

Franchising - Canada

Scope of abusive or unreasonable non-compete covenant cannot be reduced

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In the recent case of *9169-3556 Québec Inc v Gestion René Simoneau Ltée*, the franchisor, a fertilizer manufacturer, instituted injunctive proceedings against several of its former franchisees, requesting compliance with non-compete covenants contained in their franchise agreements with the franchisor. Given the similar fact patterns of each of the proceedings, the Superior Court of Quebec relied on the facts of one of the proceedings against the defendant franchisee, Gestion René Simoneau, for the purposes of rendering its decision.

Facts

Following a series of changes in the corporate structure and operations of the franchise network, the relationship between the franchisor and its franchisees began to deteriorate, resulting in the decision of over a dozen franchisees not to renew their franchise agreements with the franchisor.

The franchisor instituted proceedings against seven of these franchisees, requesting compliance with the non-compete covenants contained in their franchise agreements or alternatively, an award for damages. The franchisees essentially argued that the franchise agreements were contracts of adhesion pursuant to the Civil Code of Quebec, and that the non-compete covenants contained therein were abusive and therefore null and void. In the event that the Superior Court sided with the franchisees, the franchisor requested that the court apply a provision contained in the franchise agreements that would allow it to reduce the scope of the non-compete covenants and uphold their validity.

Decision

The court reviewed each of the franchise agreements, indicating that in addition to being almost identical, the agreements were lengthy, contained legal jargon and did not appear to have been the subject of any negotiation by the franchisees. In fact, the franchisees all testified that they signed the franchise agreements without attempting either to modify or to negotiate any of the terms and conditions.

The court concluded that the franchise agreements were contracts of adhesion pursuant to the Civil Code of Quebec and described them as *sui generis* agreements that lay somewhere between a sale of a business agreement and an employment agreement, particularly as concerned the analysis of the validity of the non-compete covenants. As such, the scope of the non-compete covenants contained in the franchise agreements could be wider than those contained in employment agreements, but narrower than those contained in sale of business agreements.

In reviewing the non-compete covenants contained in the franchise agreements, the court concluded that given the particular context, they were unreasonable and abusive. The franchisees all operated a seasonal business consisting of lawn and garden conservation and maintenance. Thus, the 18-month term would prohibit the franchisees and their employees from working for two seasons. Moreover, the radius in the non-compete unreasonably exceeded the protected territory. Finally, the scope of the prohibited activities was also too large and encompassed activities that were unrelated to the franchisor's business, preventing certain franchisees from operating other seasonal businesses such as snow removal.

In addition, the court indicated that Quebec jurisprudence is divided as regards the validity of the provision that allows the court to intervene and reduce the scope of non-compete covenants. While one current of case law supports the view that a court may

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intervene and reduce the scope of a non-compete covenant if such is the intention of the parties, a second current is of the view that a court cannot intervene and reduce or redraft a non-compete covenant. Under the circumstances, the court chose to follow this second current, indicating that such covenants are either entirely legal or not, without the possibility of any rewriting by the courts. Therefore, the court refused to intervene and reduce the scope of the non-compete covenants.

Moreover, the court rejected the franchisor's claim over the franchisees' client lists. Evidence at trial indicated that the wording of the franchise agreement was ambiguous as regards ownership of the client lists and in at least one other case, the client lists had been purchased by the franchisor.

Finally, it appeared that the franchisor had unilaterally modified the franchise agreements and requested that the franchisees execute a new franchise agreement within several days of the deadline to resiliate their existing franchise agreement. Thus, the franchisees were caught in a position where they could either accept the new unilaterally modified agreement imposed on them by the franchisor or resiliate their existing franchise agreement. The court described such conduct by the franchisor as unacceptable and abusive, and thus declared that the franchisees were no longer bound by their franchise agreements.

The decision is currently under appeal.

Comment

This case once again stresses the importance for franchisors to ensure that non-compete covenants contained in their franchise agreements are appropriately crafted so as to avoid being declared null and void. Moreover, it highlights the importance of fair dealings in franchise relationships.

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