Case Name:

United Steelworkers v. Tim Hortons Inc.

IN THE MATTER OF the Human Rights Code R.S.B.C. 1996, c. 210 (as amended) AND IN THE MATTER OF a complaint before the British Columbia Human Rights Tribunal

Between

United Steelworkers on behalf of workers from the Philippines currently and formerly employed through the temporary foreign worker program at 658380 B.C. Ltd. doing business as Tim Hortons in Fernie, British Columbia, Complainants, and

Tim Hortons Inc., TDL Group Corp., 658350 B.C. Ltd. doing business as Tim Hortons, Pierre Joseph Pelletier and Kristin Hovind-Pelletier, Respondents

[2015] B.C.H.R.T.D. No. 168

2015 BCHRT 168

File No. 12279

British Columbia Human Rights Tribunal

Panel: Walter Rilkoff, Member

Decision: November 5, 2015.

(79 paras.)

Appearances:

Counsel for the Complainants: Charles Gordon.

Counsel for the Respondents, Tim Hortons, Inc. and TDI Group Corp.: Gary Clarke and Kris

Noonan.

Counsel for 658350 B.C. Ltd., Pierre Joseph Pelletier and Kristin Hovind-Pelletier: JeremyWest.

REASONS FOR DECISION
APPLICATION TO DISMISS: Section 27(1)(b) and (c)

I INTRODUCTION

1 The United Steelworkers (the "USWA" or the "Union") has filed a representative complaint on behalf of a group described as "all workers from the Philippines currently and formerly employed through the temporary foreign worker program at 658380 B.C. Ltd. doing business as Tim Hortons in Fernie, B.C. (the "Complainant Group").

2 The Respondents are 658380 B.C. Ltd. ("658380"), who is the franchisee which operated the Tim Hortons in Fernie at all relevant times; Pierre Joseph Pelletier and Kristin Hovind-Pelletier (together the "Pelletiers"), a husband and wife who are the principals of 658380 B.C. Ltd. (collectively the "Franchisee Group").

3 The complaint is also brought against Tim Hortons, Inc. ("THI") and TDL Group Corp. ("TDL") (collectively the "Tim Hortons Respondents"). According to the Tim Hortons Respondents, TDL is in the business of licensing the right to operate Tim Hortons restaurants in Canada. As most Canadians will know, Tim Hortons restaurants are ubiquitous in Canada selling coffee, donuts, soup, sandwiches and other food and beverages.

4 Within the Tim Hortons Respondents, TDL is indirectly a wholly owned subsidiary of THI. TDL entered into a franchise agreement with 658380.

5 The complaint alleges that the Respondents discriminated against the Complainant Group in their employment contrary to s. 13 of the *Human Rights Code* because of the Complainants' race, colour, ancestry and place of origin.

6 Specifically, the Complainant Group alleges that its members were denied overtime premiums, given less desirable shifts and threatened with being returned to the Philippines, while this was not the case with workers who were not foreigners.

7 The Franchisee Group says that the USWA does not have the authority to represent the members of the Complainant Group. They deny that they have discriminated against the Complainant Group as alleged and say that they allowed banking of overtime and assisted members of the Complainant Group with immigration and other issues.

8 The Tim Hortons Respondents, for their part, deny that they employed any of the members of the Complainant Group. Rather, they say that TDL entered into a licensing agreement with 658380 to operate a Tim Hortons restaurant, but that 658380 operated as an independent contractor with regard to the employment of the Complainant Group and others.

9 More particularly, the Tim Hortons Respondents say that, while they had authority to determine certain aspects of 658380's business, such as prices, menus and branding, they were not party to any employment contracts with any members of the Complainant Group, had no control over any terms of employment and had no ability to influence the employment relationship between members of the Complainant Group and 658380.

10 I note that a complaint was also brought that six of the members of the Complainant Group had been required to rent accommodation from the Pelletiers. That complaint was dismissed as being out of time in *United Steelworkers obo others v. Tim Hortons and others*, 2014 BCHRT 152.

II APPLICATION TO DISMISS

11 The Tim Hortons Respondents have brought an application to dismiss the complaint against them, pursuant to s. 27(1)(b) and (c) of the *Human Rights Code*.

12 The relevant parts of s. 27 (1) state:

> (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply: ...
>
> (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
>
> (c) there is no reasonable prospect that the complaint will succeed; ...

13 The Franchisee Group did not participate in this application.

14 I address the application under each of the s. 27 subsections in turn. In doing so, I make no findings of fact on the merits of the complaint. While I have read and considered the complaint, response and application to dismiss, the response and reply, I only refer to those submissions necessary to my decision.

III SECTION 27(1)(b)

15 In an application pursuant to s. 27(1)(b), the Tribunal only considers the complaint as filed, without regard to any response or alternative explanation offered by the respondents. The focus is

solely on the allegations contained in the complaint and proceeds on the basis of whether a contravention of the *Code* could be established if the facts alleged in the complaint can be proven. (*Bailey v. B.C.(Ministry of Attorney General) (No. 2)*, 2006 BCHRT 168, para. 12).

16 The facts alleged must be able to establish, either directly or by reasonable inference, a *prima facie* case of a violation of the *Code.* As the Supreme Court has reaffirmed in *Moore v. British Columbia (Education)*, 2012 SCC 61, to establish a *prima facie* case, the complainants must demonstrate that they are members of a protected group, that they suffered an adverse impact and that the protected characteristic was a factor in the adverse treatment. What is unstated in this equation is that the respondent must have had some responsibility for the adverse treatment.

17 The threshold for alleging a *prima facie* case is low: *Lebovich v. Home Depot and others*, 2011 BCHRT 83.

18 The Complainant Group says that the Tim Hortons Respondents, pursuant to their franchise agreement with the Franchisee Group, have broad powers to determine many aspects of the business.

19 Specifically, the Tim Hortons Respondents assisted the Franchisee Group with access to the Temporary Foreign Worker program and were able to monitor the performance and activities of the Franchisee Group. This included carrying out audits and reviews of the employment practises of a franchisee, including compliance with employment standards and workers compensation legislation. The Complainants further assert that the Tim Hortons Group has "an internal grievance or investigation process whereby employees of a franchisee can bring a complaint or concern to the attention of the Franchisor".

20 In its submission, the Tim Hortons Respondents ignore these allegations and focus only on the actions of the Franchisee Group. They do not address the allegations that effectively allege that the Tim Hortons Respondents had the ability to interfere with and influence the employment relationship of the Franchisee Group and its employees, but failed to do so.

21 The *Code* does not require that the Tim Hortons Respondents employ the Complainants or have actively engaged in discriminatory conduct in order to be found to have violated s. 13 of the *Code. (See Chartaigh v. Blenz The Canadian Coffee Company Ltd.*, 2012 BCHRT 264). It may be sufficient if a respondent has the ability to interfere with and influence the employment relationship of the Franchisee Group with its employees and fails to do so.

22 In my view, the allegations contained in the complaint, if proven, could lead to a finding that the Tim Hortons Respondents controlled the employment relationship between 658380 and its employees or at least had the ability to interfere with and influence the employment relationship between the Complainant Group and 658380. These allegations, together with the manner in which the Tim Hortons Group exercised or did not exercise that ability, could result in a finding that the Tim Hortons Group violated section 13 of the *Code.* I discuss the requirements for a finding of

discrimination below in considering the application pursuant to s. 27(1)(c).

23 In their reply, the Tim Hortons Respondents argue that it is unfair and contrary to the rules of natural justice to proceed where there are no specific allegations against them. I reject this argument. In my view, it is abundantly clear on reading the Complaint, even if not expressly stated, that what is being alleged against them is that they had the ability to interfere with and influence the allegedly discriminatory conduct of the Franchisee Group and failed to do so, thereby violating the *Code.*

24 The Tim Hortons Respondents' application to dismiss the complaint against them pursuant to s. 27(1)(b) is denied.

IV SECTION 27(1)(c)

25 The role of the Tribunal in an application pursuant to s. 27(1)(c) is a discretionary gate-keeping one whereby it must determine whether the complaint has no reasonable prospect of success. In doing so, the Tribunal is not required to make findings of fact; rather the Tribunal assesses the evidence as a whole and applies its expertise to determine whether a hearing is warranted.

26 The threshold that a complainant must meet is low: a complainant need only show that the evidence presented takes the claim out of the realm of conjecture or speculation. (See *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49, at paragraph 27).

27 In an application to dismiss pursuant to s. 27(1)(c), the burden is not on a complainant to establish a *prima facie* case; rather it is on the respondent to show that the complainant has no reasonable prospect of success: *Stonehouse v. Elk Valley Coal (No. 2),* 2007 BCHRT 305.

28 Nevertheless, in assessing the materials which have been filed, the Tribunal will consider the likelihood that a complainant will be able to establish a *prima facie* case at a hearing. As set out above, the requirements of a *prima facie* case of discrimination were affirmed by the Supreme Court of Canada in *Moore*.

29 If a *prima facie* case is established, the burden would then shift to the respondents to justify the conduct or practice. If the discriminatory conduct is proven and cannot be justified, discrimination contrary to the *Code* will be found to have occurred. See: *Bell v. Dr. Sherk and others*, 2003 BCHRT 63.

30 The Tribunal can only make a decision based on the information which it has before it. It is the responsibility of the parties to advance the information which they believe is necessary to enable the Tribunal to make a decision under s. 27(1)(c).

Background

31 THI is a publicly-traded federally-incorporated company. TDL is a Nova Scotia company extra-provincially registered in Alberta and engaged in the business of developing, opening and licensing the rights to operate Tim Hortons restaurants. TDL is said to be an "indirectly but wholly owned subsidiary of the Respondent THI".

32 Neither the Complainant Group nor the Tim Hortons Respondents spell out any further role played by THI. However, the Tim Hortons Respondents in their Response or application to dismiss did not differentiate between the role of THI and TDL in relation to the franchisee, referring to them together as the Tim Hortons Respondents. Accordingly, I do not consider any distinction between them in this application.

33 In support of their application to dismiss pursuant to s. 27(1)(c), the Tim Hortons Respondents rely on the agreement entered into between TDL and 658380 (the "Franchise Agreement").

34 The Franchise Agreement, as presented, is between TDL, called the licensor, 658380, called the licensee, and the Pelletiers, called the Indemnifiers.

35 I note that 1277661 Alberta Ltd. (the "Alberta company") is also a party to the Franchise Agreement. It appears that it operated another Tim Hortons restaurant in Alberta and that its principals were also the Pelletiers. This application concerns only the British Columbia restaurant.

36 In the Franchise Agreement, TDL grants a license to 658380 to operate a Tim Hortons restaurant in Fernie. B.C. and, in connection with that restaurant, to use the Tim Hortons Trademarks and the "Tim Hortons System", which, among other things, includes "the Licensor's Confidential Operating Manual" (the "Manual").

37 Pursuant to the terms of the Franchise Agreement, TDL is obligated to provide the licensee with a training program, to maintain an ongoing consulting relationship and to provide periodic inspections to maintain "high and uniform standards of quality, cleanliness and appearance."

38 The Franchise Agreement stipulates that TDL is obligated to provide 658380 with the Manual, which is said to contain the "standards, specifications, procedures and techniques of the 'TIM HORTONS SYSTEM'". 658380, as the licensee, is required to operate the Tim Hortons restaurant in "conformity with such uniform methods, standards and specifications" as TDL may from time-to-time specify in the Manual. Clause 7.03(c) of the Franchise Agreement specifies that the provisions of the Manual "constitute provisions of this Agreement as if fully set out herein".

39 Notwithstanding that the Manual is clearly relevant since, by the terms of the Franchise Agreement, the Manual is part and parcel of Franchise Agreement submitted by the Tim Hortons Respondents, and notwithstanding that the Complainant Group says that they have asked for it to be produced, it has not been produced or submitted on this application. It is not possible to say what elements of the operation of a Tim Hortons restaurant, if any, are controlled by TDL. Suffice it to say that the onus is on the Tim Hortons Respondents in this application to persuade the Tribunal

that there is no reasonable prospect of success; its failure to produce the Manual weighs heavily against exercising my discretion to find that there is no reasonable prospect that this complaint will succeed.

40 The Franchise Agreement also allows TDL to inspect the premises and requires the licensee to co-operate in any inspection. Perhaps most potently, TDL, either itself or through its agents or representatives, may audit the reports, financial statements and tax returns that 658380 must submit to TDL as well as:

> Its books and records, including without limitation thereof, all bookkeeping and accounting records, invoices, **payroll records, time cards, human resources records**, **cheque stubs, cancelled cheques**, bank deposits, bank statements, receipts, income tax and Sales Tax records and returns, inventory records, personal Income Tax returns of the Indemnifiers [the Pelletiers] as may be requested by the Licensor [TDL], and any other books and records of the Licensee [658380] that the Licensor deems necessary to conduct such audit. (emphasis added)

41 TDL exercised its authority to conduct an audit and did so with regard to how employees of 658380 were being paid.

42 Apparently TDL carried out an audit of the financial and human resource records of 658380 (and the Alberta company) in 2012. It provided an audit report to 658380 in December 2012. Because concerns had been raised about 658380's temporary foreign worker practices, the audit was extended to cover all or most of 2013 and a further audit apparently was performed in October 2013. The report for that audit was delivered to the Franchisee Group in December 2014.

43 That report found, in part, that 658380 had failed to comply with the requirements of the work permits for the Temporary Foreign Worker Program, had failed to pay overtime in accordance with the *Employment Standards Act*, and had failed to comply with TDL's Temporary Foreign Worker recruitment policy.

44 The Audit Report formally notified 658380 that it was in default and required that, among other things, it pay all overtime in accordance with the *Employment Standards Act* back to 2011; that it make all required payroll deductions and remittances; that it enter into the Temporary Foreign Worker Program Monitoring Initiative administered by Human Resources and Skills Development Canada; that it provide TDL with all correspondence it received from any government agency associated with the Monitoring Initiative; that it make periodic reports to TDL relating to the status of Temporary Foreign Workers; and that 658380's payroll and employment records be audited for the six-month period commencing October 1, 2013.

45 At the end of February 2014, the Franchisee Group's lawyer appears to have provided TDL with a spreadsheet prepared by 658380's external accountant, enumerating the unpaid overtime

owing to its employees for the years 2011 to 2013 as being approximately $65,000. His letter and the spreadsheet have not been submitted.

46 TDL's response on March 18, 2014 was to say that it was astounded by the magnitude of the unpaid amounts, saying that size of the unpaid amounts suggested that this was not "an isolated incident or innocent ignorance of the provisions of employment standards and/or other applicable legislation."

47 TDL demanded further information and stated that it "was gravely concerned" with the information provided "and the potential it has to *adversely affect the Tim Hortons brand*." (italics in original)

48 TDL advised that it reserved all of its rights under the Franchise Agreements, further agreements with TDL and its rights at law or in equity.

49 On April 3, 2014, TDL gave notice of immediate termination of the Franchise Agreements and of the leases and exercised its right to purchase furniture, fixtures, equipment and signs owned by 658780. In that letter, after reiterating that, in its view, this was not an innocent breach, TDL stated:

> Furthermore, when viewed in light of your history of issues related to your overtime practices and your failure to remedy those issues despite being notified of them on several occasions, TDL cannot but take the position that there is a pattern of systemically avoiding the requirement to pay overtime to your employees. Your actions have the potential to significantly and adversely affect the Tim Hortons brand in your market, in your province and across the entire Tim Hortons system, and have already caused such harm. As you have identified, the process of repaying this overtime, even if you were given the opportunity to do so, would further serve to damage the Tim Hortons brand especially because the complainants under the *ESA* and the Human Rights complaint are among those to whom you owe significant amounts of money. TDL cannot and will not allow damage to the Tim Hortons brand and system to continue.

50 This action was taken some three and one-half months after the present human rights complaint was filed.

51 The Tim Hortons Respondents' application to dismiss is almost perfunctory in its approach. It says that the Tim Hortons Respondents did not employ the members of the Complainant Group nor did they have any control over, nor any involvement with, the employment relationship between the franchisee and its employees.

52 The Tim Hortons Respondents note that the franchisee is responsible for hiring and training its employees, establishing their terms and conditions of employment, paying WCB premiums and

complying with all local labour laws and the *Code.*

53 With regard to Temporary Foreign Workers, while the Tim Hortons Respondents will assist in an application to hire temporary foreign workers, the decision of whether to hire such employees or their terms or conditions of employment is up to the franchisee, who is not obligated to keep the Tim Hortons Respondents informed. The argument seems to be that, in general, and specifically in this case, TDL as the franchisor was not responsible for the employment practices of a franchisee and therefore could not be liable for any discriminatory behaviour of that franchisee.

54 The Complainant Group responds that the Tim Hortons Respondents do not have to be an employer; rather, they could be found liable under the *Code* if they exercised sufficient control over the operations of the franchisee to influence the franchisee's response, and were indifferent to the allegations. They rely on the decision of this Tribunal in *Ch rthaigh* where the Tribunal succinctly stated: "There is no universal conclusion that a franchisor is not a proper respondent to a complaint under the *Code* against its franchisee. (at para. 14).

55 The Complainant Group further notes that, in Ontario, the Human Rights Tribunal has held on numerous occasions that the question of whether a franchisor is liable for the discriminatory conduct of a franchisee is best determined on the facts after an evidentiary hearing, citing *Cheeseman v. McKnight Foods, Inc.*, 2014 HRT0 950; *Gonder v. Serco Canada Inc.*, 2014 HRTO 651; *Lindsey v. McDonald's Restaurants of Canada Ltd.*, 2014 HRTO 372; *Philip v. Giant Tiger Stores,* 2009 HRTO 1227 ("*Philip*").

56 The Complainant Group notes that, in *Atkinson v. Three Degrees Restaurant,* 2010 HRTO 821 ("*Atkinson"),* the Ontario Human Rights Tribunal refused to dismiss a complaint naming TDL as franchisor at a preliminary stage following the approach in *Philip* (at para. 3):

> It may be that the franchise agreement or [the franchisor's] exercise of its obligations under that agreement was a factor in any discrimination experienced by the applicant or that the franchisor is in some other way legally responsible for any discrimination experienced by the applicant. The question of the franchisor's liability should be determined following evidence and argument at the hearing.

57 In their reply, the Tim Hortons Respondents say the Complainant Group says that the liability of the franchisor for the actions of the franchisee is automatic. That is not my reading of the submission of the Complainant Group. I understand their submission to be that, on the facts of this case, the Tim Hortons Group, as franchisors, attracted liability. That would be a conclusion that could be open to the Tribunal to make.

58 The Tim Hortons Respondents then go on to suggest that the Complainant Group's allegations in response to the application to dismiss are impermissible amendments to the complaint.

59 I disagree. The Complainant Group's Response provides additional details of the power both exercisable and exercised by the franchisor over the franchisee, mostly arising from the document disclosure by the Tim Hortons Respondents.

60 The Complainant Group's response to the application to dismiss does not provide the "moving target" eschewed by the Tribunal in *Pausch v. School District No. 34 and others,* 2008 BCHRT 154 (at para. 28). Rather, in my view, the response fleshes out the allegations that are made in the original complaint that the Tim Hortons Respondents have sufficient control over the franchisee to attract liability. To treat the Complainant Groups' response as creating a moving target would be unduly technical and far from keeping with the purposes of the *Code* or fairness.

Discussion and Decision

61 First, as noted earlier, the failure by the applicant Tim Hortons Respondents to provide a relevant document that has been requested without any reason, in an application where it bears the burden of persuading me to exercise my discretion to dismiss the complaint, inclines me to the opposite conclusion: to decline to exercise my discretion to dismiss as I would be doing so on incomplete evidence in circumstances that would be unfair to the Complainant Group. If there was concern about the confidential and proprietary nature of the document, there are ways that such a concern could have been addressed.

62 However, even if that were not the case, considering all of the material submitted, I am not convinced that there is no reasonable likelihood the complaint will succeed.

63 I start with several propositions that are clear. First, and to reiterate, despite what the law may be in other jurisdictions, discrimination under s. 13 of the *Code* is not limited to employers or persons who attract vicarious liability.

64 The Tim Hortons Respondents rely on decisions of the Ontario Divisional Court in *Toshi Enterprises Ltd. v. Coffee Time Donuts Inc.,* 2008 Carswell Ontario 7954 and of the Queen's Bench of Saskatchewan in *Youngblut and others v. Jim and Jaklen Holdings Ltd.,* 2002 SKQB 463.

65 One should approach decisions in this area from other jurisdictions with some caution because of the different wording of their statutes and the emphasis in those jurisdictions on establishing an employment or employment-like relationship.

66 In British Columbia, the *Code* prohibition in s. 13 is of a person, not an "employer". The test, as noted in *Ch rthaigh*, is whether the franchisor exercises sufficient control over the franchisee to influence its behaviour and unreasonably failed to exercise that control in circumstances where the *Code* was being violated.

67 Second, the question of the liability of a franchisor for the conduct of its franchisee will typically be fact-based. In that respect, I agree with the approach in *Ch rthaigh* and *Philip* that a

determination of whether a franchisor exercises sufficient control over the actions of a franchisee to attract liability is typically best left to an evidentiary hearing on the merits.

68 The test that a complainant must meet to implicate a franchisor in a human rights complaint is not entirely developed. There are cases which suggest or even find that control must be such as to find that the franchisor is in fact the employer. This is the approach taken by the Tribunal in *Maycock v. Canadian Tire Corp.*, 2004 BCHRT 33 following a decision of the Saskatchewan Court of Queen's Bench in *Youngblut v. Jim and Jaklen Holding Ltd.*, 2002 SKQB 463.

69 *Maycock* was followed in *Boyetchko v. Home Hardware Stores Ltd.*, 2004 BCHRT421 where the Tribunal said (at para. 5):

> A franchisor may be a proper respondent to a human rights complaint arising out of its franchisee's employment relationships or services: *Maycock* v. *Canadian Tire Corporation Limited and another*, 2004 BCHRT 33. A franchisor may be liable if it exercises such a degree of control over the acts or omissions alleged in the complaint that it can be said that the franchisor is itself providing a service or employing the employees in question: *Maycock* at para. 46.

70 In *Maycock*, however, the Tribunal began with but then arguably ignored the directive of the Supreme Court of Canada in *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 where the Court addressed the issue of liability of an employer for the unauthorized discriminatory acts of its employees. The Court noted that liability in a human rights context should not be determined on the basis of principles brought from other areas but with regard to the remedial purposes of such legislation.

In finding that the educational and remedial aspects of human rights legislation would be stultified if a remedy could not be provided against an employer for the discriminatory actions of its employees, the Court stated:

> It is unnecessary to attach any label to this type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take remedial effective action to remove undesirable conditions. (para. 17)

71 More recently, in *Ch rthaigh* the Tribunal said (at para. 20):

> I am satisfied that if Blenz has sufficient control over the operations of the franchise location where the alleged harassment incidents occurred to influence the response of the franchisee to Ms. Ch rthaigh's allegations, and they were as indifferent to the allegations as alleged, they could be found in violation of the *Code.*

72 The principal underlying *Ch rthaigh* appears more in line with decisions of the Tribunal in other situations, not involving franchisees. In *Vetro v. Greater Vancouver Transportation Authority*, 2005 BCHRT 383, a Handy Dart driver employed by a co-operative under contract with a transit authority alleged discrimination and named both the transit authority and the co-operative which directly employed him. The complaint against the transit authority alleged that, once it had positive notice of the circumstances of the employer's termination of Mr. Vetro and its retaliatory acts, it had an obligation under the *Code* to ensure that the service which was being conducted for it, in its name, with its money, and to fulfill its statutory duty, was not done in a manner which contravenes the *Code*.

73 The Tribunal denied the application to dismiss stating (at para. 13):

> In this context, the issue of whether TransLink was Mr. Vetro's employer is not determinative of the issue. Section 13(1) does not require that "a person" be "an employer" in order for its provisions to apply. The section provides that "a person" must not discriminate "regarding" employment. Several decisions by the Tribunal have contemplated a contravention of s. 13(1) in situations where there was no direct employment relationship between the complainant and the respondent, but where the respondent has the ability to interfere with or influence the employment relationship: see, for example, *Middlemiss v. Norske Canada Ltd.*, 2002 BCHRT 5; and *Pettie v. Canada Safeway Limited and Gavin (No. 2)*, 2004 BCHRT 440.

74 The Tribunal noted that human rights law was not static and that a determination of whether the transit authority had any liability in the circumstances would require not only consideration of the contractual arrangement but the actual practices that were at issue. To similar effect was the decision of the Tribunal in *Hunter v. British Columbia (Ministry of Health)*, 2005 BCHRT 408. The parties did not fully argue the law on this application and I make no final determination about the legal analysis that may apply in this context.

75 In my view, regardless of whether the standard for finding a franchisor liable for the discriminatory acts of its franchisee is as set out in *Maycock* and *Boyetchko* or the approach in *Ch rthaigh* and in *Vetro*, I am unconvinced that there is no reasonable prospect that this complaint will succeed. In this case, in addition to the provisions of the Franchise Agreement, the actual conduct of the Tim Hortons Respondents could demonstrate the requisite control over the employment relationship between the Franchisee Group and the Complainant Group. This includes, among other things, carrying out extended and seemingly extensive audits of 658780, appearing to require substantial remediation and seemingly cancelling the Franchise Agreements and leases when 658780 failed to remedy its apparent violation of local employment standards legislation, particularly with regard to the temporary foreign workers. I have also considered that the Tim Hortons Respondents did not produce the "Confidential Operating Manual" when it is clearly relevant and is deemed to be part of the Franchise Agreement, suggesting that provisions in the

manual may go to the degree of control by the Tim Hortons Respondents of the franchisee.

76 As well, the Tim Hortons Respondents played a role in the franchisee's participation in the Temporary Foreign Worker program and appeared to mandate a Tim Hortons-wide harassment policy.

77 I cannot say, and it is not my role at this stage to determine, that the agreement and the actual manner of the relationship between the Tim Hortons Respondents and the Franchisee Group is sufficient to attach liability to the Tim Hortons Respondents for the alleged misconduct of the franchisee and its principals. What I can and do say at this preliminary stage is that, based on the materials before me (and also because not all of the relevant materials were placed before me), I am not prepared to exercise my discretion to dismiss the complaint without a hearing. I am not persuaded that there is no reasonable prospect that the complaint will succeed.

78 The Tim Hortons Respondents' application to dismiss the Complainant Group's complaint pursuant to s. 27(1)(c) is denied.

79 As both applications have been denied, the complaint will now be set for hearing. I expect that all parties will address, in full, not only the evidence, but the application of the *Code* to the relationship between franchisors and franchisees.

Walter Rilkoff, Tribunal Member

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