

COURT FILE NOS.: 03-CV-253039-CM2  
03-CV-252778-CM3  
DATE: 20040109

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** BEHZAD AHMED AND SHAHZAD KHAN - *Applicants*

- and -

3 FOR 1 PIZZA & WINGS (CANADA) INC.,  
TRIPLE HOLDINGS LIMITED AND 1571817  
ONTARIO INC. - *Respondents*

**COUNSEL:** Ben Hanuka  
*for the Applicants*

John Chidley-Hill  
*for the Respondents*

**MOTION  
HEARD:** January 6, 2004

**BEFORE:** Ground J.

**ENDORSEMENT**

[1] It is clear that the business operated by the Applicants, Ahmed and Khan ("A and K") at the Brampton premises, pursuant to a Management Agreement dated as of May 13, 2003 between 1571817 Ontario Inc. ("157") and A and K (the "Agreement"), was a "3 for 1 Pizza & Wings" business operation.

[2] The Agreement required A and K to pay a security deposit which ended up being in the amount of \$30,000 and granted to A and K the right to carry on the business at the location for a one-year term renewable at their option for three consecutive terms. The Agreement required A and K to use the distinctive labels, designs, trademarks, products and advertising material pertaining to such business and to operate the business in accordance with terms set out in Schedule A to the Agreement which related to product approval, quality standards, business hours, appearance and training of employees and other matters normally found in franchise agreements.

[3] It is acknowledged that the trademarks used in connection with the business are owned by 3 for 1 Pizza & Wings (Canada) Inc. ("3 for 1") and were licensed to 157 pursuant to a number of franchise agreements entered into between 3 for 1 and 157 relating to various premises including the Brampton premises.

[4] The definition of franchise in section 1 of the *Arthur Wishart Act (Franchise Disclosure)* S.O. 2000 Ch. 3 as amended (the "Act") is as follows:

"Franchise

"franchise" means a right to engage in a business where the franchisee is required by contract or otherwise to make a payment or continuing payments, whether direct or indirect, or a commitment to make such payment or payments, to the franchisor, or the franchisor's associate, in the course of operating the business or as a condition of acquiring the franchise or commencing operations and,

- (a) in which,
  - (i) the franchisor grants the franchisee the right to sell, offer for sale or distribute goods or services that are substantially associated with the franchisor's, or the franchisor's associate's, trade-mark, service mark, trade name, logo or advertising or other commercial symbol, and
  - (ii) the franchisor or the franchisor's associate exercises significant control over, or offers significant assistance in, the franchisee's method of operation, including building design and furnishings, locations, business organization, marketing techniques or training, or
- (b) in which,
  - (i) the franchisor, or the franchisor's associate, grants the franchisee the representational or distribution rights, whether or not a trade-mark, service mark, trade name, logo or advertising or other commercial symbol is involved, to sell, offer for sale or distribute goods or services supplied by the franchisor or a supplier designated by the franchisor, and
  - (ii) the franchisor, or the franchisor's associate, or a third person designated by the franchisor, provides location assistance, including securing retail outlets or accounts for the goods or services to be sold, offered for sale or distributed or securing locations or sites for vending machines, display racks or other product sales displays used by the franchisee; ("franchise")"

- [5] The definition of "Franchise Agreement" in the Act is as follows:

**"Franchise Agreement"**

"franchise agreement" means any agreement that relates to a franchise between, (a) a franchisor or franchisor's associate, and (b) a franchisee".

- [6] "Franchisor" is defined in the Act as:

"franchisor" means one or more persons who grant or offer to grant a franchise and includes a subfranchisor with regard to that subfranchisor's relationship with a subfranchisee".

[7] The evidence before the court establishes that, pursuant to the Agreement, A and K were required to make a payment or continuing payments to 157 for the right to carry on the business at the Brampton premises, that the products offered for sale at the premises were products that were substantially associated with the trademarks owned by 3 for 1 and licensed to 157 and that 157 exercises significant control over the method of operation of the business. The Agreement would, therefore, appear to qualify as a franchise agreement as an agreement relating to a franchise.

[8] Counsel for the Respondents submits, however, that the Agreement does not qualify as a franchise agreement for purposes of the Act in that the relationship established by the Agreement is not a franchise by virtue of the fact that the trademarks used in the operation of the business are not owned by 157 or by an associate of 157. I do not accept the submission of counsel for the Respondents. When one looks at the purpose and intent of the Act, it is clearly to afford protection to persons contemplating an investment in a franchise operation and to provide disclosure of material facts with respect to such operation to the proposed franchisee. The Act by defining franchisor to include a subfranchisor specifically contemplates that there will be subfranchises granted by a franchisee, as subfranchisor, to a subfranchisee as is common in the franchise industry. To carry out the intent and purpose of the Act and to grant protection to subfranchisees investing in a franchise operation, the definition of "franchise" in the Act must be given a contextual interpretation. Accordingly, the reference to the "franchisor's, or the franchisor's associates' trademark" must be interpreted, in the context of an agreement between a subfranchisor and a subfranchisee, to mean the subfranchisor's interest in trademarks licensed to it as in virtually all cases the trademarks are owned by the top franchisor. To interpret the definition as submitted by counsel for the Respondents would result in the Act providing no protection whatsoever by way of disclosure to prospective subfranchisees intending to enter into a franchise operation. Accordingly, in my view, the relationship established between 157 and the Applicants was a franchise and the Agreement does constitute a "franchise agreement" for purposes of the Act.

[9] It is conceded that no disclosure document was provided by 157 to A and K as required by section 5 of the Act and that A and K have provided a Notice of Rescission pursuant to section 6 of the Act within the time period set out in such section.

- 4 -

[10] Accordingly, an order will issue that the Agreement has been rescinded and that 157 pay to A and K the \$30,000 security deposit paid by them and the sum of \$9,693.31 being the losses incurred by A and K in operating the store, all pursuant to subsection 6 (6) of the Act.

[11] The Agreement having been found to be rescinded, the claims made by 157 in Action No. 03-CV-252778CM3 for damages for breach of contract do not raise any genuine issue for trial and an order will issue dismissing all claims in the Statement of Claim in such action.

[12] Counsel may make brief written submissions to me, on or before January 31, 2004, as to the costs of the application and the action, including the costs of this proceeding and of the proceeding before Justice Wright on December 12, 2003.



Ground J.

**Released:** January 9, 2004

THE HONOURABLE  
MR. JUSTICE JOHN D. GROUND  
SUPERIOR COURT OF JUSTICE

OSGOODE HALL  
130 QUEEN STREET WEST  
TORONTO, ONTARIO M5H 2N5  
Tel. (416) 327-5000  
Fax (416) 327-6209



L'HONORABLE  
JUGE JOHN D. GROUND  
COUR SUPÉRIEURE DE JUSTICE

OSGOODE HALL  
130, RUE QUEEN OUEST  
TORONTO (ONTARIO) M5H 2N5  
TéL. (416) 327-5000  
Télééc. (416) 327-6209

**FACSIMILE TRANSMISSION**

**TO:** Ben Hanuka  
Fax No. (416) 597-3370  
  
John Chidley-Hill  
Fax No. (416) 443-9422

**FROM:** Ground J.

**DATE:** January 12, 2004

**TOTAL NO. OF PAGES:** 5 (including cover sheet)

**RE:** Behzad Ahmed Shahzad Khan  
- and -  
3 for 1 Pizza & Wings (Canada) Inc.  
Triple Holdings Limited and 1571817  
Ontario Inc.  
Court File Nos.: 03-CV-253039-CM2  
03-CV-252778-CM3

---

**Note: Please contact Fleurette Lee at (416) 327-5230 if transmission not complete.**