KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 147**

Date: **2024 08 15**
File No.: QBG-SA-00979-2017
Judicial Centre: Saskatoon

BETWEEN:

VERN'S PIZZA COMPANY LIMITED

PLAINTIFF

- and -

101011333 SASKATCHEWAN LTD.

DEFENDANT

Counsel:

Richard T. Carlson	for the plaintiff
Ryan Lepage and Marek Coutu	for the defendant

JUDGMENT
August 15, 2024

TOMKA J.

BACKGROUND

[1] The plaintiff, Vern's Pizza Company Limited [Franchisor], has applied for summary judgment. The Franchisor seeks the following remedies:

a. An order confirming that the term of the franchise agreement dated October 31, 2000 [Franchise Agreement] between the Franchisor and the respondent, 101011333 Saskatchewan Ltd. [Franchisee], ended in 2016;

b. A declaration that the Franchisee is wrongfully carrying on business, passing itself off as, and using the Franchisor's franchise system and

trademarks without the lawful right to do so;

c. A permanent injunction requiring the Franchisee to cease and permanently refrain from carrying on business as a Vern's Pizza's franchisee; and

d. Judgment against the Franchisee for all net income earned by it after August 31, 2016.

[2] The main issue to be determined is whether the term of the Franchise Agreement is at an end due to the Franchisee's failure to maintain the lease at one of its two locations, specifically: 102-102 3337 B – 8th Street East, Saskatoon, Saskatchewan [8th St Location]. This issue arises as there was a drafting issue with the Franchise Agreement; the drafter of the Franchise Agreement did not fill in the address of the premises to be used as the restaurant in para. 3 of the Franchise Agreement.

[3] Paragraph 3 of the Franchise Agreement reads:

> **TERM**
>
> The term of this Franchise Agreement shall commence on the day [*sic*] of October, 2000, and shall continue from such date for so long as the Franchisee shall have a good and valid Lease of the premises civically designated as [address of the premises to be used as the restaurant], or in the event that the Franchisee shall purchase the subject premises, for so long as the Franchisee shall carry on the business of a licensed restaurant on the premises, and for so long as the Franchisee shall fully and faithfully perform all of the covenants, terms and conditions herein contained.
>
> [Emphasis added]

[4] The Franchisor argues the parties intended that the addresses of both locations covered in the Franchise Agreement, specifically the 8th St Location and 706C Central Avenue, Saskatoon [Central Ave Location], were to be identified as the addresses of the premises and as such, the term of the Franchise Agreement would come to an end if there was no lease at either of the locations.

[5] The Franchisee argues that the parties intended that both locations would operate as separate businesses, and that the term of the Franchise Agreement would only end if the lease at both locations ended.

[6] The evidence upon which I must make my determination includes:

a. The affidavit of Tim Burns, owner of the franchise, sworn December 16, 2022;

b. The affidavit of Grant Cole, employee of Tim Burns, sworn December 16, 2022;

c. The affidavit of Wayne Shutyr, co-Franchisee with his brother, Kelly Shutyr, sworn February 14, 2023 [Shutyr Affidavit];

d. The reply affidavit of Tim Burns, sworn February 27, 2023;

e. The reply affidavit of Grant Cole, sworn February 27, 2023;

f. The read-in answers from the questioning of Wayne Shutyr on March 24, 2021; and

g. The read-in answers of the questioning of Tim Burns on March 24, 2021.

FACTS

[7] The facts are, for the most part, not in dispute.

[8] The Franchisor is a Canadian corporation registered under the laws of Canada and of the Province of Saskatchewan, having its head office in Saskatoon. It carries on the business, without limitation, as a Vern's Pizza Restaurant Franchisor in the Provinces of Saskatchewan, Alberta, and Manitoba.

[9] At the time of the application and the dispute, the principal of the Franchisor was Tim Burns. However, he only became involved with the Franchisor in January 2007, when he became its president. He is the only director and officer of the corporation. He was not involved in any way in the drafting, negotiating, or execution of the Franchise Agreement.

[10] There are currently 12 Vern's Pizza restaurant locations. Seven are in Saskatchewan: four locations in Saskatoon, three being on the west-side of the South Saskatchewan River [River], and one on the east side; one location in Martensville, Saskatchewan; one location in Regina, Saskatchewan; and one location in Prince Albert, Saskatchewan. There are three locations in Alberta, one being on the Alberta side of Lloydminster, Alberta, and two in Calgary, Alberta. There are two locations in Winnipeg, Manitoba.

[11] The Franchisor owns registered trademarks to protect both its name and its logos or designs across Canada. The Franchisor owns the Vern's Pizza name associated with the franchise system and operation of a Vern's Pizza restaurant through a word trademark. It also owns the design trademarks used on store signs, pizza boxes, and other material.

[12] The Franchisee is a body corporate carrying on business in Saskatoon as a Vern's Pizza restaurant. The directors and principals of the Franchisee are Wayne Shutyr and Kelly Shutyr, collectively [Shutyrs]. Each of the Shutyrs owns a numbered company which own shares of the Franchisee.

[13] The Shutyrs have had a long history with Vern's Pizza. Kelly Shutyr started working at the 11th Street, Saskatoon, franchise in 1993. He also worked at the 8 Assiniboia Drive, Saskatoon, franchise location for a different franchisee.

[14] Between October 1, 2001, and September 30, 2021, the Shutyrs also

owned and operated, through a different corporation, a Vern's Pizza franchise on the west side of Saskatoon at the address civically described as 1610 11th Street West, Saskatoon.

[15] Prior to October 31, 2000, two Vern's Pizza locations were owned and operated by Lincoln Food Services Ltd. [Lincoln Food] on the east side of Saskatoon. Those locations were the 8th St Location and the Central Ave Location. In addition, at that time, there were two Vern's Pizza restaurants operating on the west side of Saskatoon.

[16] In late October 2000, the Franchisee purchased the assets relating to Lincoln Food's Vern's Pizza operations on the east side of Saskatoon. They were also assigned the two leases for those locations. In conjunction with the asset purchase agreement, the Franchise Agreement was agreed to on or about October 31, 2000.

[17] The Franchise Agreement was drafted by lawyers for the Franchisor. However, the Franchisee was also represented by counsel at the time it was signed.

[18] Under the Franchise Agreement, the Franchisor granted the Franchisee the right to carry on business as a Vern's Pizza restaurant on the east side of Saskatoon, according to the franchise system and the terms of the Franchise Agreement at the two specified locations in east Saskatoon.

[19] The wording of para. 1(a) of the Franchise Agreement is as follows:

> **1. <u>GRANT OF FRANCHISE AND PERMISSION TO USE TRADE NAME</u>**
>
> (a) <u>Grant of Franchise:</u>
>
> The Franchisee requests and the Franchisor hereby grants a franchise to operate a fast food restaurant identified as VERN'S PIZZA in the following area:
>
> 102 – 102 3337B – 8th Street East, Saskatoon, Saskatchewan,

> S7H 4Kl, 706C Central Avenue, Saskatoon, Saskatchewan, S7N 2G9 and metes and bounds all points east of the South Saskatchewan River.

[20] Paragraph 3 of the Franchise Agreement outlines the term of the agreement [Term Provision]. It states as follows:

> **3. TERM**
>
> The term of this Franchise Agreement shall commence on the day [*sic*] of October, 2000, and shall continue from such date for so long as the Franchisee shall have a good and valid Lease of the premises civically designated as [address of the premises to be used as the restaurant], or in the event that the Franchisee shall purchase the subject premises, for so long as the Franchisee shall carry on the business of a licensed restaurant on the premises, and for so long as the Franchisee shall fully and faithfully perform all of the covenants, terms and conditions herein contained.
>
> [Emphasis added]

[21] Paragraph 4 of the Franchise Agreement states as follows:

> **4. COMMENCEMENT OF OPERATIONS**
>
> The Franchisee having commenced operations from the location described in paragraph 1(a) shall during the remainder of term of the Franchise Agreement continuously operate its franchise using its best efforts, skills, diligence in the conduct thereof and regulating the franchise in accordance with the terms of this Agreement and any instructions or directives of the Franchisor which it may make or from time to time provide.

[22] Paragraph 11 of the Franchise Agreement outlines the rights to terminate, which are as follows:

> **11. BREACH OF CONTRACT AND TERMINATION**
>
> Rights to Terminate
>
> (a) The Franchisor has the right to terminate this Agreement upon Fifteen (15) days' notice in writing to the Franchisee upon the occurrence of any one of the following events:
>
> (i) If the Franchisee is declared bankrupt, becomes insolvent, makes an assignment for the benefit of

creditors, or a receiver is appointed; or a proceeding is commenced therefor by or against the Franchisee under national or provincial law or any provisions of federal bankruptcy law or amendments thereof and, if involuntary; such proceeding is not dismissed within thirty (30) days of the filing thereof;

(ii) If there occurs any voluntary or involuntary sale, assignment, transfer or other disposition, or transfer by operation of law or the business made without the written consent and approval of the Franchisor in accordance with paragraph 10;

(iii) If the Franchisee fails to submit reports and financial or statistical data which the Franchisor may require under this or any other agreement between the parties hereto;

(iv) If the Franchisee has made any false reports to the Franchisor;

(v) If the Franchisee fails, refuses, or neglects to pay to the Franchisor any monies owing to the Franchisor promptly when due, including but not limited to the franchise fee as provided in paragraph 2(a), whether under this Agreement or any other agreement with or commitment to the Franchisor (an event of default under any such other agreement or commitment will automatically constitute an event of default hereunder);

(vi) If the management and control of the business of the Franchisee is transferred or assigned by any act of the Franchisee without the written consent of the Franchisor in accordance with paragraph 10.

(b) The Franchisor has the right to terminate this Agreement, in the event that the Franchisee defaults in performance of any provision in this Agreement, other than those specifically set out in paragraph 11(a) hereof, if such default is not remedied to the Franchisor's satisfaction within Thirty (30) days after written notice of the default in performance is given to the Franchisee.

(c) In view of the irreparable damage which may result to the Franchisor and other Franchise operations, as a result of such default by the Franchisee, it is agreed that the determination of a default made in good faith by the Franchisor on the available evidence shall be binding and conclusive on the Franchisee.

[23] Paragraph 12 of the Franchise Agreement outlines the effects of termination, stating as follows:

> **12. EFFECTS OF TERMINATION**
>
> Upon the termination of this Agreement for any reason:
>
> (a) The Franchisee shall immediately discontinue the use of all trade names and derivatives, service marks, trademarks, signs, structures and printed material bearing the said trade name or trademarks identifying the business as a Vern's Pizza restaurant or the products thereof as products of a Vern's Pizza restaurant, and from and after termination to abstain from such use in any business or activity in which the Franchisee subsequently engages; and further to abstain from any act which might tend to give the appearance of carrying on business as a Vern's Pizza restaurant.
>
> (b) The Franchisee shall not, after such termination, attempt to capitalize on the goodwill of the Franchisor or seek to obtain any commercial advantage from the fact that the Franchisee has had any previous relation with the Franchisor unless the Franchisee shall have first obtained specific written permission from the Franchisor to do so. Without limiting the generality of the foregoing, the Franchisee shall not disclose to any person or make use of any of the recipes, sauces or food preparation methods developed and used by the Franchisor in any other restaurant business.
>
> (c) The Franchisee shall pay to the Franchisor all monies due at such date.
>
> (d) All right, title and interest of the Franchisee in this Agreement shall become the property of the Franchisor.
>
> (e) All signage shall be promptly returned to the Franchisor.
>
> (f) All paper products bearing the name and or logo of Vern’s Pizza shall be returned to the Franchisor.
>
> (g) The Franchisee shall not, directly or indirectly, carry on the business of a restaurant within the area covered by this Franchise Agreement, for a period of Five (5) years after the termination of this Agreement unless prior approval of the Franchisor is obtained in writing. The Franchisee further agrees that it will not, during the term of this Agreement nor afterwards, divulge to anyone any methods of the Franchisor's operation, trade secrets, or the contents of this Agreement

> which Agreement is of a confidential nature.

[24] For over a decade, the Franchisor operated without significant dispute. Then, in 2013, things began to shift when the 8th St Location property was listed for sale by the owner. Upon finding out that this was happening, Tim Burns instructed Grant Cole – the franchise manager for the Franchisor – to contact the Shutyrs and let them know the building was for sale. Tim Burns wanted to ensure the Franchisee would take steps to preserve their tenancy. Grant Cole did notify them by email on September 20, 2013, which simply stated:

> Subject: land for sale
>
> Wayne and Kelly
>
> Tim was telling me today the land and building where 8th st Vern's is, is for sale. [*sic*]
>
> Grant Cole
> Franchise Manager
> The Vern's Pizza Company Ltd
> …

[25] By March 2015, the Shutyrs were advised that the landlord of the 8th St Location had sold the building. Their commercial realtor offered to assist in trying to get a new lease for the 8th St Location with the new owner. The Franchisee had been on a month-to-month lease at the 8th St Location since November 30, 2008.

[26] By letter dated July 29, 2016, the landlord of the 8th St Location formally advised the Shutyrs that its month-to-month lease would end on August 31, 2016.

[27] On July 29, 2016, Grant Cole met with Kelly Shutyr. During the meeting, Kelly Shutyr told him that they would be closing and ceasing to carry on the business at the 8th St Location on August 21, 2016. Grant Cole informed Tim Burns of this plan.

[28] On August 3, 2016, Grant Cole met with Kelly Shutyr about the upcoming 8th St Location closure. He expressed concern and advised that the

Franchisor was of the view it needed two stores on the east side of Saskatoon.

[29] On or about August 24, 2016, the Franchisee ceased carrying on business and vacated the premises at the 8th St Location due to the lease termination.

[30] At no time prior to the lease termination did anyone from the Franchisor warn the Franchisee that the Franchise Agreement's term would be at an end if the 8th St Location ceased to carry on business under a valid lease.

[31] It was not until October 19, 2016, that the Franchisee became aware that the Franchisor was taking the position that the term of the Franchise Agreement was at an end due to the loss of the lease at the 8th St Location. On this day, the Franchisor sent formal notice to the Franchisee that the term of the Franchise Agreement had ended because they no longer had a valid lease at the 8th St Location, and further that – as required by para. 4 of the Franchise Agreement – having commenced operations from the locations referred to in para. 1(a) of the Franchise Agreement, they had failed to continuously operate a Vern's Pizza business at these locations.

[32] In response, on or about November 3, 2016, lawyers for the Franchisee by letter advised the Franchisor they were taking the position the term of the Franchise Agreement was not at an end due to the loss of the 8th St Location lease.

[33] Following the exchange of letters by the lawyers for the parties, the Franchisor attempted to arrange meetings with the Franchisee. An in-person meeting was held on November 16, 2016, to discuss the situation. During that meeting, the Franchisee was told that continuing or reviving the old agreement was not an option.

[34] As the Franchisor was insistent on having a second location in east Saskatoon, the Franchisor attempted to find possible alternative locations for the Franchisee to open a second store.

[35] The next face-to-face meeting was held on December 8, 2016. During this meeting, the Franchisor confirmed its position that the Franchise Agreement term had ended. Discussions about a possible solution were put forward to the Franchisee. The Franchisor had searched MLS Real Estate Listings and showed six possible alternative locations during the meeting. The Franchisee was encouraged to search for a possible second location.

[36] By December 9, 2016, there were further possible locations in the 8th Street of Saskatoon vicinity that were available to be leased by the Franchisee. An email was sent to the Shutyrs on December 9, 2016, by Grant Cole which provided them with this information.

[37] Eventually, it became clear there was no acceptable resolution to the situation, and the Franchisor sent to the Franchisee a letter dated December 27, 2016, which states as follows:

> …
>
> **Re: The Vern's Pizza Company Ltd.**
>
> **Expired Franchise Agreement Dated October 31 2000**
>
> This letter is further to our various conversations. Even though the term of your franchise agreement has ended, you have continued to carry on business and pass yourself off as a Vern's Pizza business. You are using our proprietary and intellectual property without right to do so. This includes but is not limited to unauthorized use of our name, trademarks, recipes and goodwill. If this matter is not resolved shortly to our satisfaction, The Vern's Pizza Company will commence legal action against you. In that action, we will seek payment from you of damages as well as all revenue earned by you in connection with your use of our name and property, commencing from and after the date your agreement ended plus legal costs. In the meantime, although it is no longer characterized as royalties, we will accept payment of the amount that previously would have been considered as royalties or other operations as a Vern's Pizza business. By paying this amount and our company receiving it, nothing will be construed as authorization or acceptance of your infringement of our rights nor shall it be construed as a renewal or extension of your expired franchise agreement.

> Yours truly,
>
> Tim Burns
> President

[38] On January 20, 2017, the lawyers for the Franchisee provided the Franchisor with a letter. It states in part as follows:

> … With respect, your allegation in that letter to the effect that the term of the Franchise Agreement has ended, is incorrect and as such, our client will continue to honour its commitments under that Franchise Agreement as it always has. It is our expectation that the Franchisor will continue to honour its obligations thereunder as well.

[39] Despite the position of the Franchisor, the Franchisee continued operating as a Vern's Pizza restaurant from the Central Ave Location as it had done previously, and continued to make payments as contemplated under the Franchise Agreement.

[40] Since the time of the purported expiry of the term of the Franchise Agreement, the Franchisee made royalty payments totalling $247,051 between September 2016 and October 2022. It continues to remit royalties to the Franchisor on a monthly basis, equal to 5% of the prior month's gross sales. At no time has the Franchisor declined to accept the royalties or returned them.

[41] The Franchisor commenced legal action by way of a Statement of Claim on or about July 16, 2017. A Statement of Defence was filed and served on or about November 3, 2017, with a Reply to Defence filed January 16, 2017. Mediation occurred on March 27, 2018. The Franchisor filed a Notice of Intention to Proceed on or about May 6, 2019. A Notice of Application for this application was initially filed on December 28, 2022, with supporting affidavits. After applications to strike out portions of each party's affidavit materials, this application was scheduled for June 25, 2024, on or about November 9, 2023.

ISSUES

[42] The following issues are to be determined:

1) Is this an appropriate case for summary judgment?

2) How should the Franchise Agreement be interpreted?

   a. What are the legal principles applicable to the interpretation of the Franchise Agreement?;

   b. Plain and ordinary meaning;

   c. Context of the entire agreement; and

   d. Surrounding circumstances: "The Factual Matrix"

3) Did the Franchisor breach the duty of honest performance *vis-à-vis* the Franchise Agreement?

4) If the term of the Franchise Agreement ended on August 21, 2018, has the Franchisee breached the agreement, the *Trademarks Act*, RSC 1985, c T-13, or is it liable due to a claim of passing off in relation to trademark use?

5) If the term of the Franchise Agreement was at an end by the closure of the 8th St Location, what are the Franchisor's damages?

LAW AND ARGUMENT

1) Is this an appropriate case for summary judgment?

[43] The law in relation to summary judgment was recently summarized by Justice Bardai (as he then was) in the case of *Schnell v Stene (Heidinger Estate)*, 2022

SKQB 146 at para 27 [*Schnell*]:

> **(b) Summary Judgment Applications**
>
> [27] In *Lund v Edward Warren* (26 January 2022) Saskatoon, QBG 454/2018 (Sask QB), I summarized the law applicable to summary judgment applications at paras. 8-13 as follows:
>
> > [8] The test to be met in a summary judgment application is not in dispute. The question is whether there is a genuine issue requiring a trial. In *Hryniak v Mauldin*, 2014 SCC 7 at para 49, [2014] 1 SCR 87 [*Hryniak*], the Court notes:
> >
> > > 49 There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
> >
> > [9] In Saskatchewan, the procedure for determining applications for summary judgment is set out in Rules 7-2 to 7-5 of *The Queen's Bench Rules*. This procedure has been the subject of numerous decisions in our province, notably, *Tchozewski v Lamontagne*, 2014 SKQB 71, 440 Sask R 34 [*Tchozewski*], *White v Turanich*, 2020 SKQB 5, *Cicansky v Beggs*, 2018 SKQB 91, 25 CPC (8th) 182, *Shephard v 101093126 Saskatchewan Ltd. (Whitewood Inn)*, 2020 SKQB 346 [*Shephard*], *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10 at paras 30-31, 429 DLR (4th) 269, *LaBuick Investments Inc. v Carpet Gallery of Moose Jaw Ltd.*, 2017 SKQB 341 at para 28 and *Smith v Hawryliw*, 2020 SKQB 169.
> >
> > [10] In a summary judgment application, both parties are required to put their best foot forward which allows the Court to assume that it has the best evidence before it. In the first instance, where a defendant is applying for summary judgment, they must establish that there is no genuine issue requiring a trial. If they do so, the burden shifts to the plaintiff to refute the evidence or risk the case being dismissed. See: *Cicanksy v Beggs*, 2018 SKQB 91 at paras 14-15, 25 CPC (8th) 182, and *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 at paras 31-32, 485 Sask R 162.

> [11] Of course, summary judgment may still be appropriate even if there is a genuine issue in dispute. The summary judgment process recognizes that for many coming before the Court, the cost of a trial is prohibitively expensive. It is of course easy to say in response to a summary judgment application that a more complete evidentiary record will be available at trial, but that does not mean a trial is required or that summary judgment should be denied. If there is a genuine issue in dispute, the question becomes whether an appropriate procedure can be crafted using Rule 7-5(2)(b) to resolve that genuine issue. This tailored approach takes into account a host of factors, including, the complexity of the claim, the amounts in issue, the importance of the issues, the cost, whether better evidence on key issues will be available at trial, whether the Court can fairly evaluate the evidence and whether summary judgment can resolve the entire claim or portions of it. See *Tchozewski*.
>
> [12] As noted in *Shephard* at para 18:
>
> > 18 Summary judgment allows for questions of law, discrete issues or entire claims to be determined without the need for an expensive trial in appropriate circumstances. It provides flexibility and allows the Court to craft an approach that recognizes "that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial." See *Hryniak* at para 27 and Rule 7-5(5)-(6).
>
> [13] If, even with the tailored approach available pursuant to Rule 7-5(2)(b), the Court is unable to weigh the evidence, evaluate credibility, draw reasonable inferences or have confidence in its conclusions, summary judgement should be denied. As the Court put it in *Hryniak* at para 50:
>
> > 50 … a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.
>
> See also *Noga v Wawanesa Mutual Insurance Company*, 2019 SKQB 160 at para 45.

[44] In this case, both parties agree that the matter can be and should be

determined summarily pursuant to Rules 7-2 and 7-5 of *The King's Bench Rules*. I am in agreement with the parties.

[45] It is my conclusion that there is no genuine issue requiring a trial. I am satisfied that the material before me allows me to make the necessary findings of fact, apply the law to the facts, and is sufficient to allow me to resolve this claim in an expeditious and proportionate way.

2) How should the Franchise Agreement be interpreted?

a. What are the legal principles applicable to the interpretation of the Franchise Agreement?

[46] This application involves the interpretation of the Franchise Agreement. Justice Bardai in *Schnell* at para 29 outlined the relevant law applicable to contractual interpretation:

> **(c) Contract Interpretation**
>
> [29] … In the recent decision of *Day v Muir*, 2022 NSSC 20 at para 24, the Court provides an apt summary of the general principles governing the interpretation of contracts as derived from the case law and in particular, the Supreme Court of Canada's landmark ruling in *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633:
>
> > 24 The parties each refer to a number of general principles of contractual interpretation which may be distilled as follows:
> >
> > > 1. "The overriding concern is to determine 'the intent of the parties and the scope of their understanding ... To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.'" [*sic*](*Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 ("*Sattva*") at paragraph 47). The relevant "surrounding circumstances" were also described as the "factual matrix" in Sattva (see, for example, paragraph 50). In Sattva, the Supreme Court of

Canada explained that taking into account the "factual matrix" or "surrounding circumstances" at the time of contract formation represented a "practical, common-sense approach not dominated by technical rules of construction" (paragraph 47 of *Sattva*). Moreover, "The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement" (paragraph 48 of *Sattva*).

2. In determining the scope of the "factual matrix" or those "surrounding circumstances" which are relevant to interpreting a contract, three limiting principles are important:

> a. The "surrounding circumstances" or "factual matrix" at the time of contract formation "must never be allowed to overwhelm the words of that agreement" (paragraph 57 of *Sattva*). The express words chosen by the contracting parties and recorded in their written agreement predominate. "The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract ... While the surrounding circumstances are relied upon in the interpretative process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement" (paragraph 57 of *Sattva*). In *Purdy v Bishop*, 2017 NSCA 84 ("*Purdy*"), the Nova Scotia Court of Appeal added: "Surrounding circumstances assist the Court in interpreting the language used by the parties, but does not displace it." (at paragraph 15); and
>
> b. The relevant "surrounding circumstances" should "...consist only of objective evidence of the background facts at the time of the execution of the contract (*King* [*King v Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man R (2d) 63], at paragraphs 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (paragraph 58 of *Sattva*). Similarly, and reminiscent of the Supreme Court of Canada's caution in Sattva, the

> Nova Scotia Court of Appeal said in *Purdy*: "The Court must interpret the intention of the parties objectively by the words they used in the deed, not by subjective wishes, motivations or recollections" (at paragraph 16).
>
> c. In *Romkey v Osborne*, 2019 NSSC 56, Arnold, J. undertook a comprehensive review of the law as to the role of "surrounding circumstances" when interpreting contracts and, more specifically for that decision, in interpreting the scope of an express right contained in a deed. He concluded, among other things, that: "Surrounding circumstances could include the historic use of the easement, the physical conditions which existed at the time of the grant, and any other background facts that were or reasonably ought to have been within the knowledge of the parties at or before the date of grant" (at paragraph 91).
>
> d. The Court should approach the parties' subsequent conduct (i.e. their actions after contract formation) with caution. In *Shewchuk v Blackmont Capital Inc*., 2016 ONCA 912, the Ontario Court of Appeal warned of the dangers which arise when the issue of contractual intent becomes tainted by subsequent conduct (at paragraphs 41 - 44). It concluded: "Evidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and its factual matrix" (at paragraph 46).

[47] I am of the view that the intent of the parties – based on a reading of the contract as a whole, giving the words their ordinary grammatical meaning consistent with the surrounding circumstances known by the parties at the time – was that the two locations for Vern's Pizza would be operational within the specified territory throughout the term of the Franchise Agreement. As such, it is my view that the end of the lease of the 8th St Location ended the term of the Franchise Agreement. I have come to this conclusion for the reasons that follow.

b. Plain and ordinary meaning

[48] I am of the view that the drafting note in para. 3 of the Franchise Agreement delineated by the square brackets can only be read as indicating that the civic address for both restaurant locations was intended to be included. I note that para. 3 of the Franchise Agreement contains clear directions in square brackets for completion of the agreement:

a. It directs the person contemplating it to type in the "address of the premises to be used as the restaurant";

b. The addresses of the "restaurant" are clearly set out in para. 1(a) as being at the Central Ave Location and the 8th St Location; and

c. Paragraph 1(a) grants "a franchise to operate a fast food restaurant identified as Vern's Pizza in the areas …". The word "restaurant" is used in describing the two locations. Paragraph 3 does not suggest that there is discretion or latitude to change that reference by only including one address or a different address.

[49] Even without completion, the instructions in the square brackets are a sufficient reference to the restaurant addresses in para. 1(a). It sets out the premises that are to be used as a "restaurant" within the franchise territory. These are the restaurant premises referenced in para. 3.

[50] I agree with the Franchisor that had anyone at the time of signing asked "which premises are to be used as the restaurant" for the purposes of para. 3 or otherwise, the question would have been obvious to them: specifically, the Central Ave Location and the 8th St Location. It is not logical to suggest that a different address would have been referenced and it is not logical that only one address or the other was to be used as the premises for the restaurant. Paragraph 1(a) makes it clear that both

addresses were to be used as the restaurant.

c. Context of the entire agreement

[51] The wording and structure of the entire agreement supports the suggestion that the drafters intended the term of the Franchise Agreement to be at an end if one of the leases were not maintained:

a. Paragraph 1(a) provides the two addresses of the restaurants; it even uses the same word "restaurant" that is used in para. 3;

b. Paragraph 4 contains a continuous operation clause. It requires the Franchisee, having commenced operations from the location "described in paragraph 1(a)" "8th Street and Central," to continuously operate its franchise;

c. Considering the reference in para. 4 to the two locations in para. 1(a) and mentioning the Franchisee commencing operations there, it is clear to me that the operation of both locations was important to the Franchisor and required by the Franchise Agreement;

d. The phrase "the premises" used in para. 3 is also referenced in para. 5(a)(v). Paragraph 5 deals with obligations of the Franchisor to make assistance available as the Franchisee is setting up its business. Paragraph 5(a)(v) requires the Franchisor to provide signage for "the premises". It also indicates the signage will remain the property of the Franchisor. Clearly, it required signage at both locations without an option for the Franchisor to only provide signage for one of the premises; and

e. Paragraph 6(o) of the Franchise Agreement states that the Franchisee

> must allow the Franchisor's representative to remain on the "premises" during business hours to inspect the premises, equipment, *etcetera*.

[52] Each time the phrase "the premises" is used in the Franchise Agreement, it is a reference to all of the business premises that are operated by the Franchisee under the Franchise Agreement. If there is only one store intended to be operating under para. 1(a), then "the premises" would only be referencing to that one location. If there were two or more locations referred to in para. 1(a), then "the premises" would be in reference to all of them. This is clearly the spirit and the intent of using the phrase "the premises." It appears by the overall wording of the Franchise Agreement that the drafter intended that the addresses were to be inserted into para. 3, and that para. 3 ought to be read as if the addresses were inserted or that they are adequately referenced.

[53] The Franchisee argues that reading the Franchise Agreement in its entirety, two things become apparent. First, they say that the agreement appears to be a standard form franchise agreement utilized by the Franchisor, based on the "blanks" in the Term Provision. Secondly, the form of the Franchise Agreement was not amended to reflect the fact that it was being utilized to grant the Franchisee two franchises *i.e.*, the Central Ave Location and the 8th St Location franchises (instead of one), and they say that the text is inherently singular throughout the Franchise Agreement; all references are to the granting of a "franchise" and a "restaurant" as distinct from two "franchises" or two "restaurants". Therefore, they contend that there was always an intention to treat both locations as separate single franchises.

[54] However, the Franchisee's interpretation of the agreement is premised on the suggestion that the Franchise Agreement was intended to award two franchises – one for each location. Nothing in para. 1(a) of the Franchise Agreement or elsewhere attempts to divide the territory that is being granted under the Franchise Agreement into

two unique areas. I agree with the plaintiff that the restaurant locations are not individual franchises. They are merely restaurant locations within the franchise territory.

[55] The meaning of the word "franchise" has common meaning and can be found, for example, defined in the Cambridge Dictionary at the hyperlink: https:\\dictionary.cambridge.org\dictionary\english\franchise. The Cambridge Dictionary defines the word franchise as "a right to sell a company's product in a particular area using the company's name". Certainly, there is nothing in the agreement to suggest that there are two separate franchises for those two separate locations that are being created by this one agreement.

[56] In my view, the Franchisee's interpretation of para. 3 is not consistent with the wording or structure of the overall agreement. The Franchisee's interpretation necessitates that the drafters intended to add the word "or" when inserting the two civil addresses for the two locations. Notably, nowhere in the agreement do the drafters differentiate or single out one of the restaurant locations or identify that the obligations therein pertained to only one of the locations. As such, I am of the view that the Franchisor's interpretation of the Term Provision is consistent, where the Franchisee's interpretation is inconsistent, with the words used and the structure of the agreement.

d. Surrounding circumstances: "The Factual Matrix"

[57] I have concluded that the factual matrix supports the interpretation of the Franchise Agreement wherein the parties intended for the two specified locations to be in operation within the franchise territory during its term.

[58] When considering the factual matrix, I am mindful that contractual interpretation is an objective exercise, and that "[e]vidence of one party's *subjective* intention therefore 'has no independent place' when considering the circumstances

surrounding the formation of a contract…" [emphasis in original] (*S.A. v Metro Vancouver Housing Corp.*, 2019 SCC 4 at para 30, [2019] 1 SCR 99). As such, the Franchisee's suggestion and evidence of their intention at the time of entering the contract to operate the two restaurant locations as independent franchises is not something that I will consider at this stage of my analysis. There is no evidence that both parties were aware of the subjective intention of the Franchisee.

[59] Again, I am mindful that the conduct of the parties after the Franchise Agreement had been signed is also something that I should approach with caution. I have determined that given the context of this case, I should not consider the post execution conduct of the Franchisee as I am not of the view that their actions are necessarily consistent with only one interpretation of the Franchise Agreement.

[60] For example, I note that although the Franchisee suggests in its evidence the two restaurant locations were operated to some extent separately, the financial statements filed as exhibits to affidavits in this application show that when reporting financial performance, the two locations were not separated; they were treated as one operation by the Franchisee. This, on its face, reveals the financial statements are inconsistent with the notion that the locations were operated as separate franchises, especially when one considers the Franchisee had indeed operated a separate franchise on the west side of Saskatoon under a different numbered company and with separate reported financial results.

[61] I note that in 2016, the Ontario Court of Appeal considered whether the conduct between parties after an agreement had been made could be considered in interpreting the contract. The answer was that subsequent conduct should not be considered as part of the "factual matrix" forming the surrounding circumstances in the making of the contract. In *Shewchuk v Blackmont Capital Inc.*, 2016 ONCA 912 at paras 39-41, 404 DLR (4th) 512 [*Shewchuk*], the court stated:

> **(1) The admissibility of evidence of subsequent conduct**
>
> [39] In *Sattva* [*Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53], the Supreme Court held that evidence of the "factual matrix" or "surrounding circumstances" of a contract is admissible to interpret the contract and ought to be considered at the outset of the interpretive exercise. This approach contrasts with the earlier view that such evidence is admissible only if the contract is ambiguous on its face: see *Eli Lilly & Co. v. Novopharm Ltd*., [1998] 2 S.C.R. 129, at paras. 55-56; and *Seven Oaks Inn Partnership (c.o.b. Best Western Seven Oaks) v. Directcash Management Inc*., 2014 SKCA 106, 446 Sask. R. 89, at para. 13.
>
> [40] The issue addressed in this appeal is whether evidence of the contracting parties' conduct subsequent to the execution of their agreement is part of the factual matrix such that it too is admissible at the outset, or whether a finding of ambiguity is a condition precedent to its admissibility.
>
> [41] In my view, subsequent conduct must be distinguished from the factual matrix. In *Sattva*, the Supreme Court stated at para. 58 that the factual matrix "consist[s] only of objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (citation omitted and emphasis added). Thus, the scope of the factual matrix is temporally limited to evidence of facts known to the contracting parties contemporaneously with the execution of the contract. It follows that subsequent conduct, or evidence of the behaviour of the parties after the execution of the contract, is not part of the factual matrix: see *Eco-Zone Engineering Ltd. v. Grand Falls – Windsor (Town)*, 2000 NFCA 21, 5 C.L.R. (3d) 55, at para. 11; and *King v. Operating Engineers Training Institute of Manitoba*, 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 72.
>
> [Emphasis in original]

[62] The danger of considering subsequent conduct was described in *Shewchuk* at paras 43-44 as follows:

a. The behaviour of the parties in performing their contract may change over time. Using subsequent conduct as evidence of intention at the times after the contract was executed would allow the interpretation of the contract to fluctuate over time.

b. Subsequent conduct may be ambiguous. As an example, a party, for various reasons, may decide not to enforce the strict legal rights under the contract. It would not be correct to use the non-enforcement to suggest that the party never had those rights.

c. If subsequent conduct was permitted to be considered, a party could engage itself in self-serving conduct after the fact in an attempt to generate evidence supporting their preferred interpretation of the contract.

[63] That being said, the Court of Appeal did indicate that, in special circumstances, subsequent conduct might be considered if it is unequivocally consistent with only one of two interpretations of a contract. In those circumstances, the court should only give it appropriate weight, having regards to the inherent dangers involved with considering subsequent conduct.

[64] Paragraphs 53-56 of *Shewchuk* state as follows:

> [53] In the usual course, evidence of subsequent conduct will be more reliable if the acts it considers are the acts of both parties, are intentional, are consistent over time, and are acts of individuals rather than agents of corporations: see *Canadian National Railways* [*Canadian National Railways v Canadian Pacific Limited*, 95 DLR (3d) 242], at p. 262. I agree with Kerans J.A. that "subsequent conduct by individual employees in a large corporation are not always reliable indicators of corporate policy, intention, or understanding*": Mesa Operating Ltd. Partnership v. Amoco Canada Resources Lt*d. (1994), 19 Alta. L.R. (3d) 38 (C.A.), at para. 52.
>
> [54] Evidence of subsequent conduct will have greater weight if it is unequivocal in the sense of being consistent with only one of the two alternative interpretations of the contract that generated the ambiguity triggering its admissibility: *Lewis v. Union of B.C. Performers* (1996), 18 B.C.L.R. (3d) 382 (C.A.), at para. 14, leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 182; and *Scurry-Rainbow Oil Ltd. v. Kasha*, 1996 ABCA 206, 39 Alta. L.R. (3d) 153, at para. 44, leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 391. For instance, in *Chippewas of Mnjikang First Nation v. Ontario (Minister of Native Affairs*, 2010 ONCA 47, 265 O.A.C. 247, at para.

> 162, leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 91, this court found that the parties' subsequent conduct was of assistance in determining which of two reasonable interpretations of a contract should be accepted because the conduct in question was "overwhelmingly consistent only with the trial judge's interpretation."
>
> [55] Evidence of subsequent conduct may also be given greater weight in proportion to the proximity of the subsequent conduct to the time of the contract's execution: see *Union Natural Gas Co. v. Chatham Gas Co.* (1918), 56 S.C.R. 253, at p. 271; and Hall, at pp. 105-106.
>
> [56] In summary, evidence of the parties' subsequent conduct is admissible to assist in contractual interpretation only if a court concludes, after considering the contract's written text and its factual matrix, that the contract is ambiguous. The court may then make retrospectant use of the evidence, giving it appropriate weight having regard to the extent to which its inherent dangers are mitigated in the circumstances of the case at hand, to infer the parties' intentions at the time of the contract's execution.

[65] Upon reviewing the evidence, I have determined the following objective circumstances surrounding the signing of the Franchise Agreement can be considered:

1. Prior to the execution of the Franchise Agreement, Lincoln Food had operated two Vern's Pizza locations: the Central Ave Location and the 8th St Location, on the east side of Saskatoon;

2. The Franchisee purchased the assets of Lincoln Food and took assignment of the two leases that were in place for the restaurant locations;

3. The 8th St Location lease was for a term of five years and was to expire on November 30, 2005, and had an option to renew for a further four years;

4. The Central Ave Location lease was for a term of five years and two months, ending on January 15, 2003, and also had an option to renew for a further five years;

5. There was only one Franchise Agreement executed covering both locations instead of two agreements each pertaining to one location;

6. The Franchise Agreement was drafted by the lawyers for the Franchisor;

7. The Franchisee was represented by counsel during the relevant time in which the Franchise Agreement was executed;

8. The Franchisee purchased the assets from Lincoln Food which included equipment and tenant improvements at the two restaurant locations;

9. At the time of execution, there were two locations operating as a Vern's Pizza restaurant on the east side of the River and two operating on the west side of the River; and

10. A sizable portion of sales for Vern's Pizza is in-store sales of pizza by the slice, which differs from many competitors who do not offer pizza by the slice.

[66] When I consider the surrounding circumstances to the execution of the Franchise Agreement, I conclude that the factual matrix weighs in favour of finding that the parties had intended that the Franchisee would be operating both locations during the term of the Franchise Agreement and, if they did not, the term would be at an end.

[67] Most telling is the fact that prior to execution of the Franchise Agreement, the parties knew there were two Vern's Pizza restaurant locations operating east of the River before the Franchise Agreement was executed. I have concluded it would have been the intent of the parties at the time of execution that the *status quo*

would continue, namely two locations would operate in this territory into the future. The suggestion that the parties would have intended that at some point only one Vern's Pizza location would or could operate on the east side of Saskatoon is, in my view, contrary to what would have been known or contemplated by the parties at the time of execution based on the admissible evidence before me. I note there is no evidence before me as to the terms of the Franchise Agreement or agreements with Lincoln Food and the Franchisor. All that can be taken from the evidence is that there were two Vern's Pizza locations operating on the east side of Saskatoon.

[68] Furthermore, it strikes me that if the parties had intended to treat the two locations as separate franchises, they would have completed two separate agreements, each outlining their own territory. Alternatively, they would have specifically and clearly worded the Franchise Agreement to reflect that intention.

[69] Lastly, I note that the evidence from the Franchisee was that "a sizable portion of their sales comprised of in-store sales of single slices of pizza" [Shutyr Affidavit, para. 56]. Given the business model and the parties' past experience with the Vern's Pizza operations, I have concluded that as pizza by the slice is a sizable revenue stream, both the Franchisor and Franchisee would want to maximize this type of revenue by having two store fronts which service this type of business in the large territory that was granted.

[70] The Franchisee suggests that it would have been known to the parties that if the term required the holding of a lease for both locations, the Franchisee would be in a precarious legal and financial predicament. Specifically, upon termination of the Franchise Agreement, the Franchisee would automatically be in default of its obligations under the Central Ave Location lease and responsible for damages. As such, they suggest the parties would never have intended that the term of the Franchise Agreement would end if one of the leases was lost considering the known terms of the

Central Ave Location lease.

[71] With respect to the Franchisee, there is no evidence to suggest that it is likely the Franchisor or the Franchisee would have considered this type of scenario at the time they executed the Franchise Agreement. Rather, the reasonable expectations of the parties would have been that both parties would fulfill the terms of the Franchise Agreement and their relationship would continue to be mutually beneficial into the future. It is clear at the time of execution, both leases had multiple years left on their terms with a corresponding right to renew for multiple years. This suggests to me both parties were of the view and expected that the *status quo* would be in place well into the future.

[72] Although the Franchisor's interpretation will have significant impact on the Franchisee, given the entire context of the Franchise Agreement, that is not something that sways my interpretation of the Franchise Agreement. It is merely a reflection of the risk faced when operating a business.

[73] To summarize, I am not of the view that the factual matrix, which I can consider, is of assistance or supportive of the Franchisee's suggested interpretation. I am of the view that the factual matrix is supportive of the Franchisor's interpretation of the agreement, which is consistent with the overall wording of the agreement.

[74] In its brief, the Franchisee suggests that in order to give business efficiency to the Franchise Agreement, the court could imply a term into the Franchise Agreement that the Term Provision was intended to continue the term of the Franchise Agreement for as long as the Franchisee maintained "… a good and valid lease of the premises civically designated as the 8th St Location or the Central Ave Location" [emphasis added].

[75] Jackson J.A. summarized the law relating to implied terms in *Saskatoon*

Auction Mart v Tkachuk, 2007 SKCA 81 at paras 19-23, 284 DLR (4th) 232:

> [19] As to the law pertaining to implied terms, Prof. Fridman in *The Law of Contract in Canada* [G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed (Toronto: Thomson Carswell, 2006) at p 465] states:
>
> > The law has long recognized that it is not always possible to confine the terms of a contract, whether written, oral, or partly written and partly oral, to those which have been expressly stipulated between the parties. There are circumstances in which a court is entitled to conclude that everything agreed by the parties is not contained in the written document or documents, or the oral statements of the parties, that appear to make up the contract. Some additional term or terms must be implied. ... [Footnotes omitted.]
>
> [20] According to Prof. Fridman, there are three possible bases for implying a term:
>
> > ... The first is that the intention of the parties is clear from the contract and its surrounding circumstances; they would have included such a term had they foreseen its necessity or it had been drawn to their attention. The second is that to import such a term is required in order to give effect to what has been called the reasonable expectations of the parties. The third is that the implication of such a term is needed to give purpose and effect to the rest of the contract. [Footnotes omitted.]
>
> [21] Though there are several judicial pronouncements favouring a highly restrictive approach to the implication of contractual terms, Prof. Waddams suggests in *The Law of Contracts* [S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005) at pp. 350-51] that in practice such terms are frequently implied to give business efficacy to agreements.
>
> [22] *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.* [[1999] 1 SCR 619] is the leading authority on implied terms. Iacobucci J., writing for the Court, stated:
>
> > [27] ... The general principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711. Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) *based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term*

> *which the parties would say, if questioned, that they had obviously assumed"* (p. 775). See also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 137, *per* McLachlin J., and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1008, *per* McLachlin J.
>
> . . .
>
> [29] As mentioned, Le Dain J. stated in *Canadian Pacific Hotels Ltd.*, *supra*, that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. *What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. ...*
>
> [Underlining in original, italics mine].
>
> [23] The test from *M.J.B. Enterprises* was applied by this Court in *Wind Power Inc. v. Saskatchewan Power Corp.* [2002 SKCA 61, [2002] 7 WWR 73] and was recently cited by the Supreme Court of Canada as "the test for implied terms" in *Double N Earthmovers Ltd. v. Edmonton (City)* [2007 SCC 3 at para 30, [2007] 1 SCR 116].
>
> [Emphasis in original]
>
> [Footnotes omitted]

[76] I do not find it necessary to imply such a term into this agreement. It is my view I can resolve the issue of contract interpretation in this case utilizing the text and context of the Franchise Agreement. Therefore, implying a term is not necessary.

[77] Furthermore, I do not find it necessary and will not apply the principle of *contra proferentem* in this case. The principle of *contra proferentem* is an interpretive tool of last resort and is only to be applied in the event a contradiction or ambiguity cannot be resolved to determine the intention of the author of the contract. See: *Hertz v Kille*, 2020 SKQB 331 at para 20. Given my findings, I find it is unnecessary to turn to

the principle of *contra proferentem*, as I have been able to adequately determine the intention of the parties based on the wording of the Franchise Agreement itself and the surrounding circumstances.

3) Did the Franchisor Breach the Duty of Honest Performance *vis-à-vis* the Franchise Agreement?

[78] The Franchisee argues that the way the Franchisor terminated the Franchise Agreement constitutes a breach of the duty of honest performance. They argue the Franchisor knew the Franchisee was operating the 8th St Location on a month-to-month lease for a period of at least three years before the lease was terminated, and at no point during those three years did the Franchisor ever indicate that it would take the position that the closure of the 8th St Location would put an end to the term of the Franchise Agreement, effectively terminating the Franchisee's right to operate the Central Ave Location. They suggest that considering the drafting deficiency in the Franchise Agreement, it was incumbent upon the Franchisor to be forthright about its intentions to take the position the term was at an end when one or more locations closed.

[79] Prior to 2014, Saskatchewan case law discussed the concept of recognizing a duty of good faith required by a party to a contract. For example, in *3317447 Manitoba Ltd. v Beaver Lumber Inc.*, 2006 SKQB 414 at para 26, 286 Sask R 290 [*Beaver Lumber*], Mills J. commented that a duty of good faith cannot result by adding terms to a contract that the parties did not bargain for.

[80] In *Beaver Lumber*, there was a right of renewal, but it required both parties to agree to the renewal. In the course of winding down the Beaver Lumber franchise, the franchisor refused to grant further renewal. The franchisee argued that the franchisor had a duty of good faith to renew. In short, if they were able to convince the court that they were entitled to additional renewals, the claim for damages – because the franchisee was being wound down – would have been greater. Mills J. found that

the duty of good faith did not extend that far. It could not give the franchisee the right to something which it had not bargained for. Mills J. stated at para. 26:

> 26) I am also concerned with the concept that imposing a duty of good faith on a party to contractual obligations in these circumstances results in the certainty of contract being diminished. The parties' agreements were specific and thorough. To impose a duty of good faith on Beaver resulting in a read-in or add-on to the contract gives to Kuzmik something that he had not bargained for, had not paid for and specifically did not want to be offered by Beaver. The proposition is clearly put in Imasco Retail Inc. v. Blanaru, [1995] 9 W.W.R. 44 (Man. Q.B.):
>
> > 41 . . . It is one thing to say that good faith may be employed so that one party cannot harm the other in exercising the other's rights under the agreement or, to put it another way, that one party cannot prevent the other from securing bargained benefits. It is another to say that, absent elements of this character, good faith can be utilized to provide for something unbargained.
>
> In cross-examination, it was made very clear by the responses given by Kuzmik that if there was to be renewal of the franchise agreement, both parties had to agree for the renewal and that Beaver had the discretion not to renew.

[81] In 2014, the Supreme Court of Canada recognized the principle of good faith through a "duty of honest performance" among parties to a contract. *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 SCR 494 [*Bhasin*], involved the termination of a contract that would normally be automatically renewed every three years unless one of the parties gave a six-month written notice to the contrary. The question in that decision was whether the defendant had acted dishonestly in its dealings with the plaintiff, one of its dealers, to enable another dealer to gain the benefit of the plaintiff's business.

[82] The plaintiff argued that it was an implied term of the contract that the actions of the other party in a commercial agreement must be carried out in an honest, good faith manner. See: *Bhasin* at paras 14-15. Clearly a party is entitled to refuse to renew an agreement when a contract gives a party that discretion. The court outlined in *Bhasin* at para 26 the findings by the trial judge to the effect that the defendant had

exercised its rights under the contract in a dishonest and misleading manner for an improper purpose:

> [26] Turning to the issue of breach, the trial judge found that Can-Am had breached the agreement, first by requiring Mr. Bhasin to submit to an audit by Mr. Hrynew and to provide the latter with access to his business records, and second by exercising the non-renewal clause in a dishonest and misleading manner and for an improper purpose. The non-renewal clause was not intended to permit Can-Am to force a merger of the Bhasin and Hrynew agencies, but that was the purpose for which Can-Am exercised this power: para. 261. The trial judge also found both respondents liable for unlawful means conspiracy and found Mr. Hrynew liable for inducing Can-Am's breach of its contract with Mr. Bhasin.

[83] In *Bhasin* at paras 65 and 70, the court recognized that while a contracting party is required to give appropriate regard to the legitimate contractual interests of the person they are contracting with, it does not require one to serve the interests of the other party. It only requires that one does not undermine the other party's interest in bad faith. It does not require loyalty to the other contracting party or an obligation to put the interests of the other party first. The court recognized that the contracting parties are free to pursue their own individual self-interest and that in business, one party may cause loss to another, and it may even do so intentionally, in the legitimate pursuit of self-interest. Doing so is not necessarily an act contrary to good faith.

[84] The court then went on to conclude with a summary of the principles in paras. 92-93 of *Bhasin,* which stated as follows:

> [92] I conclude that at this point in the development of Canadian common law, adding a general duty of honest contractual performance is an appropriate incremental step, recognizing that the implications of the broader, organizing principle of good faith must be allowed to evolve according to the same incremental judicial approach.
>
> [93] A summary of the principles is in order:
>
> (1) There is a general organizing principle of good faith that underlies many facets of contract law.

> (2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.
>
> (3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

[85] The Supreme Court of Canada then expanded on the duty of good faith in contractual performance in the case of *C.M. Callow Inc. v Zollinger*, 2020 SCC 45, [2020] 3 SCR 908 [*Callow*].

[86] *Callow* took one step further to indicate that remaining silent as an alternative means of deception could also be a breach of the duty of honest performance. In this decision, a condominium corporation had a snow clearing contract with a maintenance company. The contract permitted the condominium corporation to terminate the contract before the end of its term on ten days notice. The condominium corporation had decided months earlier to terminate the contract, but consciously decided to remain silent and delay notification so that they could continue to benefit from additional services that the company was providing without payment under their separate summer maintenance contract (*Callow* at para 13).

[87] The court found that the intentional silence of a dishonest person was a breach of their duty in face of representations made by condominium members to the contractor that they were happy with his work and the contract would be renewed. A contracting party is not required to disclose and may remain silent, but it may not intentionally use silence as a means of active dishonesty in the performance of a contract (*Callow* at paras 81 and 101). The plaintiff did not claim that the contract could not be terminated as it was. Rather, it claimed that it suffered a loss because of the deception element (*Callow* at paras 53-55). If not for the intentional deception, the

company could have secured an alternative contract much sooner. The lost profit that resulted from deceptively withholding notice was found to be the measure of damages (*Callow* at para 117).

[88] In the recent decision of *Suffern Lake Regional Park Authority v Danilak*, 2022 SKQB 118 [*Suffern*], Zuk J. considered whether there was a breach of a duty of honest performance based on a failure to warn of a pending expiry of a lease. Although the expiry of the lease was not disputed in *Suffern* as it is in this case, Zuk J.'s analysis regarding the duty to warn as a branch of the duty of honest performance *vis-à-vis* a term expiry is relevant.

[89] In *Suffern*, the defendants had leased several lots in the park operated by the plaintiff. The term of the lease was for ten years ending on January 1, 2021, and there was no renewal clause nor any option to renew. The park applied for a writ of possession for the lots due to the expiration of the lease term. The tenants refused to vacate the lots.

[90] Zuk J. concluded that the plaintiff did not have a duty to warn the defendants that the lease was going to expire. He also concluded there could be no breach of the duty of honest performance because the lease was at an end when the term expired. In doing so, he noted the plaintiff did not actively mislead the defendant about the expiry of the lease. In many respects, the *Suffern* situation is very similar to this case.

[91] In determining whether there was a breach of the duty of honest performance by the Franchisor, I recognize that before me is a unique set of facts, especially the drafting issue in the Franchise Agreement. Additionally, I have evidence from one of the principals of the Franchisee that it never crossed his mind that the term of the agreement was potentially at an end with the closing of one of the restaurant locations before being informed of the Franchisor's position several weeks after the

closing of the 8th St Location.

[92] Furthermore, it is clear to me that the Franchisor did not warn the Franchisee that the term of the Franchise Agreement would end if the 8th St Location lease lapsed, despite knowing they were on a month-to-month lease for at least three years. I am also cognizant that the Central Ave Location is a viable going concern and the end of the term of the Franchise Agreement will be financially detrimental to the Franchisee.

[93] However, when I consider the evidence as a whole, I am of the view that there was no breach of the duty of honest performance by the Franchisor. I come to this conclusion based on the following considerations.

[94] First, despite the suggestion that I should infer an intentional dishonest or malicious intent by the Franchisor's silence, especially in light of the long-standing relationship, the Franchisor's knowledge of the month-to-month lease, the drafting deficiency, and the fact that the Central Ave location was still a going concern, I have concluded there is insufficient evidence for me to make that inference and I decline to do so.

[95] Second, I have instructed myself that the duty of honest performance does not impose a fiduciary duty or a duty of loyalty. In this case, even when consideration is given to the drafting deficiency, the Franchisor's mere silence of an intention to rely on its legal right under the Franchise Agreement is not enough to support a finding of a breach of any legal duty of honest performance currently recognized.

[96] Third, there is no duty to advise another party of a pending expiration of a term of an agreement. In *Callow*, the court stated at para. 38:

> [38] Second, the Court of Appeal erred when it concluded that the trial judge's findings did not amount to a breach of the duty of honest performance. While the duty of honest performance is not to be

> equated with a positive obligation of disclosure, this too does not exhaust the question as to whether Baycrest's conduct constituted, as a breach of the duty of honesty, a wrongful exercise of the termination clause. Baycrest may not have had a free-standing obligation to disclose its intention to terminate the contract before the mandated 10 days' notice, but it nonetheless had an obligation to refrain from misleading Callow in the exercise of that clause. In circumstances where a party lies to or knowingly misleads another, a lack of a positive obligation of disclosure does not preclude an obligation to correct the false impression created through its own actions.

[97] Fourth, there is no evidence that the Franchisor actively misled the Franchisee to believe the term of the Franchise Agreement would not expire upon the closing of the 8th St Location. Instead, on the Franchisee's own evidence, it appears that either the Franchisee never turned its mind to the term of the Franchise Agreement or was simply mistaken about their rights under the Franchise Agreement.

[98] In *Callow*, the court distinguished between a party actively misleading another and permissible non-disclosure. The court stated a para. 131:

> [131] The dividing line between (1) actively misleading conduct, and (2) permissible non-disclosure, is the central issue in this appeal. As that line has been clearly demarcated by cases addressing misrepresentation in other contexts, it is in my view worth affirming here that the same settled principles apply to the duty of honest performance. The duty of honest performance is, after all, broadly comparable to the doctrine of fraudulent misrepresentation, although it applies (unlike misrepresentation) to representations made *after* contract formation (B. MacDougall, *Misrepresentation* (2016) [MacDougall, Bruce. *Misrepresentation*. Toronto: LexisNexis, 2016], at pp. 63-64). It follows that those representations sufficient to ground a claim for misrepresentation are analogous to the representations that will support a claim based on the duty of honest performance.
>
> [Emphasis in original]

[99] Fifth, there was no evidence that the Franchisor was aware of the Franchisee's mistaken interpretation of the Term Provision in the Franchise Agreement. Additionally, there is no evidence that the Franchisor – armed with such knowledge – simply remained silent, allowing the continuation of the mistake, which could have been a breach of honest performance.

[100] It is clear to me that despite this long-standing relationship, both parties kept their cards close to their chest; the Franchisor remaining silent on the term of the Franchise Agreement, the Franchisee remaining silent as to their plans with the lease at the 8th St Location. Given the evidence and the circumstances of this case, I do not find a breach of the duty of honest performance by the Franchisor.

[101] Lastly, even if there was a duty of honest performance, the Franchisee has provided no authority for the remedy they are seeking: namely, an estoppel of the enforcement of the term of the Franchise Agreement. To the contrary, there is authority suggesting that such a remedy is unavailable for a breach of the duty of honest performance. Zuk J. in *Suffern* concluded that a breach of "the duty of honest performance attracts damages rather than a declaration continuing the contract between the parties" (para. 116).

[102] Despite factual differences to the *Suffern* case, specifically that there was no dispute that the term had expired, I am of the view that I am bound by comity to follow *Suffern* on the issue of the remedy available for a breach of honest performance, given no contrary authority was provided.

[103] In sum, I have concluded that the circumstances do not warrant a finding that the Franchisor breached their duty of honest performance in this case. The Franchisor was entitled to place their interests above the interests of the Franchisee and rely on the rights provided to them in the Franchise Agreement; there is no duty to warn of a term expiration in the context of this case.

4) If the Term of the Franchise Agreement Ended on August 21, 2018, has the Franchisee Breached the Agreement, the *Trademarks Act*, or is it Liable Due to a Claim of Passing Off in Relation to Trademark Use?

[104] The Franchisor alleges that continuing to carry on business as a Vern's

Pizza restaurant after the Franchise Agreement had come to an end put the Franchisee in breach of its contract, breached the *Trademarks Act*, and further led them to commit the common law breach of passing off as an authorized franchisee.

[105] Paragraph 9(b) of the Franchise Agreement provides that:

> 9. **TRADE NAMES**
>
> …
>
> (b) The Franchisee acknowledges the exclusive right of the Franchisor to the trade name, Vern's Pizza, and any derivative thereof, and covenants and agrees that immediately after the termination of the Agreement, he will not use that trade name or derivatives in any manner or form or any colourable imitations thereof, in arty manner whatsoever.

[106] Paragraph 12 of the Franchise Agreement includes the obligation to cease using all trade names and trademarks of the Franchisor and to cease carrying on business as a Vern's Pizza restaurant, among other obligations.

[107] The relevant portions of the *Trademarks Act* are as follows:

> **When deemed to be used**
>
> **4(1)** A trademark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.
>
> **Idem**
>
> **(2)** A trademark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.
>
> …
>
> **When mark or name confusing**
>
> **6(1)** For the purposes of this Act, a trademark or trade name is

confusing with another trademark or trade name if the use of the first mentioned trademark or trade name would cause confusion with the last mentioned trademark or trade name in the manner and circumstances described in this section.

Confusion – trademark with other trademark

(2) The use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would be likely to lead to the inference that the goods or services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class or appear in the same class of the Nice Classification.

Confusion – trademark with trade name

(3) The use of a trademark causes confusion with a trade name if the use of both the trademark and trade name in the same area would be likely to lead to the inference that the goods or services associated with the trademark and those associated with the business carried on under the trade name are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class or appear in the same class of the Nice Classification.

Confusion – trade name with trademark

(4) The use of a trade name causes confusion with a trademark if the use of both the trade name and trademark in the same area would be likely to lead to the inference that the goods or services associated with the business carried on under the trade name and those associated with the trademark are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class or appear in the same class of the Nice Classification.

…

Prohibitions

7 No person shall

(a) make a false or misleading statement tending to discredit the business, goods or services of a competitor;

(b) direct public attention to his goods, services or business in such a way as to cause or be likely to cause confusion in

Canada, at the time he commenced so to direct attention to them, between his goods, services or business and the goods, services or business of another;

(c) pass off other goods or services as and for those ordered or requested; or

(d) make use, in association with goods or services, of any description that is false in a material respect and likely to mislead the public as to

(i) the character, quality, quantity or composition,

(ii) the geographical origin, or

(iii) the mode of the manufacture, production or performance of the goods or services.

…

Further prohibitions

10 If any sign or combination of signs has by ordinary and *bona fide* commercial usage become recognized in Canada as designating the kind, quality, quantity, destination, value, place of origin or date of production of any goods or services, no person shall adopt it as a trademark in association with the goods or services or others of the same general class or use it in a way likely to mislead, nor shall any person so adopt or so use any sign or combination of signs so nearly resembling that sign or combination as to be likely to be mistaken for it.

…

Further prohibitions

11 No person shall use in connection with a business, as a trademark or otherwise, any sign or combination of signs adopted contrary to section 9 or 10.

…

Infringement

20(1) The right of the owner of a registered trademark to its exclusive use is deemed to be infringed by any person who is not entitled to its use under this Act and who

(a) sells, distributes or advertises any goods or services in association with a confusing trademark or trade name;

(b) manufactures, causes to be manufactured, possesses, imports, exports or attempts to export any goods in association with a confusing trademark or trade name, for the purpose of their sale or distribution;

(c) sells, offers for sale or distributes any label or packaging, in any form, bearing a trademark or trade name, if

(i) the person knows or ought to know that the label or packaging is intended to be associated with goods or services that are not those of the owner of the registered trademark, and

(ii) the sale, distribution or advertisement of the goods or services in association with the label or packaging would be a sale, distribution or advertisement in association with a confusing trademark or trade name; or

(d) manufactures, causes to be manufactured, possesses, imports, exports or attempts to export any label or packaging, in any form, bearing a trademark or trade name, for the purpose of its sale or distribution or for the purpose of the sale, distribution or advertisement of goods or services in association with it, if

(i) the person knows or ought to know that the label or packaging is intended to be associated with goods or services that are not those of the owner of the registered trademark, and

(ii) the sale, distribution or advertisement of the goods or services in association with the label or packaging would be a sale, distribution or advertisement in association with a confusing trademark or trade name.

…

Sale, etc., of goods

51.01(1) Every person commits an offence who sells or offers for sale, or distributes on a commercial scale, any goods in association with a trademark, if that sale or distribution is or would be contrary to section 19 or 20 and the person knows that

(a) the trademark is identical to, or cannot be distinguished in its essential aspects from, a trademark registered for such goods; and

(b) the owner of that registered trademark has not consented

> to the sale, offering for sale, or distribution of the goods in association with the trademark.
>
> …

[108] I agree with the Franchisor. Given my finding that the term of the Franchise ended upon the loss of the lease at the 8th St Location and given the Franchisee has been continuously operating at the Central Ave Location as it always had, I find the Franchisee was in breach of the Franchise Agreement and the *Trademarks Act.*

[109] I have also considered whether the Franchisor established a claim of passing off involving trademarks. In *Beijing Judian Restaurant Co. Ltd. v Meng*, 2022 FC 743, the Federal Court of Canada describes the elements required to establish a claim of passing off involving trademarks as:

a) The plaintiff must show that it possesses good will in its trademarks;

b) The plaintiff must show that the respondent deceived the public by misrepresentation; and

c) The plaintiff suffered actual potential damage from the defendant's actions.

[110] I find that the Franchisor has not proven the third element of actual potential damage through the Franchisee's actions. Thus, the Franchisor cannot succeed with a claim for passing off. Indeed, despite the dispute over the termination of the Franchise Agreement, the Franchisee has continued to pay amounts equal to the royalties to be paid under the agreement. Despite disputing the payments are royalties, the payments and royalties are in substance one and the same. The Franchisor has continued to accept royalties since October 19, 2016, which fully compensates them for the use of the trademarks and thus, no actual damages have been proven to arise from Franchisee's actions.

5) If the term of the Franchise Agreement was at an end by the closure of the 8th St Location, what are the Franchisor's damages?

[111] The Franchisor has suggested several alternative methods of calculating damages in this case. First, they suggest that had the Franchisee not continued to operate, the Franchisor could have opened two or more corporate stores in the east of Saskatoon and earned net income from its operations. They say that the net profit from these theoretical stores could be used to assess damages.

[112] Second, it suggests that the court could confirm that the 5% of the gross sales received monthly after the 8th St Location closed represents what would have been received from a different authorized franchisee and thus, a fair measure of damages already paid.

[113] Lastly, the Franchisor suggests that the court could grant relief by ordering an accounting of the profits earned by the Franchisee while infringing their trademarks as done in *Nova Chemicals Corporation v The Dow Chemical Company*, 2020 FCA 141 at paras 1-22, [2021] 1 FCR 551.

[114] I agree with the Franchisee that there is an insufficient evidentiary basis to conclude it would be appropriate to award damages based on net profits of one or more corporate stores being in operation. First, the Franchisor did not take any steps to open a corporate store in the territory. Indeed, it was Tim Burns' evidence that the Franchisor never had any plans to replace the existing franchise on the east side of Saskatoon with their own franchise. Second, Tim Burns admitted that the Franchisor is not in the business of operating a corporate-owned store, and if it had to open a corporate store, it would typically be on a temporary basis until the store could be passed over to a suitable franchisee. I am of the view the claim for lost net-profits based

on the Franchisor operating corporate stores is grounded in speculation and not supported by sufficient evidence in this case.

[115] Likewise, I am of the view this is not a case where the court should award equitable relief by way of an accounting of profits. I am mindful that this case concerns selling pizza in a market where there are many competitors who are also selling pizza. I have concluded there is no need to exercise my discretion to disincentivize further infringers in this market by awarding an accounting of the profits earned.

[116] Given the nature of the breaches and violations, I am of the view that without the breaches, the Franchisor would have been able to find another authorized franchisee for the territory. There is no evidence before me as to the time or cost that may be involved in securing a new franchisee, and given the extensive experience of the Franchisee, it would be quite likely a new franchisee would not see the results that the Franchisee did during the relevant period.

[117] The Franchise Agreement ended on August 31, 2016, when the 8th St Location's lease ended. I have assessed damages for the breach of contract and the breach of the *Trademarks Act* based on what a reasonable royalty would be since the term expiration. In this case, the Franchise Agreement answers that question as being 5% of gross sales earned. As the Franchisee has been making payments on this basis and the Franchisor has accepted those payments, I am of the view no further compensation beyond these payments should be awarded.

CONCLUSION

[118] The Franchisor's application for summary judgment is granted.

[119] Based on the above reasons, I order the following relief:

a. A declaration that the Franchise Agreement term ended on August 31,

2016;

b. A permanent injunction requiring the Franchisee, 101011333 Saskatchewan Ltd., to cease and permanently refrain from carrying on business as a Vern's Pizza at the Central Ave Location. This injunction commences September 30, 2024;

c. The Franchisee is to continue to make the 5% royalty payments to the Franchisor, Vern's Pizza Company Limited, for the gross revenues earned until September 30, 2024; and

d. Costs of this action are to be paid by the Franchisee to the Franchisor for the action based on Column 2.

J.
M.E. TOMKA