GOVERNING PRINCIPLES & RECENT TRENDS IN THE 
ENFORCEMENT OF RESTRICTIVE COVENANTS IN 
FRANCHISE AGREEMENTS

Jennifer Dolman, Adam Ship, Rebecca Hall-McGuire and Tyler Wentzell

Restrictive covenants are a routine component of most franchise agreements.¹ These provisions frequently prohibit the franchisee (and the franchisee owner) from operating a competing business during the currency of the relationship and for a specified period of time thereafter, usually within a certain radius of the franchised premises and sometimes within the territory of other franchisees in the network.² Since franchisees are provided with liberal access to the franchisor’s brand and proprietary assets during their tenure as members of the network, they often develop unique knowledge and tools to potentially compete against the franchisor and other franchisees. In a certain sense, restrictive covenants are part of the quid pro quo which franchisees provide to franchisors in exchange for the liberal access they are accorded to the proprietary and competitive assets of the franchisor. To most franchisors, restrictive covenants are considered necessary to protect and preserve the unique elements of the franchise system, including the trade-marks, trade secrets, goodwill and other confidential information.³

This commercial necessity, however, exists in the context of common law principles which have historically been hostile to restrictive covenants on the basis that they offend public policy by

* Jennifer Dolman is a litigation partner and franchise law expert at Osler, Hoskin and Harcourt LLP. Adam Ship is Partner and vice-chair of the Franchise and Distribution Group at McCarthy Tétrault LLP. Rebecca Hall-McGuire and Tyler Wentzell are students-at-law at Osler, Hoskin and Harcourt LLP and McCarthy Tétrault LLP, respectively. A version of this paper was presented at the OBA’s 14th Annual Franchise Law Conference “Regulation Nation: Franchising in an Era of Increasing Regulation” (November 18, 2014).


restraining free and unencumbered trade. The case law that governs the enforceability of restrictive covenants openly acknowledges a tension between competing interests in the modern economy of free and open trade on the one hand, and freedom of contract and protection of proprietary rights on the other. The modern case law on the enforceability of restrictive covenants in the franchise context has continued this balancing exercise by requiring the scope of these provisions to correspond directly to the actual business interests of the franchisor.

This article is divided into four sections. First, we distil from the key appellate authorities the governing principles that apply to the enforceability of restrictive covenants in Canada, particularly in the franchise context. Second, we examine the extent to which courts in Canada are prepared to enforce restrictive covenants against non-signatories to the franchise agreement such as family members and other related parties to the franchisee. Third, with reference to the case law dealing with the enforceability of franchise restrictive covenants, we identify and analyze the key trends that have emerged in the last 10 years. In this regard, we have prepared a comprehensive appendix (found at the end of the article) which briefly summarizes each of the cases in the last ten years in which franchise restrictive covenants have been litigated. Fourth, building on the recent trends in the case law, we discuss some practical tips for litigation counsel when acting in proceedings to enforce franchise restrictive covenants.

I. Legal Principles Governing the Enforceability of Restrictive Covenants

At common law, restrictive covenants are presumptively unenforceable on the basis that they constrain the freedom of the covenantee to engage in trade. The legal test that governs the enforceability of restrictive covenants has two principal elements in the context of a dispute between a franchisor and a franchisee:

(a) First, the franchisor has the onus to establish, on a balance of probabilities, that the restrictive covenant is reasonable as between it and the franchisee. This inquiry, discussed in further detail below, requires the franchisor to prove that the scope of the clause in terms of space, time and subject matter is “necessary for [the] protection” of the franchisor’s “legitimate or proprietary interest[s]”.8

(b) Second, if the covenant survives the first inquiry and the franchisee still wishes to challenge its enforceability, the onus shifts to the franchisee to prove, on a balance of probabilities, that the restrictive covenant is contrary to the public interest or otherwise offends public policy.9 This inquiry, also discussed in further detail below, tends to focus on the wider economic and market context.

Before exploring the legal tests in greater detail, however, a threshold issue that must be considered is whether the terms of the restrictive covenant are sufficiently precise to provide certainty to the parties. According to the Supreme Court of Canada, where there is an interpretative ambiguity in the scope of a restrictive covenant, and the principles of contractual interpretation cannot resolve the ambiguity, the clause is per se unenforceable without further analysis. According to the court in KRG Insurance Brokers (Western) Inc. v. Shafron (“KRG Insurance”), “if the covenant is ambiguous in the sense that what is prohibited is not clear as to activity, time, or geography, it is not possible to demonstrate that it is reasonable”.10

If the terms of the restrictive covenant are certain, the next step is to consider whether it is reasonable between the franchisor and the franchisee. Integral to this analysis is to define with precision the business interests of the franchisor which the restrictive covenant is designed to protect. Since “the question of . . . validity is . . . determined by . . . whether it exceeds what is necessary for the protection of the [covenantee]”11 it is important to identify the business and

7. Nordenfelt, ibid. pp. 548 and 558; Guay inc. c. Payette, 2013 SCC 45, [2013] 3 S.C.R. 95, 363 D.L.R. (4th) 445 (S.C.C.) at para. 61, holding that; in the context of Quebec civil law as well as Canadian common law, the question is whether the clause is “necessary for the protection of the legitimate interests of the party in whose favour it is granted”.
9. Elsley, supra note 5 p. 928.
11. Nordenfelt, supra note 6 at pp. 548 and 558.
competitive interests which could potentially be harmed if the covenant is not enforced. Courts have recognized that a number of business interests are entitled to protection through restrictive covenants, including trade secrets, confidential information, trade connections, books of business,12 information about customers' preferences,13 proprietary pricing models,14 and unique merchandising styles.15 In the franchising context, it is dangerous to assume that the courts will accept without robust evidence that the franchise system contains trade secrets that are worthy of protection through restrictive covenants. In Allegra of North America Inc. v. Stevens ("Stevens"),16 for example, the franchisor of a sign building business failed to file any meaningful evidence with the court to establish a legitimate interest that needed protection and the court emphasized this fact in declining to enforce the covenant. Counsel acting for franchisors should work with their clients to identify the true business imperatives of the franchise system so that, if necessary, evidence can be developed to establish a legitimate or proprietary interest. The scope of the covenant will be measured against whether it is actually necessary to protect these interests.

Certain business interests or objectives will not be accepted by the courts as worthy of protection through restrictive covenants. The Supreme Court of Canada has consistently held that the analysis must be anchored around a legitimate (usually proprietary) interest of the promisee rather than simply the desire to avoid having another competitor in the market.17 In the franchising context, this means that evidence will likely need to be developed to illustrate that the restrictive covenant is necessary to avoid the former franchisee from misusing the franchisor's trade secrets, confidential information and/or trade connections. If the franchisor seeks a restrictive covenant in relation to business activities for which it does not provide any meaningful support or training to its franchisees (and in which the vast majority of its franchisees do not engage), the court

12. Elsley, supra note 5; Staebler, supra note 5; Tank Lining, supra note 8 at para. 16.
may well find that the franchisor lacks a sufficient interest to enforce. 18 If a franchisor updates its standard-form restrictive covenant by narrowing certain elements, there is a risk that by doing so it is providing existing franchisees with evidence that the previous form of covenant was broader than necessary. 19 The appellate case law has made clear that “each case has . . . to be considered on its own facts”, 20 “in [its own] peculiar circumstances”, 21 and in light of “all the surrounding circumstances”. 22

Once the franchisor’s business interests are clearly defined, the analysis turns to consider whether the scope of the clause goes beyond what is necessary to protect these business interests. The scope of the covenant is assessed in three separate respects:

(a) **Temporal Scope.** The temporal scope of the covenant must be reasonable having regard to the franchisor’s interests at stake. 23 In the franchise context, depending on its geographic and subject matter scope, the restrictive covenant may well impose significant impediments on the franchisee-owner’s ability to earn a living. In recent years, the majority of restrictive covenants examined by the courts have had a temporal scope of up to two years, 24 although longer terms have also been enforced in appropriate cases.

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18. Stevens, supra note 16 at para. 113 (dealing with electrical signing), and para. 117 (dealing with bucket track signing).
19. In Staebler, supra note 5 at para. 50, the Ontario Court of Appeal refused to enforce a restrictive covenant in an employment agreement, in part, on the basis that the employer’s covenant in use with other employees was narrower. While the employment context may be distinguishable from the franchise context, franchisors should be prepared to explain in the evidence why it uses narrower covenants with other franchisees.
20. Nordenfelt, supra note 6 at p. 558.
21. Elsley, supra note 5 at p. 923.
22. Ibid. at p. 924; see also Edward Levitt and Chad Finkelstein, “Non-Competition Covenants in a Canadian Context” (2011), 9 Int’l. J. Franch. L. 28 (“very fact-sensitive”) and 29 (“large amount of judicial discretion”).
23. Elsley, supra note 5 at p. 925.
In Payette, a non-franchise commercial case, the Supreme Court of Canada noted that "specialized nature of [a] business’s activities weighs in favour of finding a longer period . . . to be valid." In the end, the temporal scope must be carefully tailored to go no further than necessary.

(b) **Spatial or Geographic Scope.** The spatial scope of the covenant must also correspond to the franchisor’s proprietary or other legitimate interest. In *H.F. Clarke Limited v. Thermidaire Corp. Ltd.*, the Ontario Court of Appeal enforced a restrictive covenant in a distribution agreement, finding that the geographic scope was reasonably tailored to the manufacturer’s legitimate interests. In that case, the covenant only covered the area over which the distributor previously enjoyed territorial exclusivity. However, in *Allegra of North America and Allegra Corporation of Canada v. Russell Sugimura ("Sugimura"),* the Ontario Superior Court refused to enforce a restrictive covenant on the basis that the franchisor had put forward no evidence to prove that it actually planned to enter the relevant market area after the termination of the franchisee. In other words, the franchisor had no clear business interest that needed protection. In *Tank Lining* the licensee argued that the restrictive covenant — which covered all of Canada — was too broad because the licensed business had not in fact expanded throughout the country by the time the agreement was terminated. However, the Ontario Court of Appeal enforced the covenant on the basis that "it was reasonable when the contract was made for the parties to expect that the

29. (August 26, 2008), Doc. Mississauga CV-08-21790-00 (Ont. S.C.J.) at paras. 21 and 22. The case involved an application for an interlocutory injunction to restrain former franchisees from carrying on a printing business at the same location where an Allegra franchise was operated for many years. Allegra alleged that the former franchisees violated their post-expiration non-competition covenant because one of the former franchisees was employed by a new printing/copying business operating out of the same location as the former Allegra location. Dismissing the franchisor's application, the court held that the franchisor failed to demonstrate that irreparable harm would result from failure to grant injunctive relief.
30. *Ibid. at paras. 21 and 22.
business would develop across Canada”. This reasoning may well apply in the context of a master franchise or area development agreement that covers a larger territory than the typical unit agreement.

(c) **Subject Matter Scope.** The subject matter of the covenant, in terms of the activities it prohibits and the manner in which it defines the relevant product market, must also go no further than necessary to protect the franchisor’s legitimate interest. In the employment context, the courts will require clear evidence that a non-solicitation clause is insufficient to protect an employer’s interests. In the franchise context, while the courts have been prepared to go further than this, the franchisor must still be prepared to prove the need for a broader covenant with reference to a legitimate business interest such as the need to protect trade secrets, system-specific proprietary processes, or other confidential information. However, if the market in which the franchisor operates is highly segmented, a best practice may be to narrow the scope of the covenant to the segment in which the franchisor truly competes, given the tendency of the courts to refuse to enforce broader covenants in this context.

The leading appellate cases dealing with the enforceability of restrictive covenants arise in the context of employment disputes or disputes between the vendor and purchaser of a business. While the general legal framework is the same in both contexts, the appellate courts have emphasized consistently that the level of scrutiny or “rigor” to be applied in the reasonableness assessment will be

33. Elsley, *supra* note 5; Staebler, *supra* note 5 at paras. 41 and 56.
34. In *Pet Valu, supra* note 24 at para. 10, the court noted that a fundamental aspect of a franchise system is the “protection of its method of operation, goodwill, products, and services”.
greater in the employment context than the commercial context.\(^{37}\) Where the franchising business model fits into this dichotomy remains an open question, although at least one trial-level decision has held that the factors applicable in the employment context apply in the franchise context.\(^{38}\) The primary justification for the distinction between employment and commercial covenants has always been the nature of the negotiation process that precedes a restrictive covenant in the employment versus the commercial context. The former has been held to give rise to an “imbalance of bargaining power”,\(^{39}\) while the latter had been held to epitomize “freedom of contract”.\(^{40}\) The more recent case law suggests that the level of judicial scrutiny to be applied to a restrictive covenant should depend on whether the underlying agreement was subject to meaningful negotiation. In the recent employment decision of the Ontario Court of Appeal in *Staebler*, the court noted that the evidence *in fact* disclosed an inequality in bargaining power when the agreement was negotiated and distinguished an earlier employment case on the basis that the employee “bargained as an equal”.\(^{41}\) Similarly, in *Payette*, the Supreme Court of Canada recently confirmed that evidence as to the bargaining position of the parties at the time the covenant was drafted, and whether they had independent legal advice, will affect the level of scrutiny to be applied to the question of enforceability.\(^{42}\)

These principles suggest that, in the franchise context, the level of scrutiny to be applied to a restrictive covenant will depend in part on whether the franchise agreement is truly a contract of adhesion. Franchise and distribution relationships do not neatly fit into the traditional categories of “commercial” versus “employment” dichotomy.\(^{43}\) Where the franchisee truly negotiated the franchise agreement — a more common occurrence in the context of master franchises, area development arrangements and early start-up franchises — the court should be more inclined to apply a level of

37. *Nordenfelt*, supra note 6 at p. 566; *Elsley*, supra note 5 at p. 924; *Payette*, supra note 7 at para. 36 (confirming this also applies in the context of Quebec law); *Tank Lining*, supra note 8 at para. 20.
38. See, for example, *Sugimura*, supra note 29 at para. 16, which held that the factors set out by the Supreme Court of Canada in *Elsley* applied to the franchise context even though the Supreme Court referred expressly to the employment context in its decision.
40. *Nordenfelt*, supra note 6 at p. 566.
41. *Staebler*, supra note 5 at para. 56.
42. *Payette*, supra note 7 at paras. 39 and 62.
43. Levitt and Finkelstein, supra note 22 at p. 28.
scrutiny reserved for commercial cases. In any event, the general framework is the same in both contexts and as long as the franchisor can defend the scope of the covenant by reference to a legitimate business interest, the clause should be found to be reasonable as between the franchisor and the franchisee.

If the restrictive covenant is found to be reasonable between the parties, a franchisee wishing to challenge its enforceability must now bear the onus of establishing that the covenant is unreasonable having regard to the wider public interest. In most franchise disputes, this will not be an issue as the market in which the franchise system operates is usually open and competitive. The general trend is represented by the following comments of the Ontario Superior Court in *Imvescor Restaurants Inc. v. 3574423 Canada Inc.* ("Imvescor").44

... [I]n a fully competitive industry ... which is characterized by limited barriers to entry, there is arguably some public benefit to upholding [these covenants in] franchise agreements, both in order to allow a franchisor to enjoy the fruits of its efforts in developing a particular concept and to provide an opportunity to prospective franchisees who consider that an investment in a franchise of an operating chain with a recognized name, décor and menu reduces the franchisee's investment risk.

However, in certain contexts this may well become an important issue, especially in underdeveloped or highly specialized markets. In *Elsley*, the Supreme Court of Canada examined the wider market within which the promisee operated to assess whether the covenant in question was contrary to the public interest. The court emphasized that the large number of other players and competitors in the applicable market meant that there was insufficient evidence that customers "would suffer through the loss, for a limited period, of the services of [the promissor] in the . . . business" [and market].45 Additional factors that are relevant on the public interest analysis include:

(a) Whether the covenant at issue contravenes the *Competition Act*, in which case it will be "automatically struck down";46

(b) Whether the market in which the franchise operates is characterized by significant barriers to entry,47 which may

45. *Elsley, supra* note 5 at p. 929.
47. *ibid.*, at paras. 47 to 49.
assist the court in assessing the extent to which the restriction on the franchisee may affect the wider market;

(c) Whether the operation of the restrictive covenant, as anticipated at the time it was agreed to, leads to “monopolistic” or “anti-competitive pricing” behaviour.  

If a restrictive covenant is found to be too broad in relation to its temporal, spatial or subject matter scope, the courts will be reluctant to enforce it through contractual severance. As a general matter, courts will not perfect a flawed restrictive covenant. In the last ten years, we have not been able to find a case in the franchise context where severance has been awarded in the face of an overly broad covenant. A franchisor should assume that ambiguous or overly broad restrictive covenants will not be enforced by the courts and make best efforts to draft their clauses so that they correspond to what is necessary to protect their legitimate business interests. In *KRG Insurance*, the Supreme Court of Canada reaffirmed that there were two different types of severance, neither of which would normally be available where the restrictive covenant is found in a contract of adhesion:

(a) *Notional Severance*. This form of severance effectively “reads down” an enforceable covenant in a manner that would render it enforceable. The Supreme Court has clarified that notional severance is unavailable in the employment context.  As a risk management device, franchisors should assume that this applies in the franchise context as well.

(b) *Blue Pencil Severance*. This form of severance effectively “strikes out” offending words in an overly broad covenant in order to render the remaining language enforceable. In the employment context, the Supreme Court in *KRG Insurance* held that this form of severance is only appropriate when the problematic language is (i) clearly severable, (ii) trivial, and (iii) not part of the main purpose of the restrictive covenant.  Franchisors should again assume as a matter of risk management that this applies unless they negotiated the terms of the franchise agreement.

49. *KRG Insurance*, supra note 5 at para. 2.
II. Enforcing Restrictive Covenants Against Non-Signatories

A franchisee bound by a restrictive covenant may attempt to bypass its obligations by working with third parties (often family members or related entities) to open a business that would otherwise be prohibited by the covenant (often in the same location as the previous franchised premises). A franchisor should be able to enforce a restrictive covenant against a non-signatory to the franchise agreement where the third party, with knowledge of or wilful blindness to the obligations in the restrictive covenant, engages in conduct in concert with the franchisee that breaches the terms of the covenant.

The governing principles in this area have been established by appellate courts outside the franchise context. The leading case regarding the availability of injunctive relief against contractual third parties is the Supreme Court of Canada's decision in Canadian Long Island Petroleums Ltd. v. Irving Industries Ltd. In that case, the plaintiff held an equitable interest in land arising from a right of first refusal with the defendant. The Supreme Court had to decide whether to specifically enforce that equitable interest against a third party who purchased the land from the defendant. In terms of the availability of specific performance against a third party, the Supreme Court held that the deciding factor was whether the third party was an innocent purchaser for value without notice:

In this case [the defendant] did convey its interest in the land to [the third party], which took its title with full knowledge of the requirements of the restrictive covenant. This being so, I do not consider that the position of [the third party] as against the [plaintiffs] should be improved because [the defendant] had actually acted in breach of its commitment to the [plaintiffs], by assigning its interest to [third party]. This is a proper case for the application of the proposition stated in Fry on Specific Performance, 6th ed., at p. 90:

SS 205. Generally a stranger to the contract is not a proper defendant to an action for enforcing it. But this general rule is subject to exceptions. SS 206. If a stranger to the contract gets possession of the subject-matter of the contract with notice of it, he is or may be liable to be made a party to an action for specific performance of the contract upon the equitable ground of his conscience being affected by the notice.

51. Gray and Murray, supra note 1; Emma Cano and Katie Dolan-Galaviz, "If It Looks Like a Duck, Walks Like a Duck, and Quacks Like a Duck: The Enforceability of Noncompetes Against Nonsignatories" (2006), 33 Franchise L.J. 544.


53. Ibid. at pp. 731-32. See also Kopec v. Pyret, [1987] S.J. No. 204, 36 D.L.R.
In the realm of trade secrets and breach of confidence, the Ontario Court of Appeal in *International Tools Ltd. v. Kollar*[^54] awarded a permanent injunction against a third party who started a business with departed employees who misappropriated trade secrets from the plaintiff-manufacturer. According to the court:

... The [third party] came by the [trade] secret in one of two ways, either he was a purchaser for value of it without notice of any obligation affecting it, or he acquired the knowledge from his co-defendants under circumstances which resulted in there being an equity against him. If it had been established that he was an innocent purchaser from [the defendants] for value without notice he might be in a position where he could successfully resist the plaintiff's claim for an injunction. The circumstances of the formation of the partnership between the defendants ... and the failure of the defendants to adduce any evidence to the effect that the [third party] ... was ... an innocent purchaser leads to no possible inference other than that the [third party] was well aware that his co-defendants would bring to their new association information about the plaintiffs' trade secret extracted from the plaintiff ....

There is a proper case for restraining not only the [ex-employees] ... but also the [third party].[^55]

The Manitoba Court of Appeal has similarly held that wilful blindness on the part of the third party, in the sense of failing to make inquiries as to the source of trade secrets or confidential information, may allow for injunctive relief against them.[^56] This approach (examining closely the subjective state of mind of the third party) is the dominant approach for courts across Canada when deciding whether to issue injunctions against contractual third parties,[^57]

[^55]: Ibid. at paras. 11-13.
[^57]: *AC Tire v. Honeywood Tire Ltd.*, 1999 CarswellOnt 3444, [1999] O.J. No. 4055 (Ont. S.C.J.) at para. 25 (refusing to grant an injunction against a third party who was found to have acted in "good faith"); *1323257 Ontario Ltd. v. Hyundai Auto Canada Corp.*, 2009 CarswellOnt 88, 55 B.L.R. (4th) 265, [2009] O.J. No. 95 (Ont. S.C.J.) ("Hyundai") at para. 125, a decision in which McCarthy was counsel for the franchisor (declining to find third-party dealer "innocent" as it knew that the former dealer contested the loss of its market area and the third party obtained an indemnity from the franchisor); *Kent Building Supplies v. Magasin du Ridge Ltée*, 2004 NBQB 152, 275 N.B.R. (2d) 64, [2004] N.B.J. No. 142 (N.B. Q.B.) at para. 31 (finding that the third party's "passive knowledge" was sufficient for it to be enjoined); *North West
although on a few occasions the courts appear to have been prepared to enjoin third parties even without a finding that they had passive or active knowledge of the breach.\textsuperscript{58}

In the franchise context, consistent with these principles, the courts have in recent years been prepared to enjoin third parties and non-signatories where there is evidence that they effectively conspired with the franchisee to avoid the application of the restrictive covenant:

(a) In \textit{Bulk Barn Foods Ltd. v. Faber} ("Bulk Barn"),\textsuperscript{59} the franchise-owner's wife was enjoined from continuing to operate a business that competed with the franchisor on the basis that she knew she was indirectly circumventing the restrictive covenant signed by her husband.

(b) In \textit{Ontario Duct Cleaning Ltd. v. Wiles},\textsuperscript{60} the franchisee-owner's wife and son incorporated a new company for the sole purpose of avoiding the franchisee's non-compete obligations. The court enjoined the third-party corporation.

(c) In \textit{Pet Valu},\textsuperscript{61} the franchisee-owner's husband, a non-signatory to the franchise agreement, opened a competing business in a "transparent effort" to assist the franchisee avoid the effect of the restrictive covenants. The court enjoined the third party.


\textsuperscript{59} (November 17, 2003), Doc. 03-CV-256773 CM3, [2003] O.J. No. 5553 (Ont. S.C.J.), a decision in which Osler was counsel for the franchisor, cited by Edward Levitt and Chad Finkelstein, "Non-Competition Covenants in a Canadian Context" (2011), 9 \textit{Int'l J. Franch. L.} 30 (noting that in this case, the wife was supposed to have signed the covenant but did not).

\textsuperscript{60} [2001] O.J. No. 5150 (Ont. S.C.J.), a decision in which Osler was counsel for the franchisor, cited by Levitt and Finkelstein, \textit{supra} note 22 at p. 30.

\textsuperscript{61} \textit{Supra} note 24.
However, in *Saint Cinnamon* the court refused to extend the injunction to the third party, a previous employee and the father of the franchisee-owner, on the basis that the non-compete clause did not expressly prevent previous employees or other entities from working at a similar business. 62

### III. Recent Themes and Trends

There are a number of interesting themes and trends that arise from a review of the last ten years' worth of non-competition covenant cases in the franchise context. Most of these trends are related to the procedural context in which these cases arise, namely, on a motion for an interim or interlocutory injunction to enforce the covenant. We discuss each of the trends below.

#### A. Injunctions

A few of these themes and trends relate to how our courts are applying the well-established three-part test for an interim or interlocutory injunction from the Supreme Court of Canada. The test established in *RJR-MacDonald Inc. v. Canada (Attorney General)* 63 (the "*RJR-MacDonald test*") asks: Is there a serious issue to be tried? Will the moving party suffer irreparable harm if the injunction is not granted? And does the balance of convenience lie in favor of granting the injunction?

**Serious Issue to be Tried versus Strong Prima Facie Case**

Generally, under the first branch of the *RJR-MacDonald* test, an applicant or moving party must establish that there is a serious issue to be tried. This is a very low standard and only requires that the applicant's cause of action or complaint be neither frivolous nor vexatious.

There are occasions, however, when a court hearing an injunction for the enforcement of a non-competition covenant requires that the applicant establish a strong *prima facie* case. This is a much higher standard. To satisfy it, the applicant must be clearly in the right. One such occasion for applying the higher standard is when the granting of an interlocutory injunction would essentially be a final determination of the issues. 64 In *Second Cup* 65 for example, Lederman J.

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64. In addition to the cases discussed below, see also *BMR Bath*, supra note 24, where Harris J. found that the interim injunction would effectively be a final
concluded that the franchisor’s request for an interlocutory injunction would be a final determination of the issues and on that basis, applied the strong *prima facie* case test. He did this because there were only 15 months left on the post-term non-competition covenant, with the result that the covenant would have run its course by the time the matter went to trial, and the issue would have been moot. His Honour concluded that Second Cup had failed to meet this higher standard and dismissed its motion for reasons including the fact that the franchisor had not signed the franchise agreement, and because there was “nothing in the conduct of the parties which would suggest that they clearly assented to the precise terms of [the non-competition clause].”

In *Quizno’s Canada Restaurant Corp. v. 1450987 Ontario Corp.* (“*Quizno’s*”), Perell J. noted that the strong *prima facie* case test will be used where an injunction would “restrain an individual’s cherished ability to make a living and use his or her knowledge and skills obtained during employment.” Perell J. applied this higher standard to the franchisor’s request to enjoin the franchisees from breaching their post-termination obligations, even though they were not employees and the franchise model is not an employment relationship. Perell J. concluded that the franchisor had satisfied the higher standard. In contrast, His Honour applied the lower “serious issue to be tried” standard to the franchisee’s request to restrain the franchisor from terminating their franchise agreements, because “enjoining Quizno’s Canada from terminating the franchise determination of the case and therefore a more rigorous review of the merits was warranted.

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65. *Supra* note 35.
66. It should be noted that the franchisee against whom the franchisor was trying to enforce the non-compete had signed the franchise agreement.
67. *Second Cup, supra* note 35 at para. 19. It is not surprising that there was no evidence that the franchisee by its conduct had assented to the non-competition covenant since it was a post-term covenant.
70. In *Second Cup, supra* note 35, in applying the strong *prima facie* case standard to the first part of the *RJR-MacDonald* test, the court relied on *Lombardo v. Ragno*, 2001 CarswellOnt 1168, [2001] O.J. No. 1300 (Ont. S.C.J.), which was not a franchise case and involved a non-competition covenant in a shareholder agreement. At para. 16 of the *Lombardo* case, the court found that the plaintiffs were “seeking to enforce a negative obligation that would severely and substantially impair the rights of the defendants to make their living”, and held that in such circumstances, the “more stringent aspect of strong *prima facie* case is apt”.

would be a restrictive injunction and not a mandatory injunction,”
which he denied.

Importantly, the test to be applied under the first branch of the
RJR-MacDonald test is also impacted by the type of injunction
sought. Bark & Fitz Inc. v. 2139138 Ontario Inc. (“Bark & Fitz”)
provides a detailed discussion of the difference between prohibitive
and mandatory injunctions, and the impact the distinction has on the
test for injunctive relief. Karakatsanis J. (as she then was) noted that
a prohibitive injunction prohibits a defendant from committing a
specified act and enforces a right created by the parties and previously agreed to by the parties. Where prohibitive injunctions are
concerned, the serious issue to be tried test generally applies. In contrast, a mandatory injunction requires the defendant to act positively
and is restorative in nature. Because a mandatory injunction
enforces a right not previously agreed to by the parties, courts have
held that that this will require the applicant to establish a “strong
prima facie case”

In Bark & Fitz, a group of franchisees stopped paying royalties to
their franchisor, attempted to unilaterally terminate their franchise
agreements, and advised their franchisor that they intended to
remove all signage and branded products, de-identify their stores,
and operate independently. The franchisor sought not only to
restrain the franchisees from breaching the non-competition coven-
ant in their franchise agreements, but to compel the franchisees to
continue purchasing branded product and paying royalties. In
regard to the enforcement of the non-competition covenants, Karakatsanis J. found that the franchisor was only required to
establish a serious issue to be tried, which it satisfied. With respect to
the branded products and royalties, however, Her Honour held that
a strong prima facie case was required, which the franchisor also
established. As a result, the court granted the injunction, subject to
certain conditions.

Proof of Irreparable Harm

The second part of the RJR-MacDonald test is whether the
applicant or moving party will suffer irreparable harm. Irreparable

71. Quizno’s, supra note 68 at para. 43.
72. 2010 ONSC 1793, 2010 CarswellOnt 2082 (Ont. S.C.J.), leave to appeal
refused 2010 CarswellOnt 4407 (Ont. S.C.J.).
73. Ibid. at paras. 5-9.
74. The court characterized the actions which Bark & Fitz sought to compel not
as preventing a breach of contract but as positive actions to repair a broken
relationship.
75. Bark & Fitz, supra note 72 at para. 12.
harm is harm that cannot be readily quantified in damages. The recent case law appears to establish that franchisors claiming irreparable harm will be held to a higher standard of proof than has previously been the case. It is no longer enough for a franchisor to assert principles of general harm to the franchise system in the absence of actual evidence of such harm.

In *W.A.B. Bakery Franchising Ltd. v. Canam Advertising Ltd.*, the franchisee established a competing bakery in the same location as its previous What-a-Bagel franchise. The franchisor alleged it would suffer irreparable harm if an injunction was not granted because the integrity of the franchise system would be undermined by other franchisees opening competing shops at the end of their agreements. While the judge accepted that this would constitute irreparable harm, His Honour noted there had been “no evidence of such action being taken or threatened today or in the immediate future”. Further, there had been no proof to substantiate any of the franchisor’s other claims of irreparable harm. This requirement for actual proof of irreparable harm was also seen in *Gold in the Net Hockey School Inc. v. Netpower Inc.* wherein the court rejected the plaintiff’s argument that it would suffer irreparable harm in the form of loss of market share and goodwill. Central to the court’s conclusion was the fact that the franchisors had not presented clear evidence of either of these alleged losses. The court noted that irreparable harm will be established only where there is “clear evidence”.

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79. 2007 ABQB 520, 39 B.L.R. (4th) 57, 51 C.P.C. (6th) 244 (Alta. Q.B.). Note this case dealt with a restrictive covenant in the context of an employment agreement of a franchise. Although not a traditional franchisee-franchisor case, it has been included because it provides a helpful illustration of the trend in the case law for the courts to require clear proof of irreparable harm.
81. *Ibid.* See also *Windshield Doctor Canada Ltd. v. Glass Masters Ltd.*, 2005 BCCA 220, 2005 CarswellBC 859, [2005] B.C.J. No. 827 (B.C. C.A. [In Chambers]); *Windshield Doctor Canada Ltd. v. Glass Masters Ltd.*, 2005 CarswellBC 982 (B.C. S.C. [In Chambers]), leave to appeal allowed 2005 BCCA 220, [2005] B.C.J. No. 827 (B.C. C.A. [In Chambers]) for an example of where a franchisor had failed to provide sufficient evidence to prove irreparable harm. In that case the franchisor alleged the franchisee had breached the franchise agreement and thereby terminated the agreement. When the franchisee continued to operate the franchise, the franchisor sought an injunction to enforce termination. The franchisor claimed that allowing the defendants to continue operating was “doing violence” to their
In *Sugimura*, the court rejected the franchisor's argument that irreparable harm would result from breach of a non-competition covenant because other franchisees would feel at liberty to disregard their non-competition covenants. In its decision, the court noted that Allegra's assertion of irreparable harm was "not based on any irreparable harm flowing from the breach of the Franchise and License Agreement with the defendants", indicating that in order to demonstrate irreparable harm, a franchisor must give *specific evidence* of irreparable harm flowing from the breach at issue, rather than potential future harm. Importantly, the court found that in seeking to enjoin its former employee, the franchisor had no legitimate business interest to protect in the geographic area in which the former franchisee was employed, because there was no franchise in the area, and because there was no evidence that the franchisor intended to establish or maintain a franchise in that geographic area after the expiry of the franchise agreement. As a result, the court held that the non-competition covenant was unenforceable. To enforce it in the circumstances would serve no valid purpose as it was not reasonably required for the franchisor's protection. Interestingly, the court applied the lower "serious issue to be tried" threshold, and found that although there was a serious issue to be tried as to the enforceability of the non-competition covenant, the absence of any sustainable claim for damages or irreparable harm flowing from breach of the covenant meant that the threshold was not met.

In contrast, *Quizno's* offers an example of where a franchisor had provided sufficient evidence to establish irreparable harm. The franchisee defendants had allegedly breached their franchise agreements by selling under-proportioned sandwiches, failing to participate in promotions, and failing to provide the delivery service as directed by their franchisor, Quizno's Canada. In response to these failures, Quizno's Canada terminated the franchise agreements. The franchisees subsequently established competing restaurants in the very locations of their former Quizno's restaurants. Quizno's...
Canada sought to enjoin the defendants from operating competing restaurants in the former Quizno's premises. Quizno's Canada claimed that the ongoing breach of the restrictive covenants would have a "detrimental and devastating effect" on the franchise system.\footnote{Quizno's, supra note 68 at para. 19.} More specifically, allowing the continuous breach of the franchise agreement would send a message throughout the Quizno's franchise system that the franchise agreements provide no protection to other franchisees and may be disregarded at will. Perell J. accepted this argument and granted the franchisor's request for an interlocutory injunction.

Perell J.'s conclusion was based squarely on the facts of the case and the evidence at hand. In addition to the three franchisees involved in this motion, there were eight other Quizno's franchisees in the Greater Toronto Area who had refused to offer delivery services. As Quizno's Canada submitted, these franchisees would "no doubt continue to breach the terms of their franchise agreements should [the] court not grant the injunctive relief sought".\footnote{Ibid. at para. 19.} Further, there was evidence that the franchisees' conduct had already affected Quizno's Canada's relationship with other franchisees and interfered with its role as a franchisor because other franchisees were following suit and refusing to implement the delivery system. Additionally, this particular dispute was not just "localized" but "affect[ed] the franchisor's management rights across the chain of franchises"\footnote{Ibid. at para. 104.} that are "fundamental to the integrity of the franchise system" and thus impacted the irreparable harm analysis.\footnote{Ibid. at para. 101.} Perell J. held that the nature of the dispute affected the analysis of irreparable harm and balance of convenience, and ruled that an injunction was necessary to maintain the integrity of the franchise system.\footnote{Ibid. at para. 93.}

On appeal, Justice Carnwath rejected the franchisees' submission that Justice Perell's conclusion on the irreparable harm to Quizno's was based on evidence that did not exist. Justice Carnwath held that the affidavit evidence and jurisprudence respecting "the importance of protecting the trade-marks and systems of the franchisor, for its benefit and for the benefit of the franchisees" was sufficient evidence of irreparable harm.\footnote{Supra note 68 (add'l reasons) at para. 2.}
Negative Covenants and the RJR-MacDonald Test

The nature of the covenant being enforced has an impact on the RJR-MacDonald test and whether a moving party has to prove all three elements of the test. As Ross J. highlighted in Stonewater Group of Restaurants Inc. v. Mikes Restaurants Inc. ("Stonewater"), the case law is clear that where an applicant establishes a clear breach of a negative covenant, such as a covenant not to compete, the three-part test is applied with less rigour. In particular, "irreparable harm need not be shown, as the covenantor who is in clear breach of a covenant should not be allowed to escape from the bargain until trial". Since Stonewater dealt with a clear breach of a negative covenant, Ross J. applied the less stringent three-part test to grant the plaintiff’s request for an interlocutory injunction.

In W.A.B. Bakery, Wilton-Siegel J. explicitly rejected the applicant’s argument that a proceeding need only involve a breach of a negative covenant to obviate the irreparable harm and balance of convenience requirements of the RJR-MacDonald test. He noted that it is only a “clear breach” of a negative covenant that warrants the lower test and that, as a result, it is unlikely the lower test could ever be applied where there is a reasonable basis for the conclusion that the negative covenant is unenforceable. Because on the facts of W.A.B. Bakery, there were serious issues regarding the enforceability of the negative covenant (the covenant was structured to provide for alternate periods of duration and areas of restraint with a maximum prohibition of five years and a 50-mile radius) and the application of the covenant beyond the expiration of the agreement (there was an argument that the covenant only operated upon

92. 2005 ABQB 799, 44 C.P.R. (4th) 183, [2005] A.J. No. 1462 (Alta. Q.B.). Note that this case was a dispute between two separate and independent franchisees who entered into an agreement to only use their respective trademarks in a way that would not give rise to the possibility of confusion. Although this case does not involve a standard agreement between a franchisee and franchisor, it provides a useful summary of when the irreparable harm and balance of convenience criteria of the RJR-MacDonald test may be applied less strictly.

93. Ibid. at para. 10. Earlier franchise decisions that held that where there is a clear breach of a negative covenant, the first element of the RJR-MacDonald test is satisfied, and the additional elements of irreparable harm and balance of convenience need not be addressed, include Ontario Duct Cleaning, supra note 57; CashMoney Express Inc. v. 1035216 Ontario Inc. (August 26, 2008), Doc. 03-CV-248970 (Ont. S.C.J.); MBEC Communications Inc. v. Nagel, 2007 CarswellOnt 2042 (Ont. S.C.J.); and Mapleleaf, supra note 24.

94. Supra note 76.
termination), Wilton-Siegel J. held it was not appropriate to apply the less stringent tripartite test.

*Sugimura* should be noted as a slight exception to the general trend that courts will not require that irreparable harm and balance of convenience be proved where there is a clear breach of a negative covenant. The court stated that while less emphasis should be placed on irreparable harm and balance of convenience in cases of clear breach of an express negative covenant, this “does not mean that there is no obligation to deal with these factors”.

Significantly, in *Pet Valu,* the most recent Ontario case to deal with a franchisor’s attempt to enforce a non-competition covenant against a franchisee, Backhouse J. held, without citing any authority, that “irreparable harm and the balance of convenience are not required” when dealing with a clear breach of a negative covenant. Despite the fact that the case did involve a clear breach of a negative covenant and that therefore irreparable harm and balance of convenience did not have to be proven, Backhouse J. made the point of commenting that “there is an abundance of evidence to satisfy these elements”. This demonstrates the importance of not relying solely on the principle that where there has been a clear breach of a negative covenant, only the first part of the *RJR-MacDonald* test needs to be proved, and of having actual evidence to support the second and third parts of the *RJR-MacDonald* test.

**B. What is “sufficiently similar”??**

The case law establishes that franchisors will need to meet a high standard in order to prove that a franchisee's business is sufficiently

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95. *Supra* note 29.
96. *Ibid.* at para. 30. In the non-franchise case of *Van Wagner Communications Co., Canada v. Penex Metropolis Ltd.*, 2008 CarswellOnt 218, [2008] O.J. No. 190 (Ont. S.C.J.) at para. 39, cited by Jennifer Dolman, “Recent Trends in Franchise Injunctions” (Paper presented at the 2011 Canadian Franchise Association National Convention), Patillo J. held that “even where there is a clear breach of a negative covenant which is reasonable on its face, the issues of irreparable harm and balance of convenience cannot be ignored”. However, these factors may be given less weight in determining the issue “depending on the strength of the plaintiff’s case”. Patillo J.’s decision was upheld on appeal by the Ontario Divisional Court at [2008] O.J. No. 1707, which affirmed that, “Where a negative covenant is breached and a *prima facie* case is made out, regard must be had to irreparable harm and balance of convenience, but not to the same extent as where there is no negative covenant”.

similar to the franchisor’s business such as to breach a restrictive covenant. The court considered this issue in Second Cup,\textsuperscript{99} in which Lederman J. drew a distinction between the franchisee’s business which sold certified fair trade, organically grown coffee and tea, and the franchisor’s business which did not sell any certified fair trade or organically grown products. Based on this factual difference, he concluded that the franchisee’s business marketed a different kind of coffee and, therefore, did not breach its post-termination non-competition clause.

Similarly, in Dynamex Canada Franchise Holdings Inc. v. P&D Investments Ltd.,\textsuperscript{100} the court examined whether the franchisees’ current business, in which they offered a variety of courier services, was sufficiently similar to Dynamex’s same-day courier services. Dynamex defined same-day service as a courier service that delivers the product on the same day that it is picked up. The defendants offered evidence to suggest that they had a wide variety of overnight services, including tractor delivery, flatbed truck delivery, climate controlled trucking services, and “less than trailer load” freight services. To prove their assertions, the defendants also offered to consent to an injunction restraining them from providing same-day delivery services. In light of the foregoing, Marrocco J. concluded that the evidence strongly suggested there was a “fundamental difference between the two services” and that therefore the former franchisees were not in breach of the restrictive covenant.\textsuperscript{101}

Stevens\textsuperscript{102} underscores the need for franchisors to provide sufficient evidence to prove the similarity of the franchisee’s business and the franchisor’s business. In that case the post-term non-competition clause prohibited a franchisee from operating a signs store or similar business. The franchisees continued to offer bucket truck installation services following the expiration of the franchise agreement and the franchisor brought an action alleging, in part, that the franchisees were prohibited from offering such services pursuant to the non-competition clause. Gill J. held that the evidence provided by the franchisor regarding the scope of its business was very general. For example, the business of the franchisor was described as “commercial signage of all kinds” and it was suggested that of the 217 stores worldwide, “some provide installation and maintenance services”\textsuperscript{103} Further, the documents put into evidence by the

\begin{flushleft}
\textsuperscript{99} Second Cup, supra note 35.  \\
\textsuperscript{101} Ibid. at para. 25.  \\
\textsuperscript{102} Supra note 16.  \\
\textsuperscript{103} Ibid. at para. 113.
\end{flushleft}
franchisor made no reference to installation and repair services. In light of the evidence, or the lack thereof, Gill J. was “not prepared to construe ‘similar to’ by reference to a handful of franchisees when there was no evidence that the franchisor had provided training other than assistance in respect of [the services at issue].”

C. Corporate Sloppiness

There is a clear trend in the case law for courts to construe what may be called “corporate sloppiness” against the franchisor. “Corporate sloppiness” occurs whenever the franchisor does not quite have its act together in terms of possessing the documents it needs to prove its case, including signed contracts, or taking steps readily available to it to ensure that its rights are protected. Second Cup is a clear example of this trend. In this case the franchisor sought to enjoin the former franchisee from operating a competing business. Although the franchisee had signed the franchise agreement that contained a post-termination non-competition covenant, Second Cup was unable to produce a fully executed copy of the franchise agreement that also contained its signature. Further, evidence that the parties had been carrying on as if there was a franchise agreement for the last four years was insufficient to establish that the franchisee had actually agreed to the precise terms of the non-compete clause. As a result, Second Cup was unable to enforce the non-competition clause, and its former franchisee was permitted to carry on the operation of its competing cafe.

In Mapleleaf, there were significant differences between the restrictive covenant contained in the franchise agreement and the restrictive covenant contained in the voluntary disclosure document. The Chambers Judge granted an interim injunction based on the fact that the disclosure statement did not obviate the franchisee’s need to read the contract. The applicants brought a motion for a stay of the

104. Ibid. at para. 117. Note that this decision included a discussion regarding whether the term “similar” rendered the clause enforceable. Gill J. held that the term was not so vague so to be unenforceable. See also Jamani v. Subway Franchise Systems of Canada Ltd., 2008 ABQB 677, 461 A.R. 204, 53 B.L.R. (4th) i28 (Alta. Q.B.), a decision in which Osler was counsel for the franchisor, which dealt with an arbitration award in which the arbitrator did not consider “similar” and “reasonably contemplated” to be ambiguous. With respect to proof required to establish that a business is similar; see also BMR Bath, supra note 24 in which the court held that the former franchisee’s bathtub remodelling business was not “substantially or confusingly similar” to the franchisor’s bathtub re-glazing business.

105. Supra note 35.

106. Supra note 24.
injunction. On appeal, the court confirmed that the franchisor had a duty to ensure the information contained in the disclosure document was accurate. The franchisor’s failure to ensure the information was accurate meant it was not entitled to enforce the restrictive covenant against the franchisee.

MEDkhair Ltd. v. IMP Group Ltd.\textsuperscript{107} offers an additional example where a franchisor’s “corporate sloppiness” undermined its ability to enforce a restrictive covenant. In this case the franchisor applied for an interim injunction to prevent a shareholder of the franchise from acquiring shares of a competing company. Schedule F of the franchise renewal agreement contained an attempt to personally bind the shareholders, officers and directors of the franchise to the non-compete clause contained in the agreement. However, Schedule F was not executed by any of the shareholders, officers or directors. In light of MEDkhair’s failure to have the parties execute the agreement, Goodfellow J. held that it would not be just or convenient to enjoin them without a trial and therefore refused the injunction.\textsuperscript{108}

\textbf{D. In-term Non-Compete Clauses}

A review of the case law reveals that it is far more common for a franchisee to breach a post-term covenant than an in-term covenant. However, where the courts have been asked to consider an in-term non-competition clause, they do not appear to take any different approach to the applicable legal analysis. The test for an interim or interlocutory injunction in the context of an in-term restrictive covenant is also the \textit{RJR-MacDonald} test referred to above. Similarly, the applicable legal test to determine whether a restrictive covenant is reasonable and enforceable is equally applicable to in-term and post-term restrictive covenants. That is, the courts will use the test from \textit{Tank Lining}\textsuperscript{109} referred to earlier. The only notable difference between in-term covenants and post-term covenants, as noted by Wilton-Siegel J. in \textit{Invescor}\textsuperscript{110} is the fact that, “[s]o long as the franchisee is receiving the benefit of the franchise agreement, the franchisee should not be able to undermine the value of the franchise

\textsuperscript{107} 2005 NSSC 72, 2005 CarswellNS 150, [2005] N.S.J. No. 135 (N.S. S.C. [In Chambers]).

\textsuperscript{108} This should be contrasted with \textit{Bulk Barn}, supra note 59, where the court enjoined a shareholder of the franchisee from competing with the franchisor post-term even though the shareholder had not signed the undertaking she was supposed to sign.

\textsuperscript{109} \textit{Supra} note 8.

\textsuperscript{110} \textit{Supra} note 44.
unless special circumstances can be demonstrated". It is not clear how far courts will go in applying this principle to in-term non-competes as there have been few cases focusing on this issue.

As one of the only cases in the last ten years that offers an in-depth discussion of the enforceability of in-term non-competes, it is helpful to review the court's analysis in Invescor. A pair of brothers had entered into a franchise agreement for the Bâton Rouge restaurant in the Toronto Eaton Centre. As a result of a dispute, the brothers decided to develop a new restaurant called the Redwood Grille. Invescor brought an action against the brothers alleging that the proposed Redwood Grille restaurant breached the non-competition covenants in the franchise agreement. The brothers responded with a motion seeking a declaration that the restrictive covenants in the franchise agreement were void and unenforceable as a restraint of trade or, alternatively on grounds of ambiguity.

The court first applied the test from KRG Insurance" to conclude that the non-compete was not ambiguous. The court then considered the factors from Tank Lining to assess the validity of the covenant. The parties agreed that the first two Tank Lining factors were satisfied, i.e. that the covenant was a restraint of trade and that it was not against public policy. The court went on to consider whether the restraint could be justified as reasonable in the interests of the parties. Applying the three-part test from Elsley, Wilton-Siegel J. held that the defendants failed to establish a serious issue to be tried with respect to the reasonableness of the covenant. Finally, Wilton-Siegel J. considered whether the restraint of trade could be justified as reasonable with regard to the public interest and held that in a fully competitive industry such as the restaurant industry, there was arguably some public benefit to upholding franchise agreements. Based on the foregoing analysis the defendants' motion was dismissed.

IV. Practice Tips in Light of Themes and Trends

In light of the various issues addressed above that relate to the application of the RJR-MacDonald test to the enforcement of non-competition covenants in the franchise context, franchisors, when seeking to enforce non-competition covenants, should consider seeking injunctive relief by way of application instead of by motion. That way, the RJR-MacDonald test does not apply
since the injunction sought under an application is permanent (that is, until the covenant expires as opposed to until the trial is heard) and not interlocutory.\textsuperscript{115} Of course, the franchisor will still have to establish on a balance of probabilities that the covenant is enforceable and that it has been breached by the franchisee. Further, the franchisor will also have to establish that damages, the ordinary remedy for any breach of contract, are an inadequate remedy for any breach of the restrictive covenant, and that the franchisee's infringing conduct must therefore be enjoined.

Another option is for the franchisor, at the commencement of the hearing of a motion for an interlocutory injunction, to ask for an expedited trial to be heard well prior to the expiry of the restrictive covenant at issue.\textsuperscript{116} Obtaining an expedited trial date avoids the argument (raised in \textit{Second Cup})\textsuperscript{117} and referred to by the court) that the injunction will finally determine the matter. In the case of \textit{Hyundai},\textsuperscript{118} which was not a case involving the enforcement of a non-competition case, but rather an attempt by a franchisee to enjoin a franchisor from terminating the parties' dealer agreement, the court, after granting an interlocutory injunction in favour of the franchisee on January 13, 2009, ordered an expedited two-week trial to commence no later than April 30, 2009, only a little over three months away.\textsuperscript{119}

\begin{enumerate}
\item[114.] For an earlier discussion of how, in light of the case law on restrictive covenants in the franchise setting, franchisors should be pursuing injunctions, see Dolman, \textit{supra} note 98.
\item[115.] Under Rule 14.05(3)(g) of the \textit{Ontario Rules of Civil Procedure}, a proceeding may be brought by way of an application for an injunction, mandatory order when ancillary to relief claimed in a proceeding properly commenced by a notice of application. In the case of an application to enforce a post-termination covenant, a franchisor should apply under Rule 14.05(3)(d) for a determination of rights that depend on the interpretation of a contract (in this case a franchise agreement) in addition to its application for an injunction to enforce the post-termination obligations under the franchise agreement. \textit{W.A.B. Bakery, supra} note 76 is an example of a franchisor commencing a proceeding to enforce a non-competition covenant by way of application. However, rather than seeking an injunction on a permanent basis, the franchisor sought an interlocutory injunction until the date of a decision by an arbitrator or the court on the franchisor's request for a similar injunction on a permanent basis. As such, the \textit{RJR-MacDonald} test still applied.
\item[116.] Dolman, \textit{supra} note 98.
\item[117.] \textit{Supra} note 35. In \textit{Second Cup}, the franchise agreement expired on May 30, 2007 and the non-competition covenant was for 15 months. There was ample time for a trial to be scheduled prior to the expiry of the non-competition covenant, especially since the matter was on the Commercial List in Toronto.
\item[118.] \textit{Supra} note 57.
\item[119.] However, there was no expedited trial as the case settled.
\end{enumerate}
Also, given the trend towards requiring franchisors to have actual and compelling proof of irreparable harm, it is important for franchisors to carefully collect documents and other evidence supporting their case, before proceeding to court for any kind of injunction. This is the time to make sure the franchisee file is in order and that there are no signs of “corporate sloppiness” such as an unsigned franchise agreement, or a termination letter that does not clearly spell out for the franchisee its post-termination obligations, including its obligation not to compete within a specified geographic area and for a certain time period. Retaining a private investigator can not only document the competing activity, but in holding him or herself out as a customer of the competing business, can speak to the former franchisee and other customers at the competing business and gather useful evidence. Armed with evidence of a franchisee’s clear breach of the non-competition covenant, franchisors may even be able to avoid going to court by sharing some of the evidence with the former franchisee in an aggressive cease and desist letter. One effective strategy is to go so far as to attach a draft notice of application, and letting the former franchisee know that the application will be issued within a very short time frame if the franchisee does not agree to meet on an urgent and without prejudice basis to attempt to resolve the matter outside of court.

V. Conclusion

Given the important role that restrictive covenants play in a franchisor’s protection of its brand, trade-marks, trade secrets, reputation and franchise system, it is imperative that franchisors and their legal advisors keep on top of the latest legal developments regarding the enforcement of restrictive covenants in the franchise context. The terms of the restrictive covenants, whether in-term or post-term, contained in a franchisor’s standard form franchise agreement, must be sufficiently precise, and reasonable both in geographical and temporal scope. Further, a franchisor will need to produce for the court, through a compelling record, clear evidence of the franchisee’s breach, as well as actual proof of the irreparable harm that will be suffered by the franchisor if the restrictive covenant is not enforced. Because restrictive covenants are presumptively unenforceable at common law as being a restraint on trade, legal counsel appearing in court on the hearing of a motion or application to enforce a restrictive covenant will want to educate the court on the unique aspects of franchising, and why restrictive covenants are an inherent part of all franchise relationships.
Appendix “A”

The following appendix is meant to provide a high level overview of the Canadian case law from the last 10 years that deals with restrictive covenants in franchise agreements. The appendix provides key information such as case names and citations (where available), indicates the industry that the franchisee and franchisor were operating in, and outlines some of the details of the restrictive covenant at issue. Note that because the restrictive covenants are often quite long and detailed, by necessity, the appendix only captures the bare essentials of the covenants. The appendix also indicates whether the case is about a breach of the restrictive covenant post-term (i.e. following expiration or termination of the franchise agreement) or in-term (i.e. while the franchise agreement is still in place). Further, the appendix indicates whether the case was against a third party (e.g. where the franchisor applied to extend an injunction against the franchisee to a third party or where a non-signatory to the franchise agreement was named in an application for an interim injunction) or whether it was solely against signatories of the franchise agreement. Finally, the appendix indicates whether the order sought was an interim or final order and then goes on to provide a brief summary of key highlights from the case.
<table>
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<th>Nature of Restrictive Covenant</th>
<th>In-Term or Post-Term?</th>
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<td><em>Pet Valu Canada Inc. v. 1381114 Ontario Ltd.</em>, 2013 ONSC 5361</td>
<td>Pet supplies</td>
<td>Non-compete: 2 years within 20 km radius of a Pet Value store. Non-solicit: 1 year.</td>
<td>Post-term</td>
<td>Yes</td>
<td>Interim</td>
<td>A competing business was established by the franchisee's husband (a non-signatory to the franchise agreement). The court found that there was a ‘transparent effort by all of the defendants to avoid the restrictive covenants’. The court also noted that a fundamental aspect of a franchise system is the ‘protection of its method of operation, goodwill, products, and services’. Finally, the court upheld the doctrine that where there is a clear breach of a non-competition provision which is a negative covenant, the elements of irreparable harm and balance of convenience need not be proven (although in this case there was ample evidence of both). Held: Injunction granted.</td>
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<td><em>Imvescor Restaurants Inc. v. 3574423 Canada Inc.</em>, 2011 ONSC 1609, affirmed 2012 ONCA 387</td>
<td>Restaurant</td>
<td>Non-compete: During the term of the franchise agreement, franchisees are prohibited from selling products anywhere in Canada that are prepared in accordance with the Bâton Rouge Recipe Manual.</td>
<td>In-term</td>
<td>No</td>
<td>Final</td>
<td>Franchisees sought declaration that restrictive covenants were void and unenforceable as a restraint of trade or, alternatively, on grounds of ambiguity. Franchisees had not yet commenced operation of competing business and thus sought a remedy as a pure matter of law. The court found that the restrictive covenant was not so ambiguous that it was unenforceable. Although the restrictive covenant had a large geographic scope, it was not unreasonable given the limited scope of activities it applied to (i.e. franchisees were only prohibited from serving similar menu items prepared in accordance with the Bâton Rouge Recipe Manual). The court noted that while the franchisee received the benefit of the Franchise Agreement, it should not be able to ‘undermine the value of the franchise’. Held: Appeal dismissed.</td>
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<td>2 year prohibition on operating a 'similar' business</td>
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<td>Yes</td>
<td>Interim</td>
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The parties' relationship broke down in 2009 when the franchisor delivered unsolicited inventory, charged delivery fees for this inventory, and de-listed certain products. Franchisees stopped paying royalties, refused to carry core products, and advised franchisor they intended to de-identify their stores and operate independently. Franchisor sought to restrain franchisees from terminating and breaching franchise agreements. Karakatsanis J. applied the 'strong prima facie case' test to conclude that the franchisor had established a serious issue to be tried. Although irreparable harm was also established, the balance of convenience did not warrant the full order requested by the franchisor. Karakatsanis J. used her 'broad discretion' to require the franchisees to pay royalties and to prohibit the franchisor from imposing a mark-up on products. Held: Appeal dismissed.

Two franchisees had personally signed the franchise agreement. When the franchise stopped being profitable one franchisee gave notice and left. The other franchisee continued to operate the business under a different name, using the same logo and packaging. The trial judge in Small Claims Court had no trouble finding the second franchisee was 'totally in breach of his franchise agreement and in particular with his non-competition clause'. On appeal, the clause was found to be fair and reasonable. Mossip J. confirmed the clause did not overreach when considered as a whole, and it clearly prohibited the defendant's actions (setting up an identical business and taking former customers to the new business). Appeal dismissed.

The franchise agreement was governed by Saskatchewan law. Saskatchewan law requires an applicant seeking an injunction for breach of a restrictive covenant to make a strong prima facie case that the covenant has been
| CarswellOnt 2804 (Ont. S.C.J.) | bert area. Non-solicit: 2 years. | breached. Marrocco concluded that the applicants had failed to establish that there was a strong *prima facie* case that the defendants were carrying on a similar business in breach of the restrictive covenant. The evidence strongly suggested there was a 'fundamental difference' between the services offered by the franchisees (overnight courier business) and the business of the franchisor (same-day courier business). Held: Injunction refused. |
| Quizno's Canada Fast food restaurant Non-compete: Details not discussed. Post-term No Interim | Quizno's sought to enjoin three of its franchisees from breaching post-termination provisions of their franchise agreements. Franchisees sought to restrain Quizno's from terminating their franchise agreements pending trial. Perell J. applied the 'strong *prima facie* case' test to the franchisor's request for an injunction. His Honour concluded that the franchisor had satisfied this test, as well as the balance of convenience and irreparable harm requirements. The fact that the case was about matters 'fundamental to the integrity of the franchise system' was central to Perell J's conclusion regarding irreparable harm. His Honour applied the lower 'serious issue to be tried' standard to the franchisee's request. Perell J. concluded the franchisees had established a serious issue to be tried that the franchisor had wrongly terminated the franchise agreement. Further, Perell J. accepted the franchisees' submission that the loss of reputation and goodwill resulting from terminated agreements would constitute irreparable harm. However, the franchisees had failed to establish a balance of convenience, especially given the comparative weakness of their defence compared to Quizno's strong *prima facie* case. Held: Franchisor's injunction granted; franchisees' request for injunction refused. |
| Allegra of North America and Allegra Commodity services Non-compete: 2 year prohibition on having Post-term No Interim | Application for interlocutory injunction to restrain former franchisees from carrying on a printing business at the...
| Corp. of Canada v. Russell Sugimura, (26 August 2008), Mississauga CV-08-21790-00 (Ont. S.C.J.) | an interest in a similar business within (1) 5 miles of franchise owner's business or (2) 1 mile of any other location that uses the franchise's trade-marks. | | | same location where an Allegra franchise was operated for many years. The court noted that the 5-mile restriction was not unreasonable per se. However, the clause was not reasonably required for the franchisor's protection and served no useful purpose in the circumstances. The clause was therefore unenforceable. Allegra argued that where a franchisee breaches a non-competition covenant a court will award an injunction without requiring irreparable harm or balance of convenience to be proven. Murray J. did not agree and held that even where there is a breach of a negative covenant, interlocutory injunctions will not be granted automatically. His Honour clarified that although there would be cases where the breach is clear cut and injunctive relief was clearly warranted, this was not one such case. Held: Injunction refused. |
|---|---|---|---|
| MBEC Communications Inc. v. Nagel, 2007 CarswellOnt 2042 (Ont. S.C.J.) | Communications | Details not discussed. | Post-term | No | Interim | MBEC proceeded by way of application. The court held that because there were negative covenants being breached the usual three-part test for an interim injunction need not apply. However, the court had no difficulty in applying the test to grant the order for an interim injunction. Relief ordered was possession of premises in favour of MBEC. Held: Injunction granted. |
| Second Cup Ltd. v. Niranjan, [2007] O.J. No. 3409 (Ont. S.C.J. [Commercial List]) | Coffee Shop | Non-compete: 15 months after termination within 3-mile radius of original franchise location and 2 miles from any other Second Cup Café. | Post-term | Yes | Interim | The court noted that where an interlocutory injunction would effectively be a final determination of the issues the legal test is 'a strong prima facie case on the merits'. Because the 15-month non-compete clause would be completed before the trial would take place, an interlocutory injunction would effectively end the litigation. Therefore, Lederman J. applied the 'strong prima facie case' test. His Honour concluded that Second Cup had failed to meet this test and dismissed the motion. Note also that Lederman J. examined the similarity of the defendant's new coffee shop and concluded that because
most of its products were organic and fair trade it was sufficiently different from Second Cup's products for the purpose of the restrictive covenant. Injunction refused.

| W.A.B. Bakery Franchising Ltd. v. Canam Advertising Ltd., 2007 CarswellOnt 8989 (Ont. S.C.J.) | Baked Goods | Non-compete: Following the termination of agreement, (maximum) 5 year prohibition on operating a competitive or 'similar' business within a (maximum) 50-mile radius of the original restaurant. Note the clause provided several alternative temporal and geographic limitations with the minimum prohibitions being 1 year and a 5-mile radius. | Post-term | No | Interim | Franchise agreement expired after ten year term. Franchisee continued to operate full service bakery on premises; franchisor sought injunction to prohibit this. Wilton-Siegel J. held that only a clear breach of a negative covenant will obviate the need for irreparable harm and balance of convenience. The franchisor argued it would suffer irreparable harm if other franchisees operated bagel shops in former franchise locations following expiration of the franchise agreement. Although the court agreed with this general proposition, it held that the franchisor had failed to provide evidence this would actually occur. Wilton-Siegel J. also commented on the alternative periods of duration and areas of restraint in the clause. His Honour noted that the franchisees had a reasonably strong argument that the clause was unenforceable as vague or contrary to public policy, but noted that a court may not strike the clause and would instead only enforce the minimum restriction. Held: Injunction refused. |
| Ziebart Canada Inc. v. Enkin, 2005 CarswellOnt 7557 (Ont. S.C.J.) | Vehicle repairs and cleaning | Non-compete: 2 year prohibition on similar services within 5 miles of any licensed location. | Post-term | No | Interim | Franchise agreement expired after a ten-year term. Franchisor granted permission for franchisee to continue operating in order to facilitate sale of the franchise. Day J. held that the injunction would close down the franchisee's business, and therefore Ziebart had failed to establish the balance of convenience criterion of the RJR-MacDonald test. Day J. also noted that the non-compete clause did not specifically prohibit the franchisee from establishing a similar business on the premises. That is, the non-compete clause only prohibited the franchisee from competing within 5 miles of any licensed location. The instant the agreement expired or terminated the |
Restrictive Covenants in Franchise Agreements

### Alberta

<table>
<thead>
<tr>
<th>Case</th>
<th>Industry</th>
<th>Type</th>
<th>Duration</th>
<th>Final</th>
<th>Premise</th>
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<tr>
<td><em>Mapleleaf Franchise Concepts Inc. v. Nassus Frameworks Ltd.</em>, 2011 ABQB 594</td>
<td>Framing store</td>
<td>Non-compete: 2 years following termination. Covenant said 3 km from any franchise location, Disclosure Document said 10 kms.</td>
<td>Post-term</td>
<td>No</td>
<td>Final</td>
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<tr>
<td><em>Mapleleaf Franchise Concepts Inc. v. Nassus Frameworks Ltd.</em>, 2010 ABCA 291</td>
<td>Framing store</td>
<td>Non-compete: 2 years following termination. Covenant said 3 kms from any franchise location, Disclosure Document said 10 kms.</td>
<td>Post-term</td>
<td>No</td>
<td>Interim</td>
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<td><em>Jamani v. Subway Franchise Systems of Canada Ltd.</em>, 2008 ABQB 677</td>
<td>Restaurant</td>
<td>Non-compete: Prohibition on operating a restaurant 'identical with or similar to' the Subway franchise.</td>
<td>In-term</td>
<td>No</td>
<td>Final</td>
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Premises would cease to be a licensed location. In light of this, there was no evidence that the clause had been breached. Held: Injunction refused.

Non-compete clause contained in disclosure statement was different from non-compete contained in franchise agreement. This difference in disclosure was a misrepresentation and was thus fatal to the enforceability of the restrictive covenant. Franchise legislation is clearly intended to provide protection for prospective franchisees. The mandatory language of disclosure provisions mean that a misrepresentation of a material fact in a non-compete clause will render it unenforceable. Action struck.

Defendants applied for a stay of the injunction pending appeal. Hawco J. applied the *RJR-MacDonald* test and granted the stay. The non-compete clause contained in disclosure statement was different from the non-compete clause contained in the franchise agreement. Based on this, there was a serious issue to be tried as to whether the non-compete was enforceable. Further, this was not a case of a clear breach of a clear covenant, therefore Mapleleaf still had the obligation to prove irreparable harm and balance of convenience. Requiring the business to move 10 km would effectively 'result in the death' of the business, therefore irreparable harm was established and stay was granted. Held: Injunction stayed.

Franchisee opened two Extreme Pitas in the same city as their Subway franchise. Franchisor and franchisee went to arbitration. The arbitrator found for Subway and the franchisee sought leave to appeal pursuant to s. 44(2) of the *Arbitration Act*, R.S.A. 2000, c. A-43. Smith J.
<table>
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<tr>
<th>Case Title</th>
<th>Industry</th>
<th>Geographical Limitations</th>
<th>Post-Term</th>
<th>Interim</th>
<th>Injunction Status</th>
<th>Description</th>
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<tbody>
<tr>
<td>Gold In the Net Hockey School Inc. v. Netpower Inc., 2007 ABQB 520</td>
<td>Goal tending school</td>
<td>Non-compete: 3 year restriction on involvement in hockey school which ‘may or may not compete’ with Gold in the Net Hockey School. No geographic limitation.</td>
<td>Post-term</td>
<td>No</td>
<td>Interim</td>
<td>Plaintiff operated hockey school franchises in Alberta, throughout Canada, and internationally. Defendant was employee, shareholder and director of one franchise, and had signed restrictive covenant. Ten months after resigning, defendant incorporated a company to carry on business of goal-tender training programs. Plaintiff applied for interlocutory injunction; application was denied. The restrictive covenant was unreasonable as it was designed to restrict competition and not to protect plaintiff’s legitimate business interests. The court also noted there was insufficient proof to substantiate a claim of irreparable harm. Held: Injunction refused.</td>
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<td>Westana Leasing Corp. v. Sightus Inc., 2007 ABQB 629</td>
<td>Bottled water and related equipment</td>
<td>Non-compete: Details not discussed.</td>
<td>Post-term</td>
<td>No</td>
<td>Interim</td>
<td>Sightus Inc. went into receivership in 2007. Franchisee began dealing directly with Sightus' customers and alleged they were his personal customers. Receiver sought to enforce non-compete clause in franchise agreement; the court granted the interim injunction. It was plain and obvious from a reading of the agreement that the customer base continued to form part of the franchise. Therefore the franchisee was enjoined from selling to customers on the customer list that he had acquired from the franchisor. Held: Injunction granted.</td>
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<td>Stonewater Group of Restaurants Inc. v. Mikes Restaurants</td>
<td>Restaurant</td>
<td>Non-compete: Defendant agreed not to use its trademark in association with separate business under similar trade names.</td>
<td>In-term</td>
<td>No against 2 con-</td>
<td>Interim</td>
<td>Plaintiff and defendant were franchisees that carried on separate business under similar trade names. In 1977 the owners entered two agreements regarding the respective</td>
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<td>Restrictive Covenants in Franchise Agreements</td>
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<td><strong>British Columbia</strong></td>
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<td><strong>BMR Bath Master Reglazing Ltd. v. Watson,</strong></td>
<td>Bathtub reglazing</td>
<td>Non-compete: Prohibition on conducting 'substantially or confusingly similar' business anywhere in BC for two years. Non-solicit: two years.</td>
<td>Post-term</td>
<td>No</td>
<td>Interim</td>
<td>Former franchisee opened a bathroom remodelling business in a city where there was an existing BMR franchise; franchisor brought application for interim injunction. Because the injunction would effectively be a final determination of the case, a more rigorous review of the merits was warranted. BMR failed to establish that there was a serious issue to be tried. That is, BMR was in the business of reglazing. To the extent the defendant's business was a remodelling business there was no serious issue to be tried that defendant was in breach of the non-compete clause. BMR's evidence did not establish that the defendant's business was 'substantially or confusingly similar'. Held: Injunction refused.</td>
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<td><strong>Allegra of North America Inc. v. Stevens,</strong></td>
<td>Signage</td>
<td>Non-compete: 2 years within 9 miles of any franchise location. Cannot operate a</td>
<td>Post-term</td>
<td>No</td>
<td>Final</td>
<td>The restrictive covenant, which prohibited involvement in 'similar' businesses, was not void for uncertainty. The court canvassed the case law relating to interpretation of 'similar' and used a contextual analysis to determine what</td>
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</table>
signs store or similar business, including service and installation.

similar' meant in this agreement. The plaintiff did not provide enough evidence to prove the franchisees new business was sufficiently similar to the franchisor's business. Therefore, the defendants had not breached the restrictive covenant. Gill J. noted that if clause prevented the franchisee from engaging in the sign business in any capacity it could not be reasonable. Held: Action allowed in part, but the court did not find a violation of the restrictive covenant.

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<tr>
<th>Franchisee</th>
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<th>Duration</th>
<th>Term</th>
<th>Interim</th>
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<tbody>
<tr>
<td>Nova Scotia</td>
<td>Health products store</td>
<td>Non-compete: In-term: Prohibition on having an interest in a business similar to the franchise throughout the duration of the agreement</td>
<td>In-term</td>
<td>Yes</td>
<td>Interim</td>
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Application by franchisor for interim injunction preventing shareholder of franchise from acquiring shares of competing company. Schedule F of the Franchise Renewal Agreement contained an attempt to personally bind the shareholders, officers and directors of the franchise to the non-compete clause contained in the agreement. How-
ever, Sch. F was not executed by any of the shareholders, officers or directors. In light of MEDiChair's 'failure to have [the parties] execute Sch. F' Goodfellow J. held that it would not be just or convenient to enjoin them without a trial. Despite this conclusion, His Honour went on to note that the franchisor had also failed to establish irreparable harm and balance of convenience. Held: Injunction refused.

New Brunswick

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<tr>
<th>Saint Cinnamon Bakery Ltd. v. Cimat Recycle Inc./ Recycle Cimat Inc., 2006 NBQB 420</th>
<th>Restaurant</th>
<th>Non-compete: Post-term: 2-year prohibition on having an interest in any business 'competitive with or similar to' the franchise within 2 miles of the former franchise location.</th>
<th>Post-term</th>
<th>Yes</th>
<th>Interim</th>
</tr>
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<tr>
<td>Franchisor claimed that the franchisee breached the franchise agreement by opening a competing business (<em>Resto Chez Mat</em>) on the premises. Franchisee consented to an injunction restraining them from competing in the protected area defined in the franchise agreement. Franchisor bought a motion to extend the injunction to the franchisee's father and former employees who were working at the <em>Resto Chez Mat</em>. La Vigne J. noted that the non-compete clause did not prevent previous employees or other entities (e.g. the franchisee's father) from working at a similar business, even a similar business in the same location as the former franchise. As such, there was no serious issue to be tried that the third parties were in breach of the non-compete clauses. Despite this conclusion, La Vigne J. went on to note that the franchisor had not established irreparable harm or balance of convenience. Held: Application dismissed; injunction not extended to third parties.</td>
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