

Franchising - Canada

Encroachment concerns: *Réal Martineau v Canadian Tire*

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Introduction

The Quebec Court of Appeal decision in *Réal Martineau v Canadian Tire Corporation Ltd* is the subject of significant discussion among the Quebec franchising community. This is because courts in Quebec have rather consistently viewed and treated franchise and dealership contracts as contracts of adhesion, whose terms and conditions are not typically negotiated. This perception has traditionally led courts to rewrite clauses of such agreements that are deemed to be abusive, incomprehensible or illegible so as to compensate for the perceived inequality of bargaining power and equity between franchisors and suppliers and their respective franchisees and dealers. However, *Réal Martineau* has bucked this trend and surprised many in the Quebec franchising community. The Quebec Court of Appeal did not, as many had expected, intervene to protect the dealer from a seemingly abusive clause which permitted the supplier to build new stores in the same geographic area as the store operated by the dealer.⁽¹⁾

Réal Martineau operated four Canadian Tire stores (an automotive, hardware, garden and sporting goods retail chain with 487 locations throughout Canada) for over 40 years. Martineau brought an action in damages against the Canadian Tire Corporation Ltd. Martineau sought damages on the grounds that the opening of two new Canadian Tire stores near one of his own stores (the new stores were seven to nine kilometres from Martineau's store) was in breach of his dealer agreement with the company and caused a reduction in his store's sales. This action was dismissed by the Quebec Superior Court.

Martineau appealed to the Quebec Court of Appeal. On December 1 2011 the appeal court dismissed the action, while providing instructive guidance on these types of encroachment claim in franchise, distribution and licence networks.

First instance proceedings

Martineau argued that the company had committed fraud by concealment when the parties were negotiating the extension of the term of Martineau's dealer agreement in October 1999 by failing to inform him of its intention to open two new Canadian Tire stores near his Canadian Tire store. Martineau claimed that had he known that the company intended to open these two new stores, he would not have agreed to extend the term of his dealer agreement and would have instead retired. According to Martineau, the opening of the new stores reduced his store's sales by 12% as compared to the forecasts prepared by the company.

Martineau further asserted that the company had not consulted him before authorising the opening of the two new stores, which was a clear contravention of its commitment to protect the goodwill of its dealers. Martineau based this argument on a provision of the dealer agreement which stated, among other things, that the company would not operate, or allow another to operate, a Canadian Tire store which could have a considerably negative impact on sales of an existing store. The provision further stated that the company could nevertheless allow a new store to open in the same area as an existing store if it had sufficient reasons to believe, after consultation with the existing store's dealer and after producing a market report, that the market in that area merited the establishment of another store. Martineau argued that in addition to not having been consulted, he was not provided with the market report.

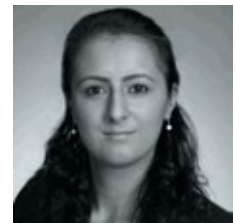
The dealer agreement included a policy which stated that should the dealer suffer

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important losses due the opening of a new store, the company would provide financial assistance. However, the policy provided that the dealer must absorb the first 5% of reduction in his or her store's annual sales for two years, irrespective of whether he or she consented to the opening of the new store, before being entitled to benefit from the policy. Furthermore, pursuant to the policy, the company had no obligation to provide financial assistance to a dealer that consented to operate a store after having been informed of the future opening of another store in the same area. Martineau argued that he was not bound by the restrictions of the policy, as it was a contract of adhesion whose conditions were imposed on him without negotiation and should be deemed abusive and therefore inapplicable.

The Quebec Superior Court held that Martineau's version of events lacked credibility and found that when Martineau had consented to the extension of the term of his dealer agreement in October 1999, he knew full well that a new store would be established, as this information had been relayed to him by a representative of the company. In November 1999, after he had extended the term of his dealer agreement, Martineau was informed of the opening of the second new store. The court found that the company had not hidden its plans to develop further in the area of Martineau's store and therefore rejected Martineau's argument that his consent to the extension of his dealer agreement was vitiated by fraud by concealment.

Appellate proceedings

On appeal, Martineau argued that:

- he had not benefited from a just and equitable trial;
- the judge had erred in finding that the dealer agreement and policy were not contracts of adhesion; and
- the Quebec Superior Court's decision that Martineau's consent to extend the term of his dealer agreement was freely given and informed constituted a reviewable error. Martineau argued that the policy was external to the dealer agreement, and that he had been unaware of the existence of the policy and its terms when he extended the term of his dealer agreement.

Decision

The appeal court held that the dealer agreement and policy were freely negotiated and constituted contracts by mutual agreement, irrespective of the fact that they had not been negotiated between the company and Martineau directly. The form of the dealer agreement and policy was heavily negotiated by the Canadian Tire Dealer's Association on behalf of its members. The appeal court based this finding on the testimony of both the company's legal counsel, who participated in the negotiations, and the director general of the Canadian Tire Dealer's Association, who declared that the documents were finalised after "pretty intensive negotiations".

The appeal court agreed with the superior court's determination that Martineau had known about the location of one of the two new stores before the extension of the term of his dealer agreement. The appeal court held that while the superior court judge should have found that Martineau was unaware of the opening of the second store until after he had extended the term of his dealer agreement, this error was not such that it would require intervention by the appeal court. The appeal court also found that Martineau's store's sales were such that it was reasonable for the company to find that the opening of the second new store would not considerably diminish his store's sales.

The appeal court further held that while the company was required to act in good faith and provide Martineau with financial information and reports relating to the commercial sector in the context of the opening of the second new location, Martineau himself had an obligation to inquire, which he did not discharge. The appeal court based this finding on the fact that Martineau was by no means a novice, but rather had been a dealer of the company for over 40 years and operated four Canadian Tire stores. Martineau received two sets of projections for his store from the company; he reviewed the first, but failed to review the second, which revised the first projections downward. The appeal court opined that Martineau should have conducted his own due diligence and prepared his own projections, as opposed to simply relying on what the company provided him – especially given that the statements did not constitute a guarantee or promise on the part of the company.

The appeal court further found that Martineau was not entitled to benefit from the policy, given that the impact on his store's sales from the opening of the second new store consisted of a decrease of less than the 5% threshold set out in the policy. The appeal court viewed this threshold as reasonable and therefore refused to nullify the policy.

Finally, the appeal court held that Martineau's behaviour from the time that he became aware of the opening of the second new store to the time of his first complaint about the opening consisted of an implied waiver and tacit renunciation of any rights and recourses he may have had. The appeal court based its finding on the fact that

Martineau did not allege a breach or otherwise complain until three years after becoming aware of the opening of the second new store. Based on the evidence, the appeal court found that during those three years, Martineau never indicated any opposition to the opening of the second new store and never claimed any breach of his rights under his dealer agreement or the policy.

Comment

This case is noteworthy in that the negotiation by the Canadian Tire Dealer's Association of the forms of the standard dealer agreement and policy on behalf of its members precluded their characterisation as contracts of adhesion, despite the fact that their essential terms were not in fact negotiated by each individual dealer and would otherwise have seemed to an individual dealer to be non-negotiable.

It would seem that a franchise, dealership or distribution agreement cannot be declared a contract of adhesion simply because it was not directly negotiated by each franchisee, dealer or distributor. This is an interesting development; but one must be mindful that the Canadian Tire Dealer's Association is a large dealer's association that is quite organised and active, and its board of directors is made up of 17 individuals, two of whom are also members of the board of directors of Canadian Tire Corporation Ltd. As such, it remains to be seen whether this decision could benefit a franchisor or supplier by insulating it from a finding that its franchisee, dealer or distribution agreement is a contract of adhesion in circumstances where an association that negotiated the agreement is smaller and less powerful than the one in this case.

For further information on this topic please contact [Bruno Floriani](#) or [Kiran Singh](#) at [Lapointe Rosenstein Marchand Melançon LLP](#) by telephone (+1 514 925 6300), fax (+1 514 925 9001) or email (bruno.floriani@lrmm.com or kiran.singh@lrmm.com).

Endnotes

(1) The issue of encroachment by franchisors has been analysed by Quebec courts in the past, most notably in the Quebec Court of Appeal's seminal decision in *Provigo Distribution Inc v Supermarché ARG Inc*, in which the court held that the franchisor had acted in bad faith by competing unfairly with its franchisee without providing the tools and assistance that the franchisee would require to counter the competition.

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