees fit. As the cases were decided according to the rules of two different legal systems, it is noteworthy that both cases cited the importance of good faith.

In *Tim Hortons*, Mr. Justice G.R. Strathy noted that there are limits to what a franchisor can do,

in that “[i]t must deal fairly with its franchisees and act in good faith and in accordance with reasonable commercial standards in the performance of its contract.”<sup>33</sup> In Ontario, “[w]hether or not a party under a duty of good faith has breached that duty will depend on all the circumstances of the case, including whether the party subject to a duty of good faith conducted itself fairly throughout the process.”<sup>34</sup> The case of *Country Style Food Services v. 1304271 Ontario Ltd.*<sup>35</sup> provides a Canadian common law precedent for a franchisor’s duty of good faith. In this case, the franchisor had committed to supporting the franchisee in a contract dispute with the franchisee’s landlord. The franchisor actually supported the landlord’s claim in the dispute without informing the franchisee that it had changed its intentions.<sup>36</sup> The franchisor was found to have “breached a duty of good faith owed by it to the franchisee.”<sup>37</sup>

In *Dunkin’ Donuts*, Tingley, J.S.C. also observed that “[f]ranchisors are bound by an obligation of good faith and loyalty towards their franchisees such that they are duty bound to work in concert with them and: [translation] ‘provide them with the necessary tools, if not to prevent economic hardship from being caused, to at least minimize the impact.’”<sup>38</sup>

Although both legal systems emphasize the importance of good faith, it should be noted that the Quebec model appears to take the extra step of requiring a franchisor to take active steps in attempting to shield its franchisees from hardship. This can be contrasted, for example, with *Country Style Food Services*, in which the franchisor “was not legally obliged to commence injunction proceedings,”<sup>39</sup> and only breached its duty of good faith when it “never *followed through* on its threats to commence legal action.”<sup>40</sup> Similarly, the Quebec model also appears to be more open, at least implicitly, to the concept of franchisor negligence.

### **Franchisor Negligence**

To be clear, there is nothing in the judgment of *Dunkin’ Donuts* that explicitly refers to the Franchisor having been negligent. However, it is noteworthy that: (i) the Franchisees, in their pleadings, characterized the Franchisor as having acted [translation] “*negligently* and in bad faith;”<sup>41</sup> (ii) this aspect of the Franchisees’ pleadings was mentioned in the judgment;<sup>42</sup> and (iii) Tingley, J.S.C. awarded damages “to the dollar [of] what [the Franchisees] determined them to be.”<sup>43</sup> We believe it is reasonable to conclude that the concept of franchisor negligence was, at a minimum, implicitly lurking at the back of Tingley, J.S.C.’s mind. However, there was no official recognition of franchisor negligence in *Dunkin’ Donuts*, as no tort of franchisor negligence has been recognized to date in Canadian common law or Quebec civil law.

### **The War of the Expert Witnesses**

The Court in *Dunkin’ Donuts* devoted a tremendous amount of its opinion to reviewing the battling reports of the experts. First, the Court went over the initial submission, the “Navigant Report,” which was prepared by the Franchisees’ experts in 2008 (before the lawsuit was initiated), to quantify the losses of “contribution margins” for each of the Franchisees, for the years 2000 to 2003.<sup>44</sup>

The Navigant approach to “lost profits” (which was wholly adopted by Tingley, J.S.C.) quantified the Franchisees’ damages by correlating their claimed lost profits to the

corresponding increases in sales at Tim Hortons.

Second, the Court reviewed the Nexia Friedman 2010 Report which was prepared by Dunkin' Donuts experts to "critique the damage calculations" presented by Navigant. Mr. Steve Harrar, one of the signatories of the Nexia Friedman report, testified that in Nexia Friedman's opinion, "the Plaintiffs' use of the sales performance of Tim Hortons' Canadian stores is highly speculative and unfounded" saying such use was "flawed" in that it overstated the level of damages sustained. He opined that "the methodology used by the Plaintiffs grossly overstates the value of the stores and the claimed damages."<sup>45</sup>

Next the Court reviewed another submission (prepared after additional discovery) from the Franchisor's expert, referred to as the Nexia Friedman 2012 Submission. This report sought to limit the "term" for which damages should be calculated to the period from May 2000 to August 2003. The Court seemed offended by such gaming and ruled, "the 'damage period' extends from 1996 when the Franchisees warned ADRIC [the Dunkin' Donuts master franchisor for Canada] of a fox looking to enter the hen-house until the last store closed its doors in 2011."<sup>46</sup>

Nexia Friedman also sought to quantify damages by using the Franchisees' "'actual activity' [as opposed to that of Tim Hortons] prior to ADRIC's wrongdoing to predict what the sales and profits should have been (but for) the 'wrongdoing' during the 'damage period.'"<sup>47</sup> The Court was clearly not convinced saying: "ADRIC seems to be suggesting that although it allowed the fox into the hen-house, it should only be responsible for 50% of the chickens that were devoured. That is rank nonsense."<sup>48</sup>

The next submission that the Court reviewed was the Navigant response to the Nexia Friedman 2012 Submission and it is overwhelmingly clear from the tone and content of the Court's opinion that it found the Franchisees' expert's reasoning, methods and calculations far more credible than those of the Franchisor's experts.

Indeed, the Court was able to turn the Franchisor's argument attacking the "comparable" method of damages (i.e. the use of the "comparable" results of Tim Hortons) and in support of the "but for" method on its head as follows:

"Notwithstanding that Navigant believes the "comparable" approach is the better method to determine the Franchisees' loss of profits in this case, Mr. Filion nevertheless demonstrated that for those eight stores (8) where the but for approach could be used reliably - that is, using at least five years of data preceding the "damage period" - the results of the two approaches are very similar. This exercise provides powerful support for the use and application of the comparable approach in this case to determine the loss of profits sustained by the Franchisees during the claim periods at the 100% level."<sup>49</sup>

Another thing that should be noted is that Tingley, J.S.C. made a point of highlighting the litany of acronyms that followed the experts' names on their reports, for example:

Mr. Douglas Fisher, BAS, MSc, FCMC, CFE, FCSI, <sup>50</sup> an expert for the Franchisee;

Mr. Francois Fillion, CA, CA-EJC, EEE, <sup>51</sup> who prepared a report provided for the Franchisees;  
and

Mr. Steve Harrar, CFE, CBV, CMA, CA, <sup>52</sup> another of Dunkin' Donuts' experts (referred to above).

Despite all of these credentials Tingley, J.S.C. seemed to show his greatest deference to the opinion of one of the Franchisees' experts, described simply as Mr. Francois Desrosiers, MBA.

### **“Lost Profits” Damages**

What is most unusual about this case, from a damages point of view, is the importation of the concept of “comparable” companies from the valuation arena into the methodology for computing “lost profits” in the damages arena. The idea of using the results from a competing (and therefore “comparable”) franchise system (Tim Hortons) to calculate the lost profits damages of Dunkin' Donuts Franchisees against their Franchisor is extraordinary.

### **Lost Profits Calculations Generally**

In *Dunkin' Donuts*, Tingley, J.S.C. held:

“Lost profits flowing from lost sales in a growing market caused by a franchisor that has failed to protect its brand and the loss of investments made to participate in such market fall readily into the category of damages ... [and] they were foreseeable at the time the Franchise Agreements were signed by the parties. An underlying assumption of all franchise agreements is that the brand will support a viable commerce.” <sup>53</sup>

Under U.S. law, if there is a damages claim for lost profits, evidence must be introduced sufficient to estimate such lost profits with some reasonable degree of certainty. Canadian law requires that the claim for lost profits not be entirely speculative or uncertain. Where damages cannot be precisely proven, however, “liability should not be escaped.” <sup>54</sup> It is black letter law, and the basis for many defense objections, that anticipated profits that are “remote, uncertain, or speculative” are not recoverable.

As a general rule, a claim for lost profits must provide the trier of fact at a minimum with the following: (1) the quantity of product or services on which lost profits are alleged; (2) the price at which such product or services would be sold; (3) the amount of time it would take to consummate the sales; (4) the expenses that would be incurred in accomplishing the sales over time; and - if the claim is for future lost profits - (5) the means to discount (that is, reduce to present value) the profits that would have been realized from the sales in future years. Without these pieces of information, the cases have held, an award cannot be accurately calculated.

Additionally, case law shows that the methods of proof that may be employed by plaintiffs to calculate their damages depend on the underlying dispute. For example, a gas station operator

was able to successfully demonstrate lost profits by estimating the average gross profit per gallon multiplied by its estimate of the gallons it would have sold monthly at its own service station. However, the premier method of proving lost profits uses calculations based on the plaintiff's own prior results or, where there was a violation of a guaranteed territory, lost profits measured by the violating competitor's results.<sup>55</sup> We are not aware of case law, other than *Dunkin' Donuts*, that predicates a plaintiff's lost profits on a competitor's operating results.

### **Use of Data about Business “Comparables” in Valuations**

The *valuation* of a franchise is normally an issue separate and apart from a claim for *lost profits* and often relies on different data. In Canada the valuation of franchises, and assets and liabilities in general, is analyzed under the concept of fair market value, the basic definition of which is found in the Federal Court (Trial Division) case, *Henderson Estate v. M.N.R.*: “the highest price obtainable in an open market between informed, prudent parties acting at arm's length and under no compulsion to transact, expressed in terms of money or money's worth.”<sup>56</sup>

The hypothetical buyer and seller are assumed to be able, as well as willing,<sup>57</sup> to trade.<sup>58</sup> The current rules of the International Financial Reporting Standards (IFRS) state: “Fair value is the amount for which an asset could be exchanged, or a liability settled, between knowledgeable, willing parties in an arm's length transaction.”<sup>59</sup>

### **Valuation Methodology**

There are three (and really only three) general methods that are acceptable for determining business value. These are - in legal terms - book value, capitalization of earnings, and comparable sales. In accounting terms these methods are known as (1) cost (book value), (2) income (capitalization of earnings), and (3) market (comparable sales), respectively.

Book value is the net worth of a company determined by either its balance sheet assets or the replacement cost of its balance sheet assets - minus liabilities.

The capitalization of earnings method assumes either that the earnings of a business constitute an annual percentage return on the value of the business or, more accurately, that the present discounted value of all of the business' earnings into the future is the current business value. Once the discount rate and the earnings are determined, a value is computed. Thus, a 5% capitalization rate (sometimes called a discount rate) applied to \$100,000 of earnings would yield a business value of two million dollars (\$100,000 divided by .05 = \$2,000,000). This is the same as a 20:1 price/earnings ratio.

Comparable sales, the third valuation method, are valuation comparisons based on recent sales of similarly situated businesses. Because such prices are not estimates but actualities, the comparable sales method is generally preferred as the most realistic proof of fair market value.

#### **a. The Court's Adoption of the “Comparable” Method in Calculating Lost Profits**

The *Dunkin' Donuts* Court prefaced its conclusions (in case any reader was wondering which

side it was on) by saying:

“The Navigant Report concludes with a reasoned defense of the “Comparable” approach it used to summarize the damages sustained by the Franchisees. The entire chapter on this issue deserves to be reproduced at length. It removes the reservations the Court entertained when it permitted ADRIAC “to develop the methodologies recommended by [its] expert on damages.” Mr. Filion [the author of the Navigant Report] has done his homework, extremely well [.]” <sup>60</sup>

From there the Court went on to quote with great approval from the Navigant Report for the next five pages of the opinion - in French - complete with charts. The Franchisor’s experts and their reports were thoroughly discredited and discarded - at least by omission.

Part of the approved report - translated into English - is below and shows some very interesting “damages” and expert testimony aspects of the case. First of all it must be emphasized that the Court used the “comparable” results of Tim Hortons, a competing franchise system, to compute the lost profits of the Franchisees. This analysis imports a concept from the valuation world - the idea of using “comparable sales” as a method to determine market value much as a real estate appraiser includes “comparable sales” of similar properties to the one being valued - into the calculation of “lost profits” damages.

The *Dunkin’ Donuts* decision conflated the two concepts. This is a very unusual adaptation of a calculation method from one legal concept and transposing it to another - without even mentioning that such use is a transposition and is somewhat radical at that. Surely this will be fodder for an appeal.

As an example of what we are talking about, the portion of the report that was quoted with approval starts:

#### **14.0 USE OF THE “COMPARABLE” APPROACH**

The present section enumerates different factors supporting the “comparable” approach as the most appropriate approach for this litigation.

##### **14.1 Comparability of Tim Hortons to Dunkin Donuts**

In evaluating companies and quantifying damages, it is frequently difficult to find the best “comparable” to the company under study because comparable companies operate in different markets, do not necessarily offer an identical product, data is not available, etc.

In the present litigation, we consider Tim Hortons to be the best comparable to Dunkin Donuts because:

Dunkin Donuts and Tim Hortons operate in the same market segment and target the same clientele;

in Quebec, Tim Hortons has cornered the market that was previously occupied by Dunkin



Donuts; and

Tim Hortons has situated itself in the same cities as those of Dunkin Donuts.

To show the transposition of theories one can simply note the first sentence of 14.1: “In *evaluating companies and quantifying damages*, it is frequently difficult to find the best “comparable” to the company under study ...”

The Court also found that there was insufficient historical data and, therefore, the “comparable” approach was most appropriate. This overlap of valuation and damages methodologies was employed as if the “comparable” method were generally and properly utilized in both situations. It may be deemed proper on appeal, but it certainly is anything but commonplace.

In these authors’ experience, based on considerable study and case review, the use of “comparables” is the preferred method for valuations. However, it is the actual operations of the party claiming damages that is the usual data source in determining lost profits damages - otherwise the claim is subject to attack as being “speculative”. In fact, Tingley, J.C.S.’ acceptance and stamp of approval of the Franchisees’ expert’s use of the alleged results of Tim Hortons to calculate the lost profits of the Franchisees is highly unusual and quite remarkable.

### **Loss of Business Value - Use of Rule of Thumb**

Ironically, although “comparables” are generally considered for valuations - rather than lost profits - in its determination of the loss of business value the Court, in this case, completely ignored Tim Hortons, the supposed comparable. Instead Tingley, J.S.C. settled on a Rule of Thumb valuation to be adopted generally for all the plaintiffs, which deemed the loss of business value to be the fair market value of Dunkin’ Donuts franchises before the millennium - i.e. 50% of gross sales, viz.:

“All of the Franchisees’ stores have closed or been sold for a fraction of their traditional value. Until the turn of the century, Dunkin Donuts stores could be sold for roughly 50% of annual sales. No such value could be attributed to a Quebec Dunkin Donuts store in the new century. They have thus lost their investments in the Dunkin Donuts System, as well as profits.” [61](#)

### **Conclusion**

The decisions in *Tim Hortons* and *Dunkin’ Donuts* provide an important lesson for franchisors and franchisees alike. Though these cases come close to establishing a set of principles that could one day be the foundation for “franchise law” as a discrete area in Canadian common law, they instead reinforce the notion that the franchisor-franchisee relationship is predicated primarily on the contractual terms of a franchise agreement. The *Dunkin’ Donuts* decision also provides an interesting analysis of the damages resulting from a breach of the franchise agreement. Though the decision is not binding on English-Canada, it provides a potential point of departure for future cases. The “comparable” method used by the Court to determine damages for “lost profits” may face further scrutiny. In future, a Court may need to determine whether the “comparable” method used by Tingley, J.S.C. meets the legal standard of not being

speculative, or whether the more traditional analysis of the claimant's own historical profits is the preferred method for calculating "lost profits".

## Footnotes

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<sup>2</sup>*Bertico Inc. et al v. Dunkin' Brands Canada Ltd. (formerly Allied Domecq Retailing International (Canada) Ltd.)*, 2012 QCCS 2809, [2012] Q.J. No. 4996 at paras. 1, 128 [*Dunkin' Donuts*].

<sup>3</sup>*Ibid* at para. 113.

<sup>4</sup>See Edward (Ned) Levitt and Bruce S. Schaeffer, "Canada's Tim Hortons Case: Lessons Learned about Franchisors' Rights, Class Action Certification and Rules of Expert Testimony," *CCH Business Franchise Guide* ¶7411.

<sup>5</sup>*Fairview Donut Inc. and Brule Foods Ltd. v. The TDL Group Corp. and Tim Hortons Inc.*, 2012 ONSC 1252, [2012] O.J. No. 834, appeal as of right to the C.A. [*Tim Hortons*].

<sup>6</sup>Edward Levitt, "Rise of franchise law creates challenges and opportunities", *The Lawyers Weekly*, (January 28, 2011) 9. online: The Lawyers Weekly <<http://www.lawyersweekly-digital.com>>.

<sup>7</sup>*Dunkin' Donuts, supra* at para. 29.

<sup>8</sup>*Ibid* at paras. 26, 29.

<sup>9</sup>*Ibid* at para. 36.

<sup>10</sup>*Ibid* at paras. 37-38.

<sup>11</sup>*Ibid* at para. 32.

<sup>12</sup>*Ibid*.

<sup>13</sup>*Ibid* at para. 33.

<sup>14</sup>*Ibid* at para. 23.

<sup>15</sup>*Ibid* at para. 34.

<sup>16</sup>*Ibid* at paras. 37-38.

<sup>17</sup>*Ibid* at para. 38.

<sup>18</sup>*Ibid* at para. 39.

<sup>19</sup>For a more detailed analysis of the facts in *Tim Hortons*, please consult our article that appeared in the June 22, 2012 edition of *CCH Business Franchise Guide*.

<sup>20</sup>*Glegg v. Smith & Nephew Inc.*, 2005 SCC 31, [2005] 1 S.C.R. 724 at para. 15.

<sup>21</sup>See *Reynolds v. Innopac Inc.* (1998), 37 O.R. (3d) 577 (C.A.) at 582-83, leave to appeal to SCC refused, 26531 (September 3, 1998), where the Court of Appeal for Ontario discusses the Supreme Court of Canada "set[ting] out the concept of constructive dismissal as it is understood in civil law and defin[ing] common law constructive dismissal in the same manner."

<sup>22</sup>*Farber v. Royal Trust Company*, [1997] 1 S.C.R. 846 at para. 32, 145 D.L.R. (4th) 1.

<sup>23</sup>*Ibid*.

<sup>24</sup>*Tim Hortons*, *supra* at para. 41.

<sup>25</sup>Levitt and Schaeffer, *supra*.

<sup>26</sup>*Dunkin' Donuts*, *supra* at para. 114.

<sup>27</sup>*Ibid* at para. 62.

<sup>28</sup>Levitt and Schaeffer, *supra*.

<sup>29</sup>*Ibid*.

<sup>30</sup>*Ibid*.

<sup>31</sup>*Dunkin' Donuts*, *supra* at para. 58.

<sup>32</sup>*Ibid*.

<sup>33</sup>*Tim Hortons*, *supra* at para. 673.

<sup>34</sup>*Shelanu Inc. v. Print Three Franchising Corp.* (2003), 172 O.A.C. 78, 64 O.R. (3d) 533.

<sup>35</sup>(2005), 200 O.A.C. 172, 7 B.L.R. (4th) 171 [ *Country Style Food Services*].

<sup>36</sup>*Ibid* at para. 98.

<sup>37</sup>*Ibid* at para. 3.

<sup>38</sup>*Dunkin' Donuts*, *supra* at para. 53, citing *Supermarché A.R.G. Inc., c. Provigo Distribution Inc.*, [1998] R.J.Q. 47 (C.A.) at p. 61, 77 A.C.W.S. (3d) 976.

<sup>39</sup>*Country Style Food Services*, *supra* at para. 99.

<sup>40</sup>*Ibid* [emphasis added].

<sup>41</sup>*Dunkin' Donuts*, *supra* at para. 31 [emphasis added].

<sup>42</sup>*Ibid*.

<sup>43</sup>*Ibid* at para. 113.

<sup>44</sup>*Dunkin' Donuts*, *supra* at para. 75.

<sup>45</sup>*Ibid* at para. 89.

<sup>46</sup>*Ibid* at para. 96.

<sup>47</sup>*Ibid* at para. 95.

<sup>48</sup>*Ibid* at para. 99.

<sup>49</sup>*Ibid* at para. 103.

<sup>50</sup>Bachelor of Administrative Studies, Master of Science, Fellow Certified Management Consultant, Certified Foodservice Executive, Foodservice Consultants Society International (footnote and underlining by the Court)

<sup>51</sup>Comptable Agréé, Comptable Agréé - Excellence in Jur Comptabilité de L'Institut canadien des Comptables Agréés du Quebec, Institut canadien des Experts en Evaluation d' Entreprises (footnote and underlining by the Court)

<sup>52</sup>Certified Fraud Examiner, Chartered Business Valuator, Certified Management Accountant, Chartered Accountant (footnote and underlining by the Court)

<sup>53</sup>*Dunkin' Donuts, supra* at para. 73.

<sup>54</sup>*Murano v. Bank of Montreal*, [1995] O.J. No. 883, at para. 161.

<sup>55</sup>Levitt and Schaeffer, *supra* at s. 13.03-4

<sup>56</sup>*Henderson Estate v. M.N.R.*; *Bank of New York v. M.N.R.*, [1973] F.C.J. No 800 (F.C.T.D.), Affd. [1975] F.C.J. No. 609 (FCA) at para. 21.

<sup>57</sup>Under IFRS 13, effective January 1, 2013 this aspect is replaced with the concept of "market participants".

<sup>58</sup>Under the U.S. Internal Revenue Code "Fair Market Value" is defined as:

the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts.

<sup>59</sup>IFRS 13 - App A. Effective January 1, 2013, the definition will be: "The price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date."

<sup>60</sup>*Dunkin' Donuts, supra* at para. 108

<sup>61</sup>*Dunkin' Donuts, supra* at para. 70.