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Is a franchisee an employee?

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Authors: Éric Préfontaine, François Laurin-Pratte, Frédéric Plamondon

The nature of the franchise agreement is that the franchisor exercises some control over the way the franchisee operates its company. However, as the decision of the Québec Court of Appeal attests in Comité paritaire de l'entretien d'édifices publics de la région de Québec c. Modern Concept d'entretien inc., 2017 QCCA 1237, overly tight control may lead to undesirable consequences for the franchisor. The Court of Appeal confirmed with a majority that such tight control may, in certain cases, lead to the qualification of the franchisee as an employee within the meaning of the *Act respecting collective agreement decrees* (the Act) and, consequently, to the franchisee's obligation to provide the minimum conditions of employment decreed pursuant to the Act.

Background

The respondent-franchisor, Modern Concept d'entretien inc., runs a network of public and quasi-public building maintenance franchises. The network operates according to a "tripartite" model. The franchisor signs an initial maintenance contract with a client. The franchisor then assigns this contract to one of its franchisees, with the client's consent, so that the franchisee provides the required services according to the terms set out in the maintenance contract. The terms and cost of services are negotiated by the franchisor and the client, without intervention of the franchisee. The franchisor remains bound by the maintenance contract assigned to the franchisee.

One of the franchisees, Mr. Bourque, runs a maintenance company with his wife. He joined the network as a franchisee on January 1, 2014. On May 31, 2014, following the assignment of five maintenance contracts, Mr. Bourque, dissatisfied with the company's profitability, terminated the franchise agreement.

The dispute stems from the intervention of the Committee paritaire de l'entretien d'édifices publics de la région de Québec (the Committee). According to the Committee, the franchisee was an employee within the meaning of the Act. It was therefore entitled to the minimum wage set by the *Decree respecting building service employees in the Québec region* (the Decree). The Committee was claiming payment by the franchisor of unpaid wages and annual leave between January 2014 and May 2014.

Reasons and conclusions

The main matter in dispute was whether the franchisee was an "employee" within the meaning of the Act. One characteristic of the Act is that it includes artisans but not independent contractors in its definition of employee. Was the franchisee an artisan within the meaning of employee in the Act, or an independent contractor excluded from this definition?

The Court of Québec ruled that the franchisee was an independent contractor not subject to the Decree and dismissed the Committee`s claim. This decision was quashed by a majority in the Court of Appeal, which came to the opposite conclusion.

The majority stated at the outset that, as in the case of the independent contractor, the notion of artisan does not assume a subordinate relationship. At the heart of the debate is what distinguishes the artisan from the contractor, specifically whether the independent contractor, unlike the artisan, assumes the enterprise risk and is compensated for this risk.

In order to identify the party assuming the enterprise risk in this matter, the majority judges analyzed the assignment of maintenance contracts to the franchisee. Under perfect assignment, the assigning franchisor would be released, while under imperfect assignment the client and the franchisor would remain bound by the contract.

The majority concluded that this was a case of imperfect assignment, since the franchisor remained a party to the assigned maintenance contract. In fact, the maintenance contract specifically stated that the franchisor remained entirely liable to the client for non-performance or breach of contract. In accordance with the franchise agreement, the franchisor exercised particularly tight control and oversight over the franchisee's performance of the maintenance contract due to this liability to the client.

In this regard, the majority stipulated that the business model developed by the respondent-franchisor broke away from the traditional franchise model. The control exercised by the respondent-franchisor exceeded what was economically and legally necessary to simply ensure protection of the franchise network. In this regard, the Court noted the following:

- The franchisee did not have effective control over the management of its company.
- The franchisee was paid by direct deposit by the respondent-franchisor, rather than directly by the client, which paid the respondent-franchisor instead.
- At a certain point, the respondent-franchisor ceased compensation of the franchisee for reasons related to the quality of services rendered by the franchisee to the client.
- Prior to paying the franchisee, the respondent-franchisor collected the sums owing by the franchisee in royalty fees or other costs under the franchise agreement.
- The franchisee must periodically complete work cards so that the respondent-franchisor can monitor work completed.
- The franchisee has little contact with the client, since the maintenance contract was negotiated between the respondent-franchisor and the client without franchisee involvement.
- The maintenance contracts did not belong to the franchisees, but rather to the respondent-franchisor, which maintained effective control by preventing the franchisees in the franchise agreement from acting as they saw fit and by retaining the right to take them over.

These factors led the majority to conclude that it was the respondent-franchisor, and not the franchisee, that assumed the enterprise risk. Imperfect assignment of maintenance contracts meant the franchisor remained directly liable to the client, while the franchisee had limited autonomy. The franchisor received considerable compensation (i.e., 43% of gross sales from maintenance contracts) for assuming the enterprise risk.

Since the enterprise risk rests with the franchisor, and not the franchisee, the franchisee falls within the definition of artisan, and, consequently, within the definition of employee under

the Act. The franchisee is thus subject to the wage conditions set pursuant to the Act, and the Committee's claim is substantiated.

Comments

This decision shows that the courts have broad jurisdiction to ascertain the nature of a business relationship. It is a reminder that parties cannot enter into a franchise agreement solely to avoid enforcement of the Act. Regardless of the type of contract, the courts will refer to the resulting rights and obligations, as well as the circumstances of the business relationship, to decide the enforcement of, namely, tax, labour or employment law.

Finally, it is important to note that the notion of "employee" in the Act is not the same as in the general civil law, although the words of the Court of Appeal majority might be echoed in other matters where the courts will have to decide, for example, whether a franchisee qualifies as an employee within the meaning of the *Civil Code of Québec* or the *Act respecting labour standards.*