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Sweet Success: Supreme Court of Canada Denies Dairy Queen Franchisee's Leave Application

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The Supreme Court of Canada has dismissed a former Dairy Queen franchisees' application for leave to appeal a decision affirming the franchisor's enforcement of a Mutual Cancellation and Release Agreement. The successful franchisor in this case was represented by the Cassels Brock franchise litigation team.

Factual Background

The saga arises out of a franchisee's lengthy history of failing to meet its obligations under its franchise agreement. The franchisee was noted in default when the franchisor, Dairy Queen Canada Inc. (Dairy Queen), determined that it had repeatedly failed to meet certain system standards.

Dairy Queen subsequently terminated the franchisee after it failed to remedy the defaults and the parties entered into a Mutual Cancellation and Release Agreement. The agreement suspended what would otherwise be an immediate right to termination for a 6-month period, during which time the franchisee was permitted to continue operating the franchise and market it for sale. At the conclusion of the 6-months, the agreement would automatically terminate.

When the franchisee became delinquent in remitting its monthly reports and royalties, the franchisor accelerated the termination of the Mutual Cancellation and Release Agreement. The franchisee refused to stop operating and litigation ensued.

Summary Trial and Appeal Decision

Following a three day summary trial, the Supreme Court of British Columbia granted judgment in favour of Dairy Queen for breach of contract and passing-off. The Court also dismissed the franchisee's counterclaim for over $1million in damages for breach of contract and various breaches of the *Arthur Wishart Act (Franchise Disclosure), 2000* (the Wishart Act), including breach of the duty of good faith.

In dismissing the franchisee's claim in its entirety, the Court upheld the Mutual Cancellation and Release Agreement, finding that it acted as a complete bar to the claims asserted in the counterclaim. The Court rejected the franchisee's arguments that the agreement had been signed under duress or should be disregarded on the grounds of unconscionability.

The summary trial decision was upheld on appeal. The Court of Appeal of British Columbia found no error in the trial judge's determination that the Mutual Cancellation and Release Agreement had been entered into without duress and agreed that Dairy Queen's offer to forbear enforcement in exchange for entering into the agreement was nothing more than "legitimate commercial pressure."

Denial of Franchisee’s Leave Application to the Supreme Court of Canada

In the third chapter of this saga, the franchisee sought leave to appeal on the following grounds, amongst others:

1. The Court below erred in refusing to adduce the franchisee’s fresh evidence on the authenticity of the signature on the Mutual Cancellation and Release Agreement; and
2. The Court below erred in determining the matter on a summary trial basis.

The Supreme Court of Canada refused to grant leave, with costs.

Key Take-Away Principle

With this matter now at an end, the final word is out on Mutual Cancellation and Release Agreements: they are an enforceable and efficient means of bringing franchise relationships to conclusion in a mutually beneficial manner. These agreements also can serve as a complete defence to a franchisee’s subsequent claims that the termination of the franchise agreement was improper, especially in circumstances where the agreement automatically terminates at a set date. Franchisors should consider using Mutual Cancellation and Release Agreements in order to bring acrimonious franchise relationships to a firm conclusion.

Dairy Queen was represented by Cassels lawyers Colin Pendrith, Geoff Shaw and Carly Cohen on this matter.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.