Cassels

Supreme Court of Canada Grants Leave to Appeal Quebec Court's Ruling that Franchisees Can Be Employees

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On May 18, 2018, the Supreme Court of Canada (the SCC) granted leave to appeal the judgment of the Quebec Court of Appeal (the QCCA) in *Comité paritaire de l'entretien d'édifices publics de la région de Québec c. Modern Concept d'entretien inc.*[1]

The case involves the question of whether a certain franchisee was an employee or an independent contractor for the purposes of the Act respecting collective agreement decrees (the Act). The lower court had determined that the franchisee was an independent contractor, and not entitled to the protections of the Act. A 2-1 majority of the QCCA overturned that ruling and held that the franchisee was an employee, and therefore protected by the Act.

The implication of the QCCA's ruling is that the franchise system's franchisees are entitled to receive a minimum wage for the hours worked on behalf of the franchisor, as well as to be provided with the other minimum conditions of employment required by the Act. The franchisor sought and received leave to appeal that judgment to the SCC.

While the memoranda of law filed by the parties in respect to the SCC leave application are currently subject to a sealing order, the fact that leave was granted means that a panel of three members of the SCC has been persuaded that the issues in the litigation are of national importance. Though the QCCA decision is in reference to a particular Quebec statute, and to the relationship between a particular franchisee and franchisor, the ultimate SCC decision may address larger questions pertaining to the issue of when a franchisee's relationship with its franchisor crosses the line from an independent contractor to an employee in the context of legislation governing labour and employment more generally, and thereby may have ramifications for franchisors across Canada.

Facts

The respondent franchisor is a subsidiary of GDI Services aux immeubles inc. (GDI), which performs housekeeping work for commercial clients such as hotel and retail chains. GDI is a 'professional employer' within the meaning of the Act, but the franchisor's business is specifically concerned with the management of its network of franchises. Franchisees actually carry out the work covered by the Act on behalf of GDI.

The franchise system operates on the basis of a "tripartite" contractual relationship between the franchisor,

franchisee, and client. Under this model, the franchisor enters a maintenance agreement with a client for the completion of housekeeping services. The franchisor then assigns this contract to a franchisee (with the client's consent). The franchisee is not involved in negotiating the terms of the maintenance agreement with the client whom it ultimately services. In addition, the franchisor remains bound to the agreement after it assigns it to a franchisee.

The appellant franchisee, Mr. Bourke, was party to a franchise agreement with the respondent dated January 1, 2014 (the Franchise Agreement), pursuant to which he acquired five maintenance contracts to provide housekeeping services to certain clients (the Maintenance Contracts). Over the course of January through May 2014, Mr Bourke and his wife had completed 409.7 hours in the execution of the Maintenance Contracts. By May 2014, Mr. Bourke was dissatisfied with his profitability and terminated the Franchise Agreement.

The lawsuit was brought as a result of an intervention by Committee paritaire de l'entretien d'édifices publics de la région de Québec (the Committee), who contended that the franchisee was an employee within the meeting of the Act and entitled to the minimum wages and other protections set by the *Decree respecting building service employees in the Québec region* (the Decree). The Committee claimed compensation for unpaid wages and annual leave for the period of January through May 2014.

Analysis

The QCCA's analysis focused on the distinction between "artisans" (considered an employee under the Act) and "independent contractors" (who, as the name belies, are not considered to be employees and are not subject to the protection of the Act or the Decree). While the Court de Québec had ruled that Mr. Bourque was an independent contractor, the QCCA panel held that the lower court judge had erred in failing to understand that the franchisor's assignments to the franchisee were what is described in civil law as "imperfect assignments." In other words, the transferring franchisor remained bound by the maintenance contracts. The majority concluded that as a result of the risk the franchisor assumed as part of this arrangement, it also retained significant power of control over the franchisee's execution of the maintenance contracts, remuneration in respect of the contracts, and the ability to surrender them. Accordingly, Mr. Bourque was an artisan and subject to the protections of the Act.

The dissenting judge agreed that the Franchise Agreement was an imperfect assignment, but was of the opinion that the imperfect nature of the transfer did not transform a business contract into a work contract. The dissenting judge viewed Mr. Bourque as having assumed risks in order to obtain compensation that would benefit both he and the franchisor, and as being free to arrange his work in a manner that suited him, in the manner of an independent contractor.

It is important to note that in coming to their decision, the QCCA majority specifically noted the franchise system was not representative of a typical franchise model. Indeed, many of the provisions of the Franchise

Agreement were far from typical. For example:

- the Franchise Agreement granted the franchisor "virtually unlimited power" to oppose transfers of maintenance contracts by a franchisee to a third party;
- the franchisee was not permitted to solicit or sign new maintenance agreements without the franchisor's consent, and was prevented from capitalizing on new opportunities with existing clients due to the language of the non-competition clause;
- the imperfect assignment of the Maintenance Contracts allowed the franchisor to exercise "sustained control over the activities of his franchisee, a control that goes beyond what is ordinarily in a franchise agreement where the franchisor is not, as here, directly responsible *vis-à-vis* the customer for breach of contract by the franchisee";[2]
- the franchisee received remuneration from the franchisor via direct deposit, and not from the clients he was servicing. In addition, the franchisor deducted amounts related to debts owed by the franchisee from these deposits as a penalty for complaints received regarding the franchisee's services. The Court found that the franchisor's payments functioned like payments of a net salary;
- the franchisor supervised the execution of work by the franchisee, including by requiring it to complete work sheets allowing the franchisor to monitor the work done. In addition, the franchisor maintained access to the work sites;
- The franchisee had very little direct interaction with the clients, and instead, the franchisor negotiated and liaised with the franchisee's clients directly; and
- the franchisor remained liable to the clients and retained a significant involvement in the relationship between the franchisee and the ultimate client, which highlighted the imperfect nature of the assignment of the Maintenance Contracts.

Key Takeaways

Coupled with the recent decision of the Ontario Labour Relations Board in *Canada Bread Company Limited*,[3] this decision is a warning sign to any franchisors who operate franchise systems with tight operational controls. These systems may expose them to liability under labour and employment legislation.

While the GDI system is not a typical franchise system, franchisors who (a) organize customer accounts on the part of their franchisees, (b) remain liable to those customers even as their franchisees provide their services, (c) receive payments directly from customers and deposit amounts to their franchisees directly, or (d) otherwise shoulder significant amounts of risk on their franchisees' behalf, should be mindful that they could attract liability under labour and employment statutes. The primary consideration is the degree of control exerted by the franchisor over the franchisee's business and the degree of risk assumed by them. Franchisors seeking to defend similar allegations should ensure that they can demonstrate that their franchisees have the flexibility to exert control over their own businesses and have assumed risk in respect of their business initiatives.

The SCC will hopefully provide clarity on this area of the law, and this upcoming decision will be the first time in many years that the SCC will have addressed issues relating to franchising.

Cassels will continue to monitor developments in this case.

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[1] 2017 QCCA 1237. Full decision is available in French here.

[2] Note: all quotes are based on a translated version of the original French judgment, and may contain minor grammatical or other errors as a result.

[3] 2017 Canlii 62172 (OLRB). A copy of our analysis of this decision and its impact on franchising can be found here.
