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No More Room at the Counsel Table: Québec Appeal Court Rejects Intervenor Status for Canadian Franchise Association in the Dunkin’ Donuts Case

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In a decision released on May 10, 2013, Justice Gascon of the Québec Court of Appeal dismissed the Canadian Franchise Association’s (CFA’s) motion for leave to intervene in ongoing proceedings between Dunkin’ Brands Canada Ltd. (Dunkin’ Donuts) and 21 of its plaintiff franchisees in Québec. The decision in Dunkin’ Brands Canada Ltd. c. Bertico inc. is particularly notable in that the Court drew a distinction between public and private disputes in determining the standing of parties wishing to intervene. It is also of particular interest to Canadian franchisors because it was the first time that the CFA sought leave as a third-party intervenor to a private franchising dispute.

Background

The plaintiffs brought a group action against Dunkin’ Donuts in Québec claiming that Dunkin’ Donuts repeatedly failed to fulfill contractual obligations owed to its franchisees to “protect and enhance” the Dunkin’ Donuts brand in that province.

Following a 71-day trial, Justice Tingley of the Québec Superior Court released a landmark decision in June 2012, awarding the plaintiff franchisees $16.4 million in damages. The judgment made waves in both the Canadian and the U.S. franchising industries owing to comments made by Justice Tingley in his reasons regarding “implicit obligations” flowing “from the general nature of franchise agreements,” including an implied obligation incumbent on all franchisors “to protect, improve and enhance the brand” and an “underlying assumption of all franchise agreements [to the effect] that the brand will support a viable commerce.” For a more comprehensive review of Justice Tingley’s decision, please refer to Osler’s analysis in the June 2012 Update.

Dunkin’ Donuts appealed Justice Tingley’s decision in July 2012 and filed its appellate factum in January 2013. The plaintiff franchisees’ responding appellate factum is expected to be filed in May 2013. The CFA brought this motion for leave to intervene requesting to file a factum under the appeal and, if authorized by the Court, to make oral representations at the hearing itself.
Motion for Leave to Intervene Dismissed

The CFA brought this motion under Article 211 of the Code of Civil Procedure (CCP), which allows a third party in Québec to seek leave to intervene if the court, in its discretion, deems such intervention “expedient, having regard to the questions at issue.” The CFA based its request for leave to intervene on the potential impact and importance of the “implicit obligations” (referred to by Justice Tingley in his trial decision) on the entire Canadian franchising industry. The CFA specifically expressed its desire to assist the Québec Court of Appeal with a thorough understanding of the potential consequences that might flow from any such implied obligations. Particularly, the CFA informed the Court that such implied obligations might “dramatically modify the nature of the obligations of both franchisors and franchisees, ... encroach on the privity of contract ... sought by both parties, ... and threaten franchising’s substantial contribution to the Canadian economy.”

While acknowledging that Article 211 of the CCP affords wide judicial discretion on a motion for leave to intervene, Justice Gascon explained that a determination under the article still necessitated an assessment of the advantages and disadvantages of intervention. Further, Justice Gascon noted that there is a distinction under this assessment between matters of public law (fundamental rights or Charter issues) and matters that are purely private in nature. He added that when a third party seeks leave to intervene in a purely private dispute, the intervening party cannot merely seek to express views or repeat positions similar to those that would be voiced by a party to the proceeding in any event. Justice Gascon held that to allow intervention in such a case would create an unnecessary, disproportional imbalance between parties whose rights are already being considered, addressed and advocated for by their own counsel.

Comparing the CFA’s leave for intervention motion materials with the Dunkin’ Donuts appellate factum, Justice Gascon found that the issues that the CFA wished to address on appeal did not materially differ from arguments that would be made by the franchisor itself. Rather, Justice Gascon concluded that the CFA’s position on the issues at stake on the appeal merely mirrored Dunkin’ Donuts’ arguments and appeared to favour the franchisor’s position, which would create a disproportional imbalance between the private parties to the proceeding. For this reason, Justice Gascon held that the CFA’s intervention would not assist or enlighten the Court in ways not already covered by both parties to the appeal. The CFA was unable to convince Justice Gascon that its perspective was sufficiently novel to the issues in dispute, and its motion for leave to intervene was dismissed.

Conclusion

Justice Gascon’s decision highlights the distinction between public and private disputes with regard to the exercise of judicial discretion under Article 211 CCP. When dealing with a private dispute, an intervenor will need to establish and address how its participation goes beyond argument or issues already addressed by the parties to the proceeding. Even in the context of a decision of great importance to an industry, in which private as opposed to public interests are at play, industry expertise will be insufficient on its own to justify the intervention sought.

Additionally, it is important to note the appellate level timing of the CFA’s motion for leave to intervene. Justice Gascon specifically mentioned the fact that the CFA chose not to involve itself in lower court proceedings, moving instead for leave to intervene in the proceedings after nearly 10 years and a lengthy trial process had passed. Therefore, future interventions of the CFA may gain more traction when raised prior to a lengthy canvass of the issues in dispute.
The Canadian Franchise Association, a not-for-profit national trade association. Further information on the CFA can be found on their website: www.cfa.ca.

2 2013 QCCA 867.

3 Dunkin’ Brands Canada Ltd. c. Bertico inc., 2012 QCCS 2809

4 Similar motions to obtain leave for third-party intervention can be brought in each Canadian province, pursuant to the provincial rules of civil procedure governing each jurisdiction. For example, Rule 13 of the Ontario Rules of Civil Procedure governs the requirements for leave to intervene as an added party or friend of the court in Ontario, and Rule 2.10 of the Alberta Rules of Court apply to intervenor status before the court in Alberta.

5 A similar distinction can be found in Ontario case law on leave to intervene, in which it has been held that in a private dispute, the burden will be heavier on the party seeking leave to intervene than in a case in which the dispute raises public issues (see, e.g., Authorson (Litigation Guardian of) v. Canada (Attorney General) (2001), 9 C.P.C. (5th) 218).

6 Of note, the plaintiff franchisees to the proceeding opposed the CFA’s request for leave to intervene, and the defendant franchisor, Dunkin’ Donuts, did not contest it. Neither party supported the request. Further, the Court noted that Dunkin’ Donuts was a member of the CFA, but the plaintiff franchisees were not.

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