

Ontario Divisional Court overturns refusal to certify franchise class action in Quizno's case

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In a 2-1 decision released April 27, 2009, the Ontario Divisional Court allowed an appeal from the dismissal of a class certification motion and conditionally certified a class of present and former Canadian franchisees of the Quizno's quick-service restaurant chain.¹

The Plaintiffs, two of more than 400 Canadian Quizno's franchisees, alleged that they had been overcharged for food and other supplies they purchased for use in their Quizno's restaurants. They sought class certification of civil claims for damages against their Quizno's franchisors (the "Quizno's Defendants") for breach of contract and for breach of section 61 of the *Competition Act* (which, until its repeal and replacement with a civil provision on March 12, 2009, made price maintenance a criminal matter – section 36 of the *Competition Act* permits civil suits for damages incurred as a result of a violation of a criminal provision of the Act, even without a conviction), as well as a "civil conspiracy" claim against the Quizno's Defendants and Gordon Food Service Inc. and its affiliate (GFS), the primary distributor of many supplies to Canadian Quizno's restaurants.

The motions judge had dismissed the certification motion in its entirety, finding that the plaintiffs had shown neither that the existence of common issues would materially advance the litigation, nor that a class proceeding was the preferable procedure for resolving their claims.² In particular, the court below found that the plaintiffs had not established that injury from the alleged price maintenance (higher food prices) – an element of liability for the *Competition Act* and civil conspiracy claims – was a common issue for the proposed class. The motions judge found this failure to be "an avalanche that buries the proposed common issues with an absence of commonality and a proliferation of individual issues". In reaching that conclusion, the motions judge considered the plaintiffs' expert economic evidence on the issue, but found that the expert's opinion was "based on so many assumptions that it becomes speculative and unreliable" and did not provide "feasible" methodologies for establishing injury on a class-wide basis. The motions judge also found that the quality and quantity of the individual issues

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overwhelmed any common issues and stood “in the way of satisfying the preferable procedure criterion of the prerequisites for certification”.

In reversing the decision, the majority of the Divisional Court held that the court below had erred in its approach to the proposed common issues, in its consideration of the expert evidence, and in its analysis of the preferable procedure requirement. Justice Swinton wrote a forceful dissenting opinion, disagreeing with the majority on virtually all issues.

The majority held that failure to establish all elements of liability, including proof of the existence of injury, is not the end of the inquiry into commonality, and that the motions judge had “erred in principle” by focusing on the existence of harm and failing to consider and identify other potential common issues. Finding that “the conduct that could give rise to liability is systemic” and that “[e]very franchisee is subject to the same contract, pricing structure and distribution system”, the majority concluded that the alleged “breach” of section 61 of the *Competition Act* by the Quizno’s Defendants and their allegedly “unlawful agreement” with GFS raised common issues for the proposed class, whether or not proof of loss was a common issue. The majority further held that consideration of “whether one of the proposed common issues is overwhelmed or buried by the individual issues is part of the analysis for the preferable procedure criterion.”

The majority of the Divisional Court also found that the court below had erred in principle in its consideration of the expert evidence and in its conclusion that proof of loss from the impugned conduct was not shown to be a common issue. Finding that conflicting expert economic evidence had been submitted by the parties on the certification motion, the majority wrote:

It is neither necessary nor desirable to engage in a weighing of this conflicting evidence on the certification motion. The plaintiffs on a certification motion will meet the test of providing some basis in fact for the issue of determination of loss to the extent they present a proposed methodology by a qualified person whose assumptions stand up to the lay reader.

Moreover, the majority also noted that other evidence in the record provided “some basis in fact” for finding that proof of loss was a common issue for the class, based again on the “systemic” nature of claims of the Quizno’s franchisees. The majority stated that “[i]t is setting the bar too high to require that evidence be led to support the factual foundation of the proposed methodology.”

Turning to the preferable procedure requirement, the majority found that “the motions judge erred in principle by concluding his assessment with his finding that the individual issues in this case overwhelm any common issues” and by “failing to consider the objectives of the CPA.”³ The majority held that the plaintiffs’ submissions that they would not be able to pursue claims individually, and their accusations of “aggressive, divisive, harsh and retaliatory conduct” by the Quizno’s Defendants, established that the goals of access to justice and behaviour modification favoured class certification in this case. Moreover, the majority’s identification of common issues, including proof of loss, that would materially advance the claims in the litigation, led it to conclude that “a class proceeding would be an efficient and manageable process.”

Justice Swinton wrote a dissenting opinion which would have dismissed the appeal. In so doing, she noted that “with all due respect, the majority is reweighing the evidence and coming to its own findings based on the evidence. That is not the role of this Court on appeal.”

Justice Swinton found that “while there may be elements of the claims of breach of the [*Competition Act*], conspiracy and breach of contract that are common to the class members, they are not a substantial part of the litigation.” Rather, “the real work on this case is on the damages side.” Moreover, the dissent noted that the motion judge’s consideration of the reliability of the plaintiffs’ expert evidence was consistent with the

approach taken by the Court of Appeal in *Chadha v. Bayer*,⁴ and that the court below was entitled to find that the lay evidence did not provide a basis in fact to show that class-wide harm from the alleged price maintenance was capable of common proof.

With regard to preferable procedure, the dissent found that, even if there were considerations of access to justice and behaviour modification that favoured certification, the motions judge did not err in principle in refusing to certify. In Justice Swinton's words, "just because the franchisees are a vulnerable group does not mean every class action brought by them should be certified." Justice Swinton was of the view that the conclusion of the motions judge that the proposed class proceeding would be unmanageable was entitled to substantial deference. Moreover, in her opinion it was also consistent with the conclusions reached in a number of other cases in which courts have refused to certify price maintenance, price fixing and civil conspiracy claims where they were not satisfied that the existence of harm could be proven on a class-wide basis (*Chadha*; *Harmegnies c. Toyota*⁵; *Steele v. Toyota Canada Inc.*⁶; *Pro-Sys Consultants v. Infineon Technologies AG*⁷; *Price v. Panasonic Canada Inc.*⁸).

Leave to appeal to the Ontario Court of Appeal has been sought by the defendants.

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¹ 2038724 Ontario Ltd. et al. v. Quizno's Canada Restaurant Corporation, et al., Court File No. DC 149/08.

² See the March 24, 2008 issue of *The Competitor* for more detail: "Competition Act class action fails class certification test", available at www.stikeman.com. Stikeman Elliott LLP represents a group of defendants in these proceedings.

³ *Class Proceedings Act 1992*, S.O. 1992, c. 6.

⁴ (2003) O.R. (3d) 22, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 106.

⁵ [2008] J.Q. No. 1446 (Que. C.A.), leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 173.

⁶ 2008 BCSC 1063.

⁷ 2008 BCSC 575.

⁸ (2002), 22 C.P.C. (5th) 379 (Ont. S.C.J.).

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