CURVES AND ÉNERGIE CARDIO: AN (UN)HEALTHY COMPETITION?

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On July 2, 2014 the Quebec Superior decided against the application for provisional injunction brought by a “Curves” franchisee (“Curves”) against the owner of a shopping mall and an “Énergie Cardio” franchisee (“Énergie Cardio”): *403-9971 Canada inc c Place Lasalle Property Corporation,* 2014 QCCS 3153, http://www.canlii.org/en/qc/qccs/doc/2014/2014qccs3153/2014qccs3153.html (2014-07-02) PeacocK J.

“Curves” operated a ladies’ fitness and weight loss centre in a shopping mall and launched legal proceedings hoping to prevent the opening of a “no frills”, mixed gender fitness facility by Énergie Cardio in the same shopping center. Curves claimed that the opening would violate the exclusivity clause in its lease, which read: “the landlord shall not lease or permit any other space in the Shopping Centre to be operated or used principally or in part as a ladies fitness centre". The lease also indicated that the “landlord shall have the right to lease or permit the occupation of a men's fitness centre in the Shopping Centre without contravening the “Curves” exclusivity”.

The core of the matter was whether the language of the exclusivity clause prevented the landlord from renting to women-only fitness centers or whether it also covered mixed-gender facilities, such as the one exploited by Énergie Cardio. Curves argued that the clause prevented the landlord from renting to any fitness facility that admitted women, whether exclusively or not.

Justice Mark G. Peacock starts off his analysis by pointing out the limited role of the motion judge at the stage of the provisional injunction - a temporary injunction valid for only 10 days - as well as the criteria for granting such an injunction: appearance of right, irreparable harm and balance of convenience.

According to Justice Peacock, Curves’ exclusivity clause covered fitness centers intended mainly for women but excluded those targeting men and women without distinction, as was the case for Énergie Cardio. Three factors came into play in his conclusion:

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- a change in the wording used between the original lease, with the original owner of the shopping center, and the second lease, with the second owner, in effect at the time of the proceedings;
- the context provided by the other clauses of the lease;
- and the differences in the businesses operated by the Curves and Énergie Cardio.

Firstly, the clause in the original lease, which was in effect when Curves entered into negotiations with the second owner of the shopping center, prevented the landlord from renting to a “ladies fitness center or any fitness center, which admits women”. In the second lease signed by Curves however, the words “or any fitness center, which admits women” were removed. For the Court, this revision demonstrated the parties' intention to reduce the scope of the protection to fitness centers designed exclusively for women.

Secondly, reading the exclusivity clause in context with other clauses of the lease confirmed this interpretation. A separate clause stipulated that the owner of the shopping mall was not prevented from leasing to other tenants “carrying on a business which is similar in whole or in part to the business permitted to be carried on from the leased premises”. According to the Court, this clause provided the owner of the shopping mall greater flexibility in its choice of tenants.

Thirdly, with respect to the last factor of the analysis, the different nature of the businesses operated by the Curves and Énergie Cardio, Justice Peacock noted that, unlike Curves, Énergie Cardio's "Econofitness" concept had no space dedicated exclusively to women and no support staff, and did not provide weight loss advice. Membership costs for Econofitness were also a fraction of those charged by Curves.

Although Curves acted diligently in protecting its exclusivity clause by starting legal proceedings in a timely fashion, it had failed to demonstrate an appearance of right to the injunction and irreparable harm, two elements required to succeed in its proceedings. Curves' concern that it would be priced out of business due to Énergie Cardio's significantly lower prices was, according to Justice Peacock, a mere result of “legitimate price competition in the free market where consumers are provided with a broad gamut of choices” and did not justify a larger interpretation of the exclusivity clause. Curves' application for provisional injunction was thus dismissed.

Essentially, the decision turns on one principle only: the general rule of open competition and its corollary, the narrow interpretation of clauses restricting it. Since the exclusivity clause invoked by Curves was an exception to the rule of freedom of trade, the Court interpreted it narrowly and decided that it did not apply to the case at bar.

On August 27, 2014, the Court of Appeal refused Curves' motion for leave to appeal Justice Peacock's decision, mentioning that the provisional judgment had no binding effect on the decision to be rendered at the interlocutory stage, scheduled for March

2015: *4039971 Canada inc c Place Lasalle Property Corporation,* 2014 QCCA 1585, http://www.canlii.org/fr/qc/qcca/doc/2014/2014qcca1585/2014qcca1585.html (2014-09-27) Marcotte J.

Recent decisions in France and South Africa looked at exclusivity clauses, such as the one signed by Curves, from the perspective of free competition. In Canada, could the *Competition Act* have an impact on the validity of such clauses

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