

Competition Act class action fails certification test

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Stikeman Elliott is counsel to a group of defendants in a very recent proposed class action decision in Ontario in which certification was dismissed, adopting earlier court approaches in applying the test for certification where competition law violations are alleged. The Ontario Superior Court of Justice dismissed the motion for certification in a proposed class proceeding brought by two Ontario franchisees of the Quiznos restaurant chain against their Quiznos franchisors and Gordon Food Service, Inc. and GFS Company Inc. (GFS), the primary food distributors to the Quiznos franchise system.¹ The plaintiffs, who sought to represent a class of all Canadian Quiznos franchisees, brought claims for civil conspiracy against GFS and the Quiznos franchisors, together with claims for breach of section 61 of the *Competition Act*, R.S.C. 1985, c.19 (2nd Supp) (the Act) and breach of contract against Quiznos. Katherine Kay and Mark Walli of our firm represent GFS.

Under the franchise agreements, Quiznos appointed GFS to act as the primary distributor of a wide range of food and other supplies to the Canadian franchisees. GFS distributed these products to franchisees according to geographic region, from distribution centres located in six provinces across the country. Each GFS distribution centre sent monthly product order guides to the franchisees in its territory, and the franchisees paid GFS for the supplies they purchased from it. GFS purchased the majority of the products it distributed to franchisees from Quiznos, or from suppliers designated by Quiznos, at prices negotiated by Quiznos.

In the amended statement of claim, the plaintiffs allege that the Quiznos franchisors, GFS, and unnamed food manufacturers or suppliers entered into “price maintenance agreements” to artificially maintain the prices franchisees paid for supplies at inflated levels. The plaintiffs assert that Quiznos has engaged in unlawful price maintenance, in breach of Section 61 of the Act, by dictating the prices charged by GFS to franchisees. They also assert that, by agreeing to charge the allegedly maintained prices for supplies, GFS aided and abetted the Quiznos price maintenance and unlawfully conspired with it.

On the plaintiffs’ motion to certify their action as a class proceeding, Justice Paul Perell recognized “the collective aspiration of the class members to band together to have their day in court to obtain justice for their perceived grievances”, but found that the franchisees’ claims on the record before it in the case “are a large square peg of law and facts that cannot fit into the large round whole of procedure that is a class proceeding.”

Justice Perell held that the plaintiffs had failed to satisfy the criteria required for certification under section 5 of Ontario’s *Class Proceedings Act 1992*, S.O. 1992, c.6. In particular, the court held that the plaintiffs failed to demonstrate

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they could prove loss (*i.e.*, that they paid higher food prices) from the alleged conduct on a class-wide basis, which they had to do to establish liability as a common issue for the class on the civil conspiracy claim. Justice Perell agreed with the defendants that the expert economic evidence offered by the plaintiffs on this issue was based on a host of unfounded assumptions, which rendered the expert's opinion "speculative" and "unreliable", and his proposed common methodologies for proving harm on a class-wide basis "conceptually unsound" and "not feasible". Absent proof of harm on a class-wide basis, what remains as a proposed class proceeding results in "an avalanche that buries the proposed common issues with an absence of commonality and a proliferation of individual issues." In Justice Perell's view, the resolution of any common issues would not meaningfully advance the litigation and a class proceeding would not be the "preferable procedure" for resolving the franchisees' claims.

In previous cases, Canadian courts have accepted defendants' arguments regarding the difficulties in such a case with seeking to prove the fact of harm on a class-wide basis and have been persuaded that there remains a myriad of individual issues in such cases, even after resolution of any common issues. While the courts have been careful to say that there is no absolute rule against certifying competition law class actions, the decisions to date have made it clear that certifying such cases as class actions does not meet the goals of the class proceedings legislation. Further appellate consideration of this issue is anticipated.

¹ 2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation et. al., 2008 CarswellOnt 1156 (Ont. S.C.J.)

Recent Group Developments

White Papers Now Available!

Katherine Kay, a member of the Competition/Antitrust and Litigation Groups, will be presenting her paper "**Canadian Criminal Competition Cases: A Defence Lawyer's Lament**" at the 56th Annual ABA Antitrust Spring Meeting in Washington, DC in the "Competition, Crime and Punishment" session (March 26-28).

Shawn Neylan, a member of the Competition/Antitrust Group, will be presenting his paper "**The Treatment of State-Owned Enterprises Under Canada's Investment Review Regime**" at the Inter-Pacific Bar Association, 18th Annual Conference on "Many Borders. One World." in Los Angeles, CA (April 27 - 30).

* To obtain a copy of either paper mentioned above, please contact us at info@stikeman.com

Upcoming ABA Antitrust Law Conference



Members of the Competition/Antitrust Group will be in Washington, DC attending the **56th Annual American Bar Association's Antitrust Law Spring Meeting** on March 26-28, 2008. Come by and meet our group members at our annual cocktail reception on Wednesday, March 26 at the Willard InterContinental Hotel, 1401 Pennsylvania Ave. NW, in the Grant Suite, Second Floor at 6:00 p.m.

For more information regarding any of the articles please contact your Stikeman Elliott representative, any member of our Competition/Antitrust Group or the editor, Susan Hutton (shutton@stikeman.com).

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