Court of King's Bench of Alberta

Citation: 1010805 Alberta Ltd v Sundial Growers Inc, 2024 ABKB 173

Date: 20240325
Docket: 2201 14923
Registry: Calgary

Between:

1010805 Alberta Ltd, 2087866 Alberta Ltd, 2083136 Alberta Ltd, 2082910 Alberta Ltd

Applicants

- and -

Sundial Growers Inc and Spirit Leaf Inc

Respondents

Reasons for Judgment
of the
Associate Chief Justice
D.B. Nixon

I. Introduction

[1] Four franchisees (the "**Applicants**") appeal the Partial Final Awards and Costs Quantum Awards of an Arbitrator under section 44 of the *Arbitration Act*, RSA 2000, c A-43. The parties have agreed to base their arguments on the Partial Final Award re: 2087866 Alberta Ltd ("**Partial Final Award**"), as the relevant background facts are substantially similar.

II. Background

[2] There is significant background on the relationship between the parties and the factual developments in the Partial Final Award. I summarise the key elements here.

[3] This relationship stems from the early flurry of activity that occurred once cannabis legalisation had been announced. The retail sale of non-medicinal cannabis became legal in Canada on October 17, 2018.

[4] Production of cannabis is regulated by the federal government whereas distribution and retailing of cannabis is regulated by the provincial governments. The Alberta regulator is the Alberta Gaming Liquor & Cannabis (the "**AGLC**").

[5] The AGLC began accepting applications for cannabis retail licenses on March 6, 2018. Spirit Leaf Inc was incorporated in May 2017 ("**Spirit Leaf**"). Its intention was to develop a franchise system of recreational cannabis retailers.

[6] Spirit Leaf began soliciting applications from potential franchisees in the summer of 2017. The Applicants signed Franchise Agreements with Spirit Leaf in 2019.

[7] On July 20, 2021, Sundial Growers Inc ("**Sundial**") acquired Spirit Leaf. On March 31, 2022, Sundial acquired all the shares of Alcanna Inc ("**Alcanna**").

[8] Alcanna is a liquor retailer that largely operates discount outlets. It owns a 63% equity interest in Nova Cannabis, which operates discount retail cannabis stores under the "Value Buds" banner.

[9] Following the acquisition of Alcanna, Sundial became the indirect owner of the Spiritleaf franchise system. Sundial also became the indirect majority owner of Nova Cannabis and its chain of Value Buds stores.

[10] The Applicants brought arbitration proceedings against Spirit Leaf and Sundial on March 17, 2022. The Applicants sought to determine "whether Sundial breached or induced the breach of the Franchise Agreement by acquiring Alcanna, the majority owner of Nova Cannabis which owns and operates competing Value Buds stores": Partial Final Award at para 99.

[11] The Arbitrator was appointed pursuant to the arbitration clause in the Franchise Agreements by the parties as the sole arbitrator of the dispute on April 12, 2022. After scheduling the proceedings, hearings commenced on August 26, 2022, and the proceedings continued into October 2022.

[12] On December 1, 2022, the Arbitrator provided the Partial Final Award declaring that:

> (a) Spirit Leaf Inc is declared in breach of the duty of good faith under the Franchise Agreement for employing or appointing individuals in positions that relate to the performance of the Franchise Agreement by Spirit Leaf who are the current employees or appointees of Nova Cannabis Inc.
>
> (b) Nominal damages are awarded to the Claimant payable by Spirit Leaf Inc in the amount of $1,000.00, which amount is payable forthwith.
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> (c) Jurisdiction is reserved to award costs. The Parties are to advise me on or before December 21, 2022, if they cannot reach an agreement on costs, in which case I will set a procedure for their determination.

(d) All other claims made against Spirit Leaf Inc or Sundial Growers Inc are dismissed.

[13] Following the Partial Final Award, the Arbitrator issued a Costs Quantum Award on April 20, 2023.

[14] The Applicants subsequently appealed to this Court both the Partial Final Award and the Costs Quantum Award pursuant to section 44 of the *Arbitration Act*.

III. Issues

[15] The issues to be decided are as follows:

a. Does this Court have jurisdiction to determine the issue of whether the Arbitrator properly interpreted the test of *contra proferentem*?

b. What is the appropriate standard of review?

c. Did the Arbitrator make a reviewable error in her interpretation of the relevant contracts?

d. Did the Arbitrator make a reviewable error in finding that Sundial was not bound by the Franchise Agreements or a Franchisor under the *Franchises Act*?

e. Did the Arbitrator make a reviewable error when she refused to pierce the corporate veil between Spirit Leaf and Sundial?

f. Did the Arbitrator make a reviewable error in finding that the Franchise Agreements allowed Sundial to acquire a company that had an ownership interest in another company that operated the discount cannabis retailers in the Applicants' territories?

g. Did the Arbitrator make a reviewable error by determining that Sundial's acquisition of Value Buds did not cause Spirit Leaf to be in breach of the Franchise Agreements?

h. Did the Arbitrator make a reviewable error in finding that the Franchise Agreements should not be terminated for fundamental breach?

i. Did the Arbitrator make a reviewable error in awarding only nominal damages for the breach of the duty of good faith that she found?

j. Did the Arbitrator make a reviewable error in her costs award?

IV. Analysis

A. Does this Court have jurisdiction to determine the issue of whether the Arbitrator properly interpreted the test of *contra proferentem*?

[16] An initial jurisdiction issue raised by the Respondents is whether this Court is precluded from determining whether the Arbitrator properly interpreted the application of the contractual interpretive principle of *contra proferentem* due to section 44(3) of the *Arbitration Act*. That section states that:

> (3) Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.

[17] The Respondents argue that the question of the proper interpretation of the contractual interpretive principle of *contra proferentem* had been extensively canvassed by the Arbitrator during the arbitration. Further, the Arbitrator asked for additional submissions from the parties as to their positions on how *contra proferentem* applies in the context of contracts of adhesion as it is set out ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co***, 2016 SCC 37 [***Ledcor***]. These additional questions were answered by both parties.

[18] Section 44(3) of the *Arbitration Act* has consistently been interpreted narrowly by this Court: see ***Driscoll v Hautz***, 2017 ABQB 168 at para 19; ***KBR Industrial Canada Co v Air Liquide Global E&C Solutions Canada LP***, 2018 ABQB 257 at para 62 [***KBR***]; and ***Clark v Unterschultz*** at para 45 [***Clark***]. As set out in ***Clark***, "there has to be an explicit referral of an identified question of law to the Arbitrator, to bar an appeal": at para 45.

[19] Based on the record and my analysis of the law, I find that section 44(3) of the *Arbitration Act* does not bar me from determining whether the Arbitrator properly interpreted the principle of *contra proferentem* as it would apply to this case. I make this determination because I do not find that this question was explicitly referred to the Arbitrator to consider. Given this determination, I find that this Court has the jurisdiction to determine the issue of whether the Arbitrator properly interpreted the test of *contra proferentem*.

B. What is the standard of review of an appeal under s 44 of the *Arbitration Act*?

[20] The parties agreed the proper standard of review on an appeal under section 44 of the *Arbitration Act* is that the appellate standard of review applies: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65, [2019] 4 SCR 653 at para 37 [***Vavilov***]. Of course, the appropriate standard of review is a question of law, and agreement between the parties is not determinative: ***Monsanto Canada Inc v Ontario (Superintendent of Financial Services)***, 2004 SCC 54 at para 6.

[21] The issue of the proper standard of review for an appeal under section 44 of the *Arbitration Act* was extensively considered by Justice Marion in ***Esfahani v Samimi***, 2022 ABKB 795 at paras 26-86. [***Esfahani***]. As outlined by Justice Marion in ***Esfahani***, this is a complicated issue without a clear direction. It was not resolved and left for another day by the majority in ***Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District***, 2021 SCC 7 at paras 45-46.

[22] There has therefore been significant divergence throughout the jurisprudence as to how to determine the proper standard of review when dealing with commercial arbitration appeals. It is likely it will eventually be determined at a higher level of court: see the discussion in Jennifer K. Choi and Thomas A. Cromwell "A Question for Another Day: Vavilov and Appeals from Commercial Arbitration", 2022 3-1, *Canadian Journal of Commercial Arbitration* 42.

[23] The reasoning of Justice Marion is thorough and well researched. Based on the evidence and my analysis of the law, I would adopt his reasoning and find that the proper standard of review is the appellate standard.

[24] The appellate standards of review are those set out in ***Housen v Nikolaisen***, 2002 SCC 33 [***Housen***]. On questions of law, including questions of statutory interpretation and those

concerning the scope of a decision maker's authority, the standard of review is correctness: ***Housen*** at para 8. Where the statutory appeal includes questions of fact, or questions of mixed fact and law where the legal principle is not readily extricable, the appellate standard of review for those questions is palpable and overriding error: ***Housen*** at paras 10, 19 and 26-37.

[25] Although there was agreement that these are the applicable standards, the parties significantly disagreed as to which standard applied to the issues raised in this case. The Applicants argued that nearly every issue to be determined was a question of law on the correctness standard. The Respondents on the other hand have largely claimed that issues should be dealt with on a reasonableness standard.

[26] The typical approach to the standard of review on contractual interpretation is a question of mixed fact and law subject to deferential review on appeal: ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 [***Sattva***].

[27] The Applicants rely on ***Ledcor*** for their argument that although ***Sattva*** made it clear that contractual interpretation is generally a question of mixed fact and law, this is not the case where a contract is a standard form contract, also known as a contract of adhesion. As the majority notes:

> I would recognize an exception to this Court's holding in ***Sattva*** that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal. In my view, where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review: ***Ledcor*** at para 24.

[28] This is all effectively summarised by the Court of Appeal in ***Bidell Equipment LP v Caliber Midstream GP LLC***, 2020 ABCA 478. The Court of Appeal made the following comments in that case.

> [21] For standard form contracts, the standard of review is correctness where the appeal involves interpretation of the contract, the interpretation is of precedential value, and there is no meaningful factual matrix to assist the interpretation process: ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co***, 2016 SCC 37, paras 4, 24, [2016] 2 SCR 23.
>
> [22] Contractual interpretation outside of standard form contracts is a question of mixed fact and law where the trier of fact must evaluate the circumstances surrounding the contract, or factual matrix, in order to interpret the contract. As such, the standard of review is reasonableness: ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53, paras 50, 55, [2014] 2 SCR 633; ***Ledcor***, para 46; ***Housen v Nikolaisen***, 2002 SCC 33, paras 10, 16-17, 31, 34-36, [2002] 2 SCR 235. We agree that the contract before us was not a standard form contract, and the standard of review is reasonableness except as to extricable questions of law arising in the interpretation process. Whether reasonableness or correctness is applied, the court searches for the objective meaning of the words chosen by the parties, understood in their proper context; "[i]f the wording of the contract is plain and unambiguous, that will ordinarily be an end of the matter": ***Ron Ghitter***

> ***Property Consultants Ltd v Beaver Lumber Company Limited***, 2003 ABCA 221, para 8, 330 AR 353. See also ***Scammell and Nephew, Ltd v Ouston***, [1941] AC 251, 255 (HL); ***Sattva***, para 47 and the many comments in ***Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp***, 2020 SCC 29, paras 19, 28-31, 33-37, 47-54, 75, referring to courts looking for objective manifestations of intent in the interpretation process.

[29] The Respondents admit that the Franchise Agreements are standard form contracts. Nevertheless, they highlight that the exception in ***Ledcor*** should not apply because there was a significant factual matrix involved in the evidence and material submitted to the Arbitrator as well as the fact that this being a sealed and confidential arbitration this would be of limited precedential value.

[30] The Respondents emphasize that there was "significant evidence led by both parties on the legalisation of cannabis, the early days of the cannabis industry, the specific disclosure documents provided to each of the Franchisees, the individualised territorial restrictions and the parties individual circumstances of entering each of their franchise agreements".

[31] The exception in ***Ledcor*** is centered on the importance of having clear appellate reasoning that applies for standard form contracts that will have significant impact on Canadians. The present case involves an appeal from an arbitrator where much of the information of the agreements will be under seal and it is highly unlikely that there will be much precedential value that derives from it. As a result, based on the evidence and my analysis of the law, the exception set out in ***Ledcor*** does not apply. The standard of review on appeal for contractual interpretation in this case is therefore that as set out in ***Sattva***. Given this determination, I find that the standard of review for questions of contractual interpretation in this case is reasonableness.

[32] It is important as well to highlight that, where the standard is palpable and overriding error, it is not enough for me to find that there could be an alternative view of the evidence that was before the Arbitrator. As noted in ***Nelson (City) v Mowatt***, 2017 SCC 8:

> [38] The possibility of alternative findings based on different ascriptions of weight is, however, not unusual, and presents no basis for overturning the findings of a fact-finder. It is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. Absent palpable and overriding error — that is, absent an error that is "plainly seen" and has affected the result — an appellate court may not upset a fact-finder's findings of fact (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 6 and 10; see also *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 55). The standard of palpable and overriding error applies with respect to the underlying facts relied upon by the trial judge to draw an inference, and to the inference-drawing process itself (*Housen*, at para. 23). ...
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> **C. Did the Arbitrator err in her interpretation of the related contracts and her contractual interpretation of *contra proferentem*?**

[33] The Applicants argue that the Arbitrator erred in her finding that in contracts of adhesion, such as the present one, *contra proferentem* only applies if the contract is ambiguous and even then, only if the general rules of contractual construction cannot resolve the ambiguity. This is a question of law involving whether the Arbitrator correctly described a rule of interpretation.

[34] The Applicants argue that the Arbitrator ignored the statement in ***760437 Alberta Ltd v Fabutan Corp***, 2012 ABQB 266 [***Fabutan***] at para 99 that "As contracts of adhesion, the franchise agreements must be interpreted strictly against Fabutan as drafter, regardless of whether there is any ambiguity." Although the Applicants recognise that ***Fabutan*** was decided before ***Ledcor*** and ***Ledcor*** is from the Supreme Court of Canada, they argue that ***Fabutan*** is more useful because it is in the franchise context as opposed to ***Ledcor***, which is in the insurance context.

[35] Based on the record and my analysis of the law, I find that the Arbitrator was correct in finding that *contra proferentem* only applies in cases of ambiguity, even in the franchise context. The Supreme Court of Canada decision in ***Ledcor*** displaces the statement in ***Fabutan*** as dealing with contracts of adhesion. Further, this has been the approach used in other franchise law cases such as ***Jamani v Subway Franchise Systems of Canada, Ltd***, 2008 ABQB 677 at para 13; ***1734934 Ontario Inc et al v Tortoise Restaurant Group Inc et al***, 2021 ONSC 8014 at paras 77-78; and ***2249778 Ontario Inc v Smith (Fratburger)***, 2014 ONCA 788 at para 22. Given this determination, I find that the Arbitrator did not err in her interpretation of the related contracts and her contractual interpretation of *contra proferentem*.

D. Did the Arbitrator err in finding that Sundial was not bound by the Franchise Agreements or a Franchisor under the *Franchises Act*?

[36] The Applicants argue that the Arbitrator erred in determining that Sundial was not bound by the Franchise Agreements and is not a Franchisor under the *Franchises Act*, RSA 2000, c F-23 [***Franchises Act***].

[37] The question of whether an entity fits a statutory definition requires the application of a legal standard to a set of facts. As such, it is a question of mixed fact and law, and the findings should not be disturbed unless there was a palpable and overriding error.

[38] The Applicants argue that despite the fact that the Arbitrator found that there was a "blurring of entities and roles" (Partial Final Award at para 50), she still determined that Sundial was not a franchisor. The Applicants assert this was an error.

[39] The Arbitrator begins her analysis by considering the applicable principles of contractual and statutory interpretation at issue, highlighting the relevant caselaw and placing particular emphasis on the fact that this is a contract of adhesion and that there is a significant power imbalance in the context of franchise law that "imposes on the franchisor a duty of utmost good faith": Partial Final Award at para 110. She then proceeds to note the purposes of the *Franchises Act* set out at section 2:

> 2 The purpose of this Act is
>
> (a) to assist prospective franchisees in making informed investment decisions by requiring the timely disclosure of necessary information,
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> (b) to provide civil remedies to deal with breaches of this Act, and
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> (c) to provide a means by which franchisors and franchisees will be able to govern themselves and promote fair dealing among themselves.

[40] The Arbitrator again highlights the importance of recognising the power imbalance inherent between franchisor and franchisee: Partial Final Award at paras 113-114. It is with this analysis in mind that she considers whether Sundial is considered a franchisor.

[41] After considering the *Franchises Act* in whole and the other sections in relation to the submissions of the parties, the Arbitrator determined that the burden is not on Sundial to prove that it is not a franchisor. The Arbitrator found that Sundial was not a franchisor under the definition of the *Franchises Act* as it was not involved in the granting of the franchise (having not yet been associated with Spirit Leaf) and that "granting" under the *Franchises Act* is not a continuous act.

[42] The Arbitrator then considered whether Sundial could be an "associate" under the *Franchises Act*. There are two branches to the definition of "associate" under section 1(2) of the *Franchises Act*, and they are as follows: (i) whether the person was "directly involved in the granting of the franchise"; or (ii) "if there are continuing financial obligations by the franchisee to that person and significant operational controls by that person on the franchisee".

[43] The Arbitrator found that Sundial was not an associate under the first branch for the same reason that she found that Sundial was not a franchisor. As for the second branch, she found that the financial obligations under the agreement are owed to Spirit Leaf and not Sundial. The Arbitrator noted that, although "monies paid by the franchisee to Spirit Leaf may ultimately end up with Sundial, or that stocking Sundial products is a condition for financial support offered by Spirit Leaf to franchisees (using money from Sundial) [,] does not demonstrate a financial obligation owed by the franchisee to Sundial": Partial Final Award at para 128.

[44] The Arbitrator considered the cases cited by the Applicants, namely ***Addison Chevrolet Buick GMC Ltd v General Motors of Canada Ltd***, 2016 ONCA 324 and ***Burnett Management Inc v Cuts Fitness for Men***, 2012 ONSC 3358. She distinguished those cases on the facts. Noting that although there was evidence of Sundial employees sending Spirit Leaf royalty invoices to franchisees, the Arbitrator found that the uncontroverted evidence was that "franchisees pay those invoiced amounts to Spirit Leaf and that Spirit Leaf maintains separate accounts from Sundial": Partial Final Award at para 133.

[45] Finally, the Arbitrator dismissed the notion that there was a separate implied or verbal "franchise agreement" between Sundial and the franchisees because Sundial provides strategic and business advice, shared corporate services and other functions to Spirit Leaf and its franchisees. The Arbitrator highlighted the liberal interpretation of what constitutes a franchise agreement under franchise law but found that there was no evidence to support the conclusion that there was a separate implied or verbal franchise agreement in the record before her.

[46] Based on the record and my analysis of the law, I find no reviewable error in the reasons of the Arbitrator in respect of her finding that Sundial was neither a franchisor nor an associate under the *Franchises Act*.

[47] The Applicants also argued that the Arbitrator misapplied the law of privity of contract, and that based on the principled exception to the doctrine of privity Sundial should be found liable. The Arbitrator found in her review of the Franchise Agreement, viewed as a whole, the use of the term affiliates and associates were not intended to include those groups as parties to the Franchise Agreement. I had asked the parties to provide some additional written submissions on this question following oral argument.

[48] The Applicants argued both before the Arbitrator and in the additional written submissions that ***1196303 Ontario Inc v Glen Grove Suites Inc***, 2015 ONCA 580 [***Glen Grove***] establishes a test via which the privity of contract rule could be relaxed, and liability imposed on

a third party: at paragraph 103. The Respondents cited the decision in ***Ocean Choice International Limited Partnership v Landvis Canada Inc***, 2016 NLCA 36, where the Newfoundland Court of Appeal emphasised that the discussion in ***Glen Grove*** was clearly *obiter* and that such a test should not be taken as established law: see paras 36-43.

[49] The Arbitrator considered these arguments and noted that although there is a principled exception to the doctrine of privity in Canadian law as established in ***Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd***, [1999] 3 SCR 108, she was not convinced that "the doctrine of privity of contract is yet so relaxed that contractual liability can be imposed on a third party to a contract". She highlighted that in ***Glen Grove***, the Ontario Court of Appeal recognised that it was *obiter* and not intended to set out a new test because counsel had not had the opportunity to argue it: ***Glen Grove*** at paras 94 and 104. Finally, she noted that there was no indication that this test, even if it did exist, had been brought into Alberta jurisprudence.

[50] Based on the record and my analysis of the law, I see no reviewable error in this part of the Arbitrator's reasoning. Given this determination, I find that the Arbitrator did not err in finding that Sundial was not bound by the Franchise Agreements or a Franchisor under the Franchises Act.

E. Did the Arbitrator err when she refused to pierce the corporate veil between Spirit Leaf and Sundial?

[51] The issue of whether the Arbitrator erred in her decision not to pierce the corporate veil between Spirit Leaf and Sundial is a question of mixed fact and law, requiring the determination of whether the Arbitrator correctly applied the legal standard to the facts. As such, her finding should be overturned only if there is a palpable and overriding error.

[52] The Arbitrator reviewed the leading caselaw on piercing the corporate veil, including ***Driving Force Inc v I Spy-Eagle Eyes Safety Inc***, 2022 ABCA 25 [***Driving Force***] and ***Yaiguaje v Chevron Corporation***, 20187 ONCA 472. The Arbitrator determined that this meant that corporate separateness is the rule and that it would require "fraud or some other conduct that rises to a similar level of impropriety" to ignore corporate separateness: Partial Final Award at para 149. She found that a breach of contract or breach of good faith would not be enough to justify such a remedy.

[53] After reviewing the case law, the Arbitrator found that the allegations and evidence did not justify piercing the corporate veil. Recognising the specific context of a franchise relationship, she still found that there was no evidence presented to support the allegations that Sundial was "using Spirit Leaf's franchise relationship with the Claimants to impose significant losses and monetary damages on the Claimant": Partial Final Award at para 150.

[54] Based on the record and my analysis of the law, I find no palpable and overriding error in the finding of the Arbitrator on this issue. Given this determination, I further find that the Arbitrator did not err when she refused to pierce the corporate veil between Spirit Leaf and Sundial.

F. Did the Arbitrator err in finding that the Franchise Agreements allowed Sundial to acquire a company that had an ownership interest in another company that operated the discount cannabis retailers in the Applicants' territories?

[55] Before determining this question, the Arbitrator reviewed the case law surrounding the application of the duty of fair dealing in section 7 of the *Franchises Act*. She referred to the

discussion of the concept in ***Fairview Donut Inc v The TDL Group Corp***, 2012 ONSC 1252 at paras 499 to 502 [***Fairview Donut***] and highlighted that the duty of fair dealing must be considered within the context of the relationship between the parties. She considered in particular the following principles from ***Fairview Donut***:

> [502] The content of the duty of good faith and fair dealing has been expressed to include the following:
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> • to require the franchisor to exercise its powers under the franchise agreement in good faith and with due regard to the interests of the franchisee: *Shelanu*, at paras. 66 and 69;
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> • to require the franchisor to observe standards of honesty, fairness, and reasonableness and to give consideration to the interests of the franchisees: *Landsbridge* at para 15; *Shelanu* at paras 5, 68-71;
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> • to ensure that the parties do not act in such a way that "eviscerates or defeats the objectives of the agreement that they have entered into": *Transamerica Life Inc. v. ING Canada Inc.* (2003), 2003 CanLII 9923 (ON CA), 68 O.R. (3d) 457 at para. 53 (C.A.); or "destroy the rights of the franchisees to enjoy the fruits of the contract.": *Landsbridge*, at para. 17;
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> • to ensure that neither party substantially nullifies the bargained objective or benefit contracted for by the other, or causes significant harm to the other, contrary to the original purpose and expectation of the parties: *Katotikidis v. Mr. Submarine Ltd.*, 2002 CanLII 49646 (ON SC), [2002] O.J. No. 1959 at para. 72 (S.C.J.); *TDL Group Ltd. v. Zabco Holdings Inc.*, [2008] M.J. No. 316 at para. 272 (Q.B.); and
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> • where the franchisor is given a discretion under the franchise agreement, the discretion must be exercised "reasonably and with proper motive, and may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.": *Landsbridge*, at para. 17, citing *Carvel Corporation v. Baker*, 79 F. Supp. 2d 53 (D. Conn 1997) at para. 69; *CivicLife.com Inc. v. Canada (Attorney General)* 2006 CanLII 20837 (ON CA), [2006] O.J. No. 2474, 215 O.A.C. 43 (C.A.), at para. 50; *Shelanu* at para. 96.
>
> [503] The duty of the franchisor to give consideration to the interests of the franchisee does not require the franchisor to prefer the franchisee's interests to its own, and the franchisor is not a fiduciary in that sense: *Shelanu* at paras. 5, 68-71. As Kershman J. observed in *117304 Ontario Inc. (c.o.b. Harvey's Restaurant) v. Cara Operations Ltd.*, above, at paras. 68-72, a party may act self-interestedly, however in doing so that party must also have regard to the legitimate interests of the other party.

[56] The Arbitrator then went on to consider the alleged breach of the ownership, operation, and control of Value Buds stores within the territory of the Applicants. The Arbitrator began by finding as fact that in her review of the evidence Spirit Leaf did not own, control, or operate the Value Buds stores. She then noted that based on her conclusion that Sundial was neither a party to the Franchise Agreements nor bound by it, they could not be found to have breached the Franchise Agreement. She found that this would be sufficient to dispose of the issue. However,

she went on to consider whether, if Sundial were a party or otherwise bound by the Franchise Agreement or the *Franchises Act*, it would have breached the Franchise Agreement. This issue is one of mixed fact and law. As a result, the finding of the Arbitrator should not be disturbed because there was no palpable and overriding error.

[57] It is important to reiterate that the Arbitrator found that Sundial does not own and operate Value Buds. Instead, Nova Cannabis does.

[58] The Arbitrator noted that Sundial owns an indirect majority interest in Nova Cannabis, but Nova Cannabis is controlled and operated by an independent board of directors. Therefore, while the Arbitrator found that Sundial does seek to exert influence over Nova Cannabis by virtue of its ownership interest and as a creditor, it has neither the ability to operate nor control Nova Cannabis. For that reason, it has neither the ability to operate nor control the Value Buds stores: Partial Final Award at para 161. Based on this finding of fact, the question becomes whether Sundial owning an interest in the competing Value Buds stores within the franchisee's territory was a breach of the Franchise Agreement.

[59] The Arbitrator found that the Franchise Agreement set out the exclusive territory of the franchisee and outlined the reserved rights of the franchisor.

[60] The Arbitrator then notes in her analysis that the Franchise Agreement specifically allows the franchisor to own and operate competing business outside the exclusive territory set out. She also found that there is nothing in the Franchise Agreement that expressly prohibited Spirit Leaf from operating competing stores within the territory that do not use the "System". In addition, the Arbitrator found that one of the reserved rights of the Franchise Agreement was directly applicable because Spirit Leaf was acquired by Sundial, and Sundial indirectly owns a majority interest in a company that operates competitive businesses.

[61] The Arbitrator rejected the argument by the Applicants that for this reserved right of the Franchise Agreement to apply Sundial would have had to already have been in the business of retail cannabis before it acquired Spirit Leaf. She rejected this argument and found instead that the section "recognises the right of a parent to operate competing business and specifies that the acquisition of Spirit Leaf (by a new parent) is not disallowed on that basis": Partial Final Award at para 168. She felt bolstered in this interpretation based on the fact that the section is silent on the prospective owner being required to divest itself of the competing business following the acquisition.

[62] The Arbitrator concluded that there was nothing in the section that puts a limitation on the competitive business being in the same territory outlined in the Franchise Agreement. She highlighted that the reserved rights place a number of distinctions between what can and cannot be done inside and outside the territory, and that the fact there is no distinction for this provision of the Franchise Agreement supports the interpretation that it is not meant to place a limitation.

[63] Following her finding that there was no breach of the Franchise Agreement, the Arbitrator then considered whether there had been a breach of the duty of good faith and fair dealing. She found that the conduct was expressly permitted within the contract. On the issue of fair dealing, she found that Sundial did take the interests of the franchisees into account fairly and reasonably, while noting that it was not required to prefer the franchisees' interest to its own.:

[64] The Arbitrator also found that Spirit Leaf took steps to respond to the issues that had been raised by the Applicants including not opening or franchising new stores amongst other measures: Partial Final Award at para 193. The Arbitrator noted that although the Applicants may not be satisfied with these offerings, Spirit Leaf had recognised the challenges presented by the increased competition and had attempted to assist the franchisees unlike the "business as usual" approach taken by the franchisor in ***Dunkin' Donuts***.

[65] Based on the record and my analysis of the law, I find no reviewable error in the conclusions of the Arbitrator on this issue. Given this determination, I further find the Arbitrator did not err in finding that the Franchise Agreements allowed Sundial to acquire a company that had an ownership interest in another company that operated the discount cannabis retailers in the Applicants' territories.

G. Did the Arbitrator err by determining that Sundial's acquisition of Value Buds did not cause Spirit Leaf to be in breach of the Franchise Agreements?

[66] The Applicants argue that Sundial induced a breach of the Franchise Agreement, citing the test in ***369413 Alberta Ltd v Pocklington***, 2000 ABCA 307 (CanLII) at para 13 and ***Brae Centre Ltd v 1044807 Alberta Ltd***, 2008 ABCA 396 at para 19.

[67] The Arbitrator considered this case law and found that Spirit Leaf was the contracting party and did not commit the alleged breaches because it does not own, operate, or control the competing Value Buds stores: Partial Final Award at para 205. She further found that even if a breach of contract by Spirit Leaf were proven, she would not conclude that Sundial had committed the tort because this would require some factor over and above actual inducement, citing ***Furniture.com Inc v Leon's Furniture Ltd***, 2019 ONSC 7451.

[68] The finding of the Arbitrator on the issue of inducement of breach of contract is a question of mixed fact and law. Based on the record and my analysis of the law, I do not see a palpable and overriding error on this issue that justifies disturbing this finding. Given this determination, I further find the Arbitrator did not err when she decided that Sundial's acquisition of Value Buds did not cause Spirit Leaf to be in breach of the Franchise Agreements.

H. Did the Arbitrator err in finding that the Franchise Agreements should not be terminated for fundamental breach?

[69] The Arbitrator found a breach of the duty of good faith because Spirit Leaf had employed the CEO of Nova Cannabis, Marcie Kiziak, concurrently as a director. The Arbitrator highlighted that the duty of fair dealing "requires the franchisor to observe standards of fairness, and reasonableness and to give consideration to the interests of the franchisees": Partial Final Award at para 180. The Arbitrator found that, as Nova Cannabis is a third-party competitor to Spirit Leaf:

> [182] ... [H]aving a current officer or employee of a franchisee's independently controlled competitor perform key roles for the franchisor in the performance of the Franchise Agreement is not something that could have been in the reasonable contemplation of the Parties. This is because it is so clearly contrary not only to the interests of the franchisee but to the franchise relationship itself.

[70] Despite this finding of the breach of the duty of fair dealing, the Arbitrator found that this was not a fundamental breach entitling the Applicants to treat the contract as at an end. The Arbitrator cited ***Angeltvedt v Flint Field Services Ltd***, 2010 ABQB 749 at para 42 for the

principles governing repudiation. She noted that although the breach had been found, it did not "deprive the Claimant of the very thing bargained for": Partial Final Award at para 199. Further, she found that even if the breach was a fundamental one, the Applicants did not promptly elect to bring the Franchise Agreement to an end.

[71] The Applicants argue that the Arbitrator erred in this finding because they claim it is contradictory to describe the duty of good faith and fair dealing as fundamental to the franchise relationship but not find this breach of the duty a fundamental breach.

[72] In my view, this misinterprets what was said by the Arbitrator. The Arbitrator correctly recognised that the duty of good faith and fair dealing was fundamental to the relationship, and as such awarded damages for that breach. However, to find that a fundamental duty had a particular breach does not mean the breach was a fundamental one. The Arbitrator was correct in finding that to determine whether it was a fundamental breach is to inquire whether this breach then deprived the Applicants of substantially the whole benefit of the contract.

[73] Based on the record and my analysis of the law, I do not find that there is a reviewable error in her finding that there was no fundamental breach entitling the Applicants to repudiate the Franchise Agreement. I make this determination because the findings of the Arbitrator on this issue should only be disturbed if there is a palpable and overriding error. On this point, I find no palpable and overriding error. Further, even if there was a fundamental breach entitling the Applicants to repudiate the Franchise Agreement, the election to repudiate it was not unequivocal on the record: Partial Final Award at paras 201-202. Given these determinations, I find the Arbitrator did not err in finding that the Franchise Agreements should not be terminated for fundamental breach.

I. Did the Arbitrator err in awarding only nominal damages for the breach of the duty of good faith that she found?

[74] The Arbitrator awarded nominal damages for the breach of the duty of fair dealing. The assessment of damages is a question of fact, and the standard of review is palpable and overriding error: ***Genge v Centron Residential Corporation***, 2014 ABQB 50 at para 25.

[75] The Applicants argue that the damages being $1,000 per franchisee is inadequate, citing ***Salah v Timothy's Coffees of the World Inc***, 2010 ONCA 673 and ***Katotikidis v Mr Submarine***, 2002 CanLII 49646 (ON SC). However, both of those cases involved findings of far more egregious conduct on the part of the respective franchisors. In the present case, the sole breach found by the Arbitrator was in relation to the appointment of Ms. Kiziak. The Arbitrator determined that there was no conduct that rises to the level where punitive damages would even be contemplated and that the Applicants had not established damages flowing from the breach. The Arbitrator found that the award of $1,000 per franchisee was appropriate to affirm the breach of the duty: Partial Final Award at paras 209-211.

[76] Based on the record and my review of the law, I do not find any overriding or palpable error justifying disturbing this finding by the Arbitrator. Given that determination, I further find the Arbitrator did not err in awarding only nominal damages for the breach of the duty of good faith that she found.

J. Did the Arbitrator err in her costs award?

[77] The *Arbitration Act* provides the authority for the Arbitrator to award costs at para 53(1). Further, the Consent Order between the Parties allowed for the Arbitrator to award costs on whatever basis she deemed just and reasonable.

[78] The Arbitrator's award of costs is discretionary and should only be disturbed if it was based on an error of principle or if it was wholly unreasonable: ***Driving Force*** at para 71. In the circumstances of this case, the Applicants have not demonstrated that the costs were unreasonable or based on an error.

[79] Based on the record and my analysis of the law, I do not find any error justifying varying the Arbitrator's findings in regard to costs. Given that determination, I find the Arbitrator did not err in her costs award.

V. Conclusion

[80] Based on the record before me and my analysis of the law, I find the Applicants have not satisfied me that the Arbitrator made any reviewable error in the Partial Final Award, or the costs associated with it. Given these determinations, I dismiss the appeal.

VI. Costs

[81] The parties may speak to costs if they cannot otherwise agree.

Heard on the 28th of July; the 3rd day of October 2023; and the 14th day of November 2023; followed by written submissions dated 28th day of November 2023 and 5th day of December 2023.
Dated at the City of Calgary, Alberta this 25th day of March 2024.

D.B. Nixon
A.C.J.C.K.B.A.

Appearances:

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for the Applicants

Adam Ship, Kyle McMillan
for the Respondents