Franchising - Canada

Are provisional injunctions still available for competition by former franchisees?

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Introduction

The vast majority of franchise agreements contain a non-compete clause whereby the franchisee's conduct at the termination or expiration of the franchise agreement is restricted in some manner. Such clauses are meant to ensure that the franchisee does not use the resources and know-how provided by the franchisor during the course of the franchise agreement in order to compete unfairly with the franchisor and its franchisees.

In *Groupe Sportscene Inc v 2639-6564 Quebec Inc*, a recent judgment of the Quebec Superior Court, the franchisor of sports bar-type restaurants operating under the banner 'Cage aux Sports' filed a motion for a provisional injunction to prevent its former franchisee from operating another restaurant from the same premises where it had previously operated a franchised Cage aux Sports restaurant pursuant to its franchise agreement, on the basis that the franchisee was violating its non-compete and de-identification obligations.

Facts

The term of the franchise agreement for the franchisee's Cage aux Sports restaurant expired on September 2 2012. While the parties had been in discussions to renew the franchise agreement, in April 2012 the franchisee advised the franchisor of its intention not to renew.

In July 2012 the franchisor was informed that its former franchisee intended to operate a new restaurant under a new name from the same premises where it had previously operated its Cage aux Sports restaurant. The franchisor reminded its former franchisee, on numerous occasions, of its obligations pursuant to the non-compete provision and its obligation to de-identify the restaurant in order to strip all similarity to the Cage aux Sports system.

The non-compete provision stipulated that the franchisee could not, without the prior written consent of the franchisor, for a period of two years after the termination or expiration of the franchise agreement, operate, participate in, advise, lend money to, guarantee the debts or obligations of or permit its name to be used for any business operating one or more restaurants offering a speciality of steak, chicken and/or ribs and/or offering entertainment or decor relating to sports and located in a radius of five kilometres from the premises in which the franchisee had operated its Cage aux Sports restaurant.

The franchisor also advised its former franchisee on many occasions that it had concerns with regard to the concept, look, location and menu of the franchisee's new restaurant. Nevertheless, the new restaurant opened for business in December 2012. On January 8 2013 the franchisor filed its motion for a provisional injunction. The franchisor argued that the exterior of the premises, televisions, ceiling, lights, blinds, menu and presentation of the dishes were very similar to those of the Cage aux Sports system, causing confusion in the minds of customers and resulting in an unlawful diversion of customers of the Cage aux Sports system.

Decision

Courts in Quebec rarely provide written judgments in respect of a motion for a provisional injunction. It is therefore noteworthy that the judge in this instance took the

trouble and time to issue a written judgment. Moreover, the judge remarked that it will be interesting to follow this case in order to determine the outcome on the merits at trial.

In order to obtain a provisional injunction in Quebec, it must be proved that three conditions have been met:

- There is a real and immediate urgency.
- There is a serious and irreparable prejudice or the likelihood of something occurring which the judgment at trial could not rectify.
- In the words of the Supreme Court, there is a "colour of right" (ie, it appears that the applicant may be entitled to a provisional injunction (a *prima facie* case)).

The Quebec Superior Court held that there was no real and immediate urgency, as the new restaurant had been open for business for over a month when the provisional injunction motion was filed and the franchisor had known for months that its former franchisee was planning to establish and operate the restaurant at that location. The court focused on the facts that the franchisor had:

- known about the restaurant project for many months before filing its motion;
- repeatedly followed up with its former franchisee in order to obtain details regarding the project; and
- visited the restaurant premises and taken photographs in November 2012.

Perhaps most significantly (and ominously for franchisors generally), the court also attached importance to the fact that there was no other Cage aux Sports restaurant in the franchised network in the same town as the new restaurant. The court held that this, coupled with the fact that the franchisor was unable to show a concrete plan for a new Cage aux Sports restaurant in the same town, undermined the franchisor's assertion of urgency.

The judge found that the concept embodied by the new restaurant appeared to be different from that of the Cage aux Sports system and targeted a different customer base; therefore, issuing an injunction would cause a prejudice to that customer base and to the former franchisee, who had invested a considerable amount of its resources into the new restaurant. As a result, the franchisor was unable to establish that the case met the second criteria for the granting of a provisional injunction.

Finally, the court held that, at first glance, the new restaurant did not seem similar enough to the Cage aux Sports franchised restaurants to create confusion between the two systems. The judge stated that at this stage of the proceedings, the court should not be evaluating the enforceability of the non-compete clause; however, *prima facie* there did not seem to be unfair competition. As a result of this determination, the franchisor failed to meet the third criteria of the test.

Comment

While the franchisor's motion for a provisional injunction was refused, this case will go to trial on the merits. The court's analysis of the non-compete provision and the obligation to de-identify will be of great interest in the Canadian franchising community. As a result of the unusual step taken by the court in providing written reasons for a provisional injunction, franchisors in Quebec which are faced with similar situations may well wonder whether attempting to obtain a provisional injunction against their former franchisees is a quixotic pursuit. However, in the final analysis, this decision may have little weight in the long term if the trial judge evaluating this situation on its merits concludes that the franchisee has not breached its no-compete covenants by reason of the dissimilarities between the new restaurant and the formerly franchised restaurant. In the interim, there are several takeaways from this case, especially concerning the requirement for urgency when seeking a provisional injunction:

- It is somewhat astonishing that in the final analysis, the delays resulting from the franchisor's conduct which, superficially at least, seemed cautious and respectful of the expired franchisee's rights, weighed against the availability of a provisional injunction.
- Also surprisingly, the absence of other franchised or corporate-owned outlets of the franchised network in the general vicinity of the former franchisee's location seemed to have weighed heavily in the judge's analysis, at least as concerned the alleged urgency of the matter.
- It is noteworthy that the court did not dwell on the similarities between the two restaurant systems in concept and appearance, but rather focused on the fact that the franchisor was well informed of the franchisee's intentions and failed to take immediate action.

The inescapable conclusion is that franchisors simply cannot wait very for long before filing a motion for provisional injunction in order to enforce a non-compete covenant

against their former franchisee. More than ever, it is advisable to strike while the iron is hot in order to meet the urgency requirement for provisional injunctions in Quebec.

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