COURT FILE NO.: 06-CV-311330CP
DATE: March 4, 2008

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

2038724 ONTARIO LTD. and 2036250 ONTARIO INC.

Plaintiffs

- and -

QUIZNO'S CANADA RESTAURANT CORPORATION,
QUIZ-CAN LLC, THE QUIZNO'S MASTER LLC,
GORDON FOOD SERVICE, INC. and GFS CANADA COMPANY INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

Allan D.J. Dick and David Sterns for the Plaintiffs
Geoffrey B. Shaw, Timothy Pinos, and Eunice Machado for the Defendants Quizno's Canada Restaurant Corporation, Quiz-Can LLC, The Quizno's Master LLC
Katherine L. Kay and Mark Walli for the Defendants Gordon Food Service Inc. and GFS Canada Company Inc.

HEARING DATE: February 14, 15, 19, 20, 21 and 22

REASONS FOR DECISION

PERELL, J.

Introduction and Overview

[1] A certification motion under the *Class Proceedings Act, 1992*, S.O. 1992, c.6 and a motion to stay are before the court.

[2] In the certification motion, the Plaintiffs 2038724 Ontario Ltd. (the "Windsor-Plaintiff") and 2036250 Ontario Inc. (the "Oakville-Plaintiff") move to certify this action as a class proceeding. The Defendants Quizno's Canada Restaurant Corporation

(“Quizno’s-Canada”), Quiz-Can LLC (“Quiz-Can”), The Quizno’s Master LLC (“Quizno’s Master”), Gordon Food Services Inc. (“GFS-USA”), and GFS Canada Company Inc. (“GFS-Canada”) resist certification.

[3] In the stay motion, relying on provisions in the franchise agreements, Quizno’s-Canada, Quiz-Can and Quizno’s Master (collectively, the “Quiznos Defendants”) move for a stay on two grounds; namely: (1) they submit that the Plaintiffs and the class they seek to represent have contracted out of a class proceeding; and, (2) they submit that 347 of the approximately 426 franchisees are subject to franchise agreements that contain an exclusive jurisdiction clause in favour of British Columbia. The Plaintiffs respond that the contract terms that stand in the way of their class proceeding are illegal as contrary to public policy, in particular they are contrary to their statutorily protected right of association.

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[4] I will provide the details below, but by way of overview, the Windsor Plaintiff and the Oakville Plaintiff propose to sue on behalf of all Canadian franchisees of a fast food restaurant chain known as Quiznos that sells submarine sandwiches of various sorts. The Plaintiffs sue the the Quiznos Defendants, and they sue GFS-Canada, the distributor of food for the restaurant chain and GFS-USA, its parent corporation, (collectively the “GFS Defendants”).

[5] The Plaintiffs submit that they and the other franchisees have been overcharged for the products and merchandise used in their restaurants. They submit that the overcharging comes about because of a distribution agreement and scheme between the GFS Defendants, the Quiznos Defendants, and Canada Food Distribution Company (“CFD”), a Nova Scotia corporation that is an affiliate of the other Quiznos Defendants. The Plaintiffs submit that the franchisees have been the victims of the tort of conspiracy, the effect of which was to maintain prices contrary to s. 61 of the *Competition Act,* R.S.C. 1985, c. 19 (2nd Supp.).

[6] CFD, which, in my opinion, is a necessary party to this action, is, however, not yet a party to this litigation, probably because its involvement, although suspected, was not discovered by the Plaintiffs until after their proceedings commenced on May 12, 2006.

[7] The Plaintiffs submit that the overcharging is price maintenance contrary to s. 61 of the *Competition Act,* a breach of contract, and a breach of duty of fair dealing under Ontario’s *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 and Alberta’s *Franchises Act*, S.A. 1995, c.F-17. They submit that the franchisees have all suffered damages and that the Quiznos Defendants and the GFS Defendants are liable for the tort of conspiracy. They submit that the GFS Defendants wrongfully aided and abetted the contravention of s. 61 of the *Competition Act* by the Quiznos Defendants and its affiliate CFD.

[8] All the Defendants deny any wrongdoing, and putting together all their various arguments, they submit that the Plaintiffs have not satisfied four of the five criteria set out in s. 5 (1) of the *Class Proceedings Act, 1992* for the certification of this action as a class

proceeding. They also submit that even if all the criteria for certification were satisfied, which they strenuously deny is the case, the court should exercise its gatekeeper function and not certify the action and unjustly embroil the defendants in the procedural colossus of a class proceeding. See *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 389 (Gen. Div.) at p. 391.

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[9] For the reasons that follow, it is my conclusion that the action should not be certified as a class proceeding. By way of foreshadowing, I conclude that although the Plaintiffs have defined a class, they have failed to satisfy the other elements of the test for certification. Thus, the criteria for certification have not been satisfied, and while some of the aspects of non-satisfaction could be redressed, ultimately, the Plaintiffs fall short of satisfying the criteria for certification.

[10] I reach this decision regretfully because I recognize the collective aspiration of the class members to band together to have their day in court to obtain justice for their perceived grievances, but, in my opinion, based on the evidentiary record now before the court, their claims are a large square peg of law and facts that cannot fit into the large round hole of procedure that is a class proceeding.

[11] The conclusion that the action should not be certified makes the motion for a stay moot; however, because my judgment may be appealed, I will rule on the stay motion on the assumption that I am wrong in concluding that this action should not be certified as a class proceeding.

[12] On the stay motion, on public policy grounds associated with the administration of justice, I reason that as a general principle, an agreement to contract out of class proceedings legislation should be read down so that it is just a strong factor in determining whether a class proceeding is the preferable procedure for the resolution of the common issues. This means that contracting out clauses are neither categorically enforceable nor categorically unenforceable and their enforcement will be determined in the context of a certification motion. (This is similar to the law about the effect of arbitration provisions.) Applying the general principle to the immediate case and based on the assumption (contrary to my conclusion) that a class proceeding was indeed the preferable procedure, it follows that a stay should not be granted.

[13] My reasons for these conclusions will have the following organization: (1) I discuss the general factual background; (2) I discuss the background to the stay motion; (3) I explain why I would dismiss the stay motion were it not moot; (4) I explain why I am not certifying this action as a class proceeding by discussing each of the criteria found in s. 5 (1) of the *Class Proceedings Act, 1992*, and during this discussion. I will add more factual background as necessary; and (5) I conclude with, among other things, some directions about the future steps in this proceeding as an individual action, including the addition of CFD as a party defendant, and I will invite submissions with respect to the costs of the two motions.

General Factual Background

[14] Quiznos is a franchise chain of restaurants operated in Canada, the United States, and in other parts of the world. There are about 427 franchised restaurants in Canada. The number has fluctuated during the course of these proceedings.

[15] It is proposed that the Windsor Plaintiff and the Oakville Plaintiff be the Representative Plaintiffs for a class proceeding on behalf of the franchisees.

[16] Until recently, the Windsor Plaintiff was a Quiznos franchisee in Windsor, Ontario. Mr. Edward May is the owner of the Windsor Plaintiff and two other former Quiznos franchises in Windsor. Mr. May's restaurants went out of business last year. Mr. May's experience with Quiznos restaurant goes back to 1997, when he became the first Quiznos franchisee in Ontario. From Mr. May's cross-examination evidence, it appears that the Windsor Plaintiff does not have the financial capability to pay costs if costs were awarded to the Defendants.

[17] A challenge to the Windsor Plaintiff raised by the Quiznos Defendants is that the franchise agreement relied on by the Windsor Plaintiff was never properly assigned to it by another corporation. In my opinion, since the Windsor Plaintiff operated the restaurant in Windsor and paid royalties etc. as a franchisee of the restaurant chain, this particular challenge to the Windsor Plaintiff is without merit.

[18] The Oakville Plaintiff is a Quiznos franchisee in Oakville, Ontario. Mr. Douglas Johnson is an owner of the Oakville Plaintiff and of two other Quiznos franchises in Oakville. Mr. Johnson is the president of the Denver Subs Franchise Association ("Denver Subs"), an advocacy group for the franchisees, and he has been a member of advisory groups of franchisees enlisted by the Quiznos Defendants. From Mr. May's cross-examination evidence, it appears unlikely that the Oakville Plaintiff has the financial capability to pay costs, if costs were awarded to the Defendants.

[19] In a point that is pressed by the GFS Defendants as relevant to the criterion of whether the Plaintiffs are suitable representative plaintiffs, the GFS Defendants submit that the Plaintiffs have no way to satisfy an adverse costs order that would likely be made against them if it were established that they have made unfounded allegations of criminal conduct. I will return to this point later.

[20] This action commenced on May 12, 2006, and it is proposed that the class of franchisees for the purpose of this class proceeding be defined as follows: "all persons, including firms and corporations, carrying on business in Canada under a "Quiznos" Franchise Agreement on or after May 12, 2006."

[21] The Defendant Quizno's-Canada is the Quiznos restaurant franchisor, and it is owned by the Defendant Quiz-Can, which provides it with management services. The Defendant Quizno's Master is the owner of the trademark and trade name Quiznos.

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[22] Quizno's-Canada contracts with franchisees in Canada and enters into standardized franchise agreements. Quizno's Master is named as a third party beneficiary under the franchise agreements.

[23] The franchisees are parties to standard form franchise agreements. As will be seen, there are some differences; for example, there are some different forum and choice of law clauses, but, in most respects, the contracts are identical, and the franchisees are obliged to follow uniform business practices. What they may sell to customers, how they sell it, and the maximum prices they may charge for what they sell are determined by the Quiznos Defendants. Perhaps, most importantly for the purposes of this certification motion is that the franchisees are required to purchase their goods and supplies from sources designated by the Quiznos Defendants.

[24] The Quiznos restaurant chain has had between 163 and 256 products specified for use in the preparation and sale of the franchisee's menu items. Approximately 50% of the products are based upon Quiznos' unique specifications. Franchisees are provided with specifications on how to prepare the menu items that are sold in Quiznos restaurants. The franchisees are, however, not provided with the specifications for the ingredients in individual food products.

[25] The Quiznos Defendants generate revenues from franchisees from initial franchise fees, royalties, and the supply of products. Excepting the Plaintiffs' allegations of illegalities, discussed below, obtaining revenue in these ways is typical of the fast food franchise business.

[26] In 2003, the Quiznos Defendants appointed CFD, another Quiznos corporation, as agent to negotiate contracts with suppliers and to retain a food distributor for the restaurant chain. CFD retained GFS-Canada as the food distributor to Quiznos' franchisees in Canada.

[27] The Defendant GFS-USA is an American corporation that owns GFS-Canada, a New Brunswick corporation that, along with several associated corporations, is a major food distributor to restaurants across Canada. GFS-Canada supplies a huge list of products to customers that include individual restaurants and also restaurant chains and franchisees.

[28] GFS-Canada was retained pursuant to a distribution agreement between it and CFD. The current distribution agreement is dated October 1, 2006, and a predecessor agreement has also been produced.

[29] GFS-Canada maintains an inventory of Quiznos specified products for distribution to franchisees. Under the distribution agreement and the arrangements between GFS-Canada and CFD, product for distribution to the franchisees is obtained in four ways: (1) CFD purchases the product, marks up the price, and sells it to GFS-Canada; (2) CFD contracts with a supplier to sell a product to GFS-Canada, who pays the supplier its price and a "sourcing fee" to CFD; (3) GFS-Canada sells its own brands ; and (4) GFS-Canada acquires the product from a supplier. Once the product is obtained by

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GFS-Canada, it adds its own markup and distributes the product to the franchisees with a maximum price determined by CFD. GFS-Canada is at liberty to charge lower prices than the maximum. The GFS-Canada corporations invoice the franchisees directly.

[30] The Quiznos Defendants explain or justify the sourcing fee as consideration for the services rendered including: establishing the confidential specifications, negotiating with suppliers, inventory management, establishment of the brand and goodwill and demand for the product.

[31] Quiznos divides Canada into five different regions and each region has a food distribution centre operated by GFS-Canada. The associated corporations and the GFS-Canada distribution centres are: (a) West Region – Neptune Foodservice Inc. located in Delta, British Columbia for 97 franchisees; (b) Central Region – Bridge Brand Food Service Ltd. with locations in Edmonton, Calgary and Winnipeg for 76 stores; (c) East Region – GFS Canada located in Milton, Ontario for 180 franchisees; (d) Quebec – Distal, Inc. with centres in Beauport and Boucherville for 43 franchisees; and, (e) The Maritimes – Atlantic Distributors located in Bay Roberts, which serves 5 franchisees in Newfoundland, and, M & S Food Service Inc., located in Amherst, Nova Scotia, which serves the remainder of the Maritime provinces and 13 franchisees.

[32] Under section 13.4 of the standardized franchise agreement, the franchisees are required to purchase from sources designated by Quizno's-Canada. It has designated GFS-Canada as the supply source for Canadian franchisees. Franchisees purchase their supplies directly from GFS-Canada or its related Canadian corporations, which, along with one independently owned Newfoundland corporation, operate the distribution centres across Canada.

[33] The list of products and the prices that GFS-Canada charges franchisees in each region are set out in Order Guides that are issued monthly. Most - but not all of the products - offered to Quiznos franchisees through GFS-Canada are the same from region to region, but there are somewhat different product lists because in some Order Guides some products are omitted or replaced by substitutes. Further, the price of products to franchisees may vary by region and over time. To calculate the prices of products set out in the Order Guides, GFS-Canada assembles supplier price information for each product from each supplier for each distribution center in a region and adds any sourcing fees payable to CFD and GFS-Canada's fixed mark-up fee, as contractually set out in the Distribution Agreement. CFD reviews the Order Guides before they are released to the franchisees.

[34] The volume of purchases by franchisees varies from franchisee to franchisee. Typically, a low volume franchisee orders 30 units of product per week from GFS-Canada and a high volume franchisee orders may order up to 300 units of product per week.

[35] The Quiznos Defendants permitted some products, most typically fresh vegetables such as tomatoes and lettuce, to be purchased independently by the franchisees, and there is some evidence that some franchisees, in what would appear to be a breach of the

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franchise agreement, purchased goods in a so-called grey market. However, by and large, the franchisees had no choice but to purchase the goods at the prices set out in the Buyers Guides. In the fixed prices of the Buyers Guides lies the root of the thorny bush that is the litigation now before the court.

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[36] Beginning around 2004, and perhaps earlier, the Canadian franchisees of Quiznos became concerned about the prices that they were being charged for the goods that they used and sold in their restaurants. Given that under the franchise agreements, the Quiznos Defendants specified the goods and fixed the maximum amounts that the franchisees could charge customers, the franchisees' ability to make a living obviously was directly dependent on very tight profit margins. The franchisees began to suspect and believe that they were being overcharged by the Quiznos Defendants.

[37] The Plaintiffs now believe that the overcharging came about through the "sourcing fees" and "markups" that have been added by CFD to the price of goods charged by the GFS Defendants to the franchisees. The Plaintiffs allege that there is a civil conspiracy because GFS-Canada has contractually bound itself to sell goods at prices fixed and maintained by the Quiznos Defendants, which is alleged to be contrary to s. 61 of the *Competition Act*. The Plaintiffs allege that the arrangement between CFD and GFS-Canada influences upward and discourages the reduction of the prices of supplies. The Plaintiffs allege in their factum that with the agreement of the GFS Defendants, CFD "extracted" over $12.3 million in revenue from the franchisees' purchases in 2006 and that this sum is in addition to over $1 million in rebates paid to the Quizno's-Canada by Coca-Cola and Frito-Lay. The comparable sums for other years are not yet disclosed.

[38] I pause here to say that at this point in the litigation, where the defendants have not even pleaded their defence, it has not been determined nor would it be appropriate for me to determine whether the distribution agreement or conduct pursuant to it is wrongful. Similarly, it has not been determined nor would it be appropriate for me to determine whether all or any portion of the money said to be extracted by CFD is overcharging or a legally wrongful act in any way. Whether or not the Plaintiffs' beliefs about Defendant wrongdoing are correct remains to be determined.

[39] In any event, individually and collectively by forming an independent association known as "Denver Subs" some of the franchisees sought information and action by the Quiznos Defendants and by the GFS Defendants to redress their concerns about the cost of the goods they had to purchase. In this regard, the Plaintiffs make much of correspondence from GFS-Canada that states that it could do nothing because pricing was a matter for the Quiznos Defendants to determine. For present purposes, once again, I cannot make a determination of any wrongdoing, and for present purposes all that can be said is that this correspondence heightened the franchisee's suspicion of being overcharged, but whether it is proof of wrongdoing remains to be determined.

[40] For present purposes, it is also sufficient to note that the efforts by franchisees, individually or collectively, to obtain information and a useful response to their concerns about overpricing only led to a heightened concern and considerable acrimony. The

Plaintiffs accuse the Quiznos Defendants of stonewalling, of thwarting the attempts to redress overcharging, and they accuse the Quiznos Defendants of aggressive, divisive, harsh, and retaliatory conduct to intimidate the franchisees.

[41] The Plaintiffs describe the Defendants' defence of this proceeding as strident and note that the defendants brought eleven interlocutory motions, delivered three expert reports, and cross-examined the Representative Plaintiffs and their expert for nine days. The Plaintiffs submit that a class proceeding against the Defendants is the only possible way for the franchisees to obtain justice because there is no franchisee that has the time, money, managerial resources, and fortitude to advance this case against these formidable opponents.

[42] In response, the Quiznos Defendants submit that: their conduct is lawful; the franchisees' food costs are "not out of line;" it would be against the franchisor's own self-interest to harm the franchisees; and the franchisees are somewhat hysterically seeking to blame others for their business challenges and misfortunes. For their part, the GFS Defendants submit that it would be a perversion of the purposes of the *Class Proceedings Act, 1992* for them to be joined as a party to a franchisor-franchisee class action in an attempt by the Plaintiffs to leverage the litigation risk of a class proceeding in an entirely improper manner.

[43] I pause here to say that the worth of the passion and righteous indignation of all the parties to this litigation is tied to deciding the merits of the claim and the defence, and these are not matters to be decided on a certification motion. I have, however, not ignored the evidence about what led up to the current litigation to the extent that it is relevant to the criteria of certification and to the goals of the *Class Proceedings Act, 1992.* For those purposes, I have also not ignored the "with prejudice" settlement offer made by the GFS-Defendants that was designed to get them out of the litigation by offering a new distribution arrangement. However, in my opinion, this offer was so subject to contingencies, including legal hurdles involving the Quiznos Defendants, that however generous and sincere was the GFS-Defendants' offer, it did not offer a realistic or feasible alternative to the Plaintiffs and they cannot be faulted for not taking up on it.

[44] Returning to the factual background, the Plaintiffs allege that the Distribution Agreement and the arrangements between CFD and GFS-Canada constitute price maintenance contrary to s. 61 of the *Competition Act*, R.S.C. 1985, c. C-34. Based on this allegation, the Plaintiffs assert a statutory claim for damages pursuant to s. 36(1) of the *Competition Act*.

[45] Sections 36 (1) and s. 61 of the *Competition Act* state:

> 36 (1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

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may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

61 (1) No person who is engaged in the business of producing or supplying a product, who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography, shall, directly or indirectly,

(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or

(b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

[46] In their statement of claim, the Plaintiffs plead that: (a) by paying the prices fixed by Quiznos and its co-conspirators, the Plaintiffs were deprived of the benefits of the prices that would otherwise be available; (b) the class members paid prices that were significantly above the prices they would have paid absent the conspiracy; and (c) Quiznos used threats and retaliation to prevent franchisees from obtaining lower prices or even finding out what lower prices were available in the market.

[47] The Plaintiffs also assert claims for civil conspiracy, breach of contract and breach of franchise legislation in Alberta and Ontario. They assert that the GFS Defendants have aided and abetted the contravention of s. 61 of the *Competition Act*, which is an offence under to s.21 of the *Criminal Code*, R.S.C. 1985, c. C-46. The Plaintiffs on behalf of themselves and the other franchisees claim damages of $50 million plus punitive damages.

[48] Further, the amended statement of claim asserts that Quizno's-Canada has breached contractual obligations by failing to assist franchisees in obtaining and maintaining commercially reasonable prices for the supplies; failing to ensure that the designated manufacturers, suppliers and distributors are charging fair and commercially reasonable prices to the class members; failing to remove the exclusive or sole designation of manufacturers, suppliers and distributors that charge excessive prices for supplies; and using contractual powers and the promise of exclusivity to maximize the amount of remittances paid, all without regard to the interests of, and to the prejudice of class members.

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[49] The Plaintiffs allege that ss. 9(1) (c), 10 (1) and 13 (4) of the franchise agreement have been breached by the Quiznos Defendants. Those sections state:

> 9(1)(c) – QCC shall provide…advice regarding the standards and specifications for the equipment, supplies and materials used in, and the menu items offered for sale by, the Restaurant and advice regarding the selection of suppliers for and the purchasing of such items.
>
> 10.1 – QCC shall make available the following assistance:
>
>> (a) upon the reasonable request of the franchisee, consultation by telephone regarding the continued operation and management of a restaurant and advice regarding restaurant services, product quality control, menu items and customer relations issues;
>>
>> (c) on-going updates of information and programs regarding menu items and their preparation, the Restaurant business and related Licensed Methods, including information about special or new services or products that may be developed and made available to franchisees of Quizno's Restaurants and Licensed Methods in Canada.
>
> 13(4) – Franchisee is prohibited from offering or selling any services or products from or through the Restaurant that have not been previously authorized by QCC. However, if Franchisee proposes to offer, conduct or utilize any services, products, materials, forms, items or supplies for use in connection with or sale through the Restaurant that are not approved by QCC, Franchisee shall first notify QCC in writing requesting approval. QCC may, at its sole discretion, elect to withhold such approval; however, in order to make such determination, QCC may require submission of specifications, information, or samples of such services, products, materials, forms, items or supplies. QCC will advise Franchisee within a reasonable time whether such products, supplies or services meet the specifications of QCC.

[50] The amended statement of claim pleads that Quizno's-Canada has a common law duty (in addition to its statutory duties) to exercise powers to designate suppliers and distributors in good faith and in a commercially reasonable manner. It is further pleaded that this duty prevents Quizno's-Canada from exercising such powers and discretion in a self-preferential manner over the interests of the franchisees. Moreover, the amended statement of claim alleges that Quizno's-Canada has breached s. 3 of Ontario's *Arthur Wishart Act (Franchise Disclosure)* and s. 7 of Alberta's *Franchises Act.*

[51] Neither the Quiznos Defendants nor the GFS Defendants have delivered a statement of defence in the proposed class proceeding.

[52] The Defendants did bring interlocutory motions in advance of the certification motion now before the court, including a partially successful motion for security for

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costs. Several of these motions were adjourned by Hoy, J., who was the class action judge for this action before it was assigned to me, to the hearing of the certification motion. I heard one interlocutory motion about the conduct of the certification motion and ruled on February 8, 2008 that the question of whether the Quiznos Defendants breached the duty of fair dealing under s. 3 of the *Arthur Wishart Act (Franchise Disclosure)* and s. 7 of the *Franchises Act* could not be advanced as a common issue at this certification motion without prejudice to the Plaintiffs subsequently reapplying for certification on this ground. In other words, consideration of this particular proposed common issue was deferred.

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[53] Some of the adjourned interlocutory motions concern matters I must now decide, and in the discussion below, it will be necessary for me to mention them and in some instances to determine their merits, but the above is the essential general background information for the certification motion and the stay motion. Next, I will add background details for the motion to stay, which will mention one of the outstanding interlocutory motions, and later I will add more factual details as necessary to discuss the criteria for certification.

Factual Background – Motion to Stay

[54] As already noted in the introduction, The Quiznos Defendants move for a stay on two grounds: (1) the Plaintiffs and the group they seek to represent have contracted out of a class proceeding; and, (2) 347 of the approximately 426 franchisees are subject to franchise agreements that contain an exclusive jurisdiction clause in favour of British Columbia.

[55] A motion to stay was one of the interlocutory motions adjourned by Hoy, J. in her Reasons for Decision reported *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. 2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* [2007] O.J. No. 1136 (S.C.J.), leave to appeal refused [2007] O.J. No. 2404 (Div. Ct.). As I read her judgment, she analogized the Quiznos Defendants reliance on the contracting out provision to an arbitration clause and followed the judgment of E. Macdonald, J. *Smith* v. *National Money Mart Co.*, [2005] O.J. No. 2660 (S.C.J.), appeal quashed [2005] O.J. No. 4269 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 528, which is authority that whether or not to grant a stay of proceeding because an agreement requires disputes to be arbitrated should be determined at the certification hearing as part of the determination of whether a class proceeding is the preferable procedure. I will return to this reasoning, when I discuss the merits of the motion to stay. For the moment, I will confine myself to the factual background for this motion.

[56] With respect to the first ground, the standardized franchise agreements entered into between Quizno's-Canada and the Plaintiffs and the franchisees who are members of the proposed class contain the following provisions:

> 21.2 **Waiver of Jury Trial.** QCC [Quizno's-Canada], Franchisee...each waive their right to a trial by jury. Franchisee and QCC acknowledge that the parties' waiver of jury trial rights provides the parties with the mutual

benefit of uniform interpretation of the Agreement and any dispute arising out of this Agreement or the parties' relationship created by this Agreement....

21.3 **Remedies.** ...The parties agree that any claim for lost earnings or profits by Franchisee shall be limited to a maximum amount equal to the net profits of the Restaurant for the prior year as shown on Franchisee's income tax return....

21.4 **Limitation of Claims.** ...Except with regard to Franchisee's obligations to pay Royalty payments, the Marketing and Promotion Fee and other advertising fees, and other payments due QCC....pursuant to this Agreement, any claims between the parties must be commenced within one year from the occurrence of the facts giving rise to such claim, or such claim shall be barred. The parties understand that such time limit may be shorter than otherwise allowed by law. Franchisee agrees that its sole recourse for claims arising between the parties shall be against QCC or its successors and assigns. Franchisee agrees that Franchisor, the shareholders, directors, officers, and employees and agents of QCC and Franchisor and their affiliates shall be personally liable nor named as a party in any action between QCC and Franchisee....Franchisee acknowledges and agrees however, that Franchisor is an intended third-party beneficiary of the rights accruing to QCC under this Agreement, including without limitation provisions of this Agreement related to dispute resolution... QCC and Franchisee agree that any proceeding will be conducted on an individual, not a class-wide, basis, and that a proceeding between QCC and Franchisees ... may not be consolidated with any other proceeding between and any other person or entity.

23.8 **Injunctive Relief.** Nothing herein shall prevent QCC or Franchisee from seeking injunctive relief to prevent irreparable harm, in addition to all other remedies.

[57] With respect to the second ground for a stay, of the Quiznos' franchised restaurants in Canada, 347 franchisees have agreements executed prior to April 5, 2006. These agreements contain the following provision giving exclusive jurisdiction to the British Columbia courts:

21.1 **Governing Law/Consent to Venue and Jurisdiction**. Except to the extent required by the provincial legislation in the Province in which the Franchised Location is located, this Agreement shall be interpreted under the laws of the Province of British Columbia and any dispute between the parties shall be governed by and determined in accordance with the laws of the Province of British Columbia, which laws shall prevail in the event of any conflict of law. The Franchisee and QCC have also negotiated regarding a forum in which to resolve any disputes which may arise between them and have agreed to select a forum in order to promote stability in their

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> relationship. Therefore, if a claim is asserted in any legal proceeding involving the Franchisee or any Bound Party and QCC, the parties agree that the exclusive venue for disputes between them shall be in the Courts of the Province of British Columbia located in Vancouver or New Westminster, British Columbia, and the parties each waive any objection they may have to the personal jurisdiction of or venue in such courts.

[58] With this factual background, I can now turn to the merits of Quiznos Defendants' motion to stay any class proceeding.

Discussion: The Motion for a Stay

[59] The discussion of the merits of the Quiznos Defendants motion to stay may begin with a description of the competing arguments of the parties. By way of overview, the Quiznos Defendants rely upon an argument based on the freedom to contract, and the Plaintiffs rely upon an argument based on the freedom to associate. The Quiznos Defendants rely solely on the contract provisions in the franchise agreement as justification for the stay and hence their argument sounds the call of freedom of contract. Confronted with the contracts they signed, the Plaintiffs look for a way to have the blocking provisions of their franchise agreements struck down as illegal on the grounds of public policy and hence their arguments sounds the call of freedom to associate.

[60] In support of their motion for a stay, the Quiznos Defendants submit that as a matter of freedom of contract, parties are free to limit liability and their rights one against the other. The general argument is that the law only rarely interferes with freedom of contract and the grounds for doing so are not present in the case at bar. Thus, it is submitted that the Quiznos Defendants and the franchisees were free to contract out of *Class Proceedings Act, 1992*, and there is no reason for the court not to enforce their contract. Moreover, having regard to the fact that the Act permits class members to opt out, the Quiznos Defendants submit that contracting out of the Act in advance is not inconsistent with the policies of the Act.

[61] With respect to the exclusive jurisdiction clause, the Quiznos Defendants rely on authorities that support the enforceability of such clauses. Relying on: *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450 (S.C.C.); *Crown Resources Corp. S.A. v. National Iranian Oil Co.*, 273 D.L.R. (4th) 65 (Ont. C.A.); *V. Kelner Pilatus Center Inc. v Charest*, [2007] O.J. No. 2066 (Ont. S.C.J.) at para. 29; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 and *Kanitz v Rogers Cable Inc*. [2002] O.J. No. 655 (S.C.J.), the Quiznos Defendants submit that an exclusive jurisdiction clause should be respected and enforced by the courts, unless there is "strong cause" to override the contract.

[62] The Quiznos Defendants submit their argument about the exclusive jurisdiction clause is not hindered by s. 10 of the *Arthur Wishart Act (Franchise Disclosure), 2000* which states:

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Attempt to affect jurisdiction void

10. Any provision in a franchise agreement purporting to restrict the application of the law of Ontario or to restrict jurisdiction or venue to a forum outside Ontario is void with respect to a claim otherwise enforceable under this Act in Ontario.

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[63] They submit that s. 10 is not an obstacle because it applies only to claims "otherwise enforceable under this Act in Ontario" and in the action, only the Plaintiffs' claim for breach of the fair dealing provisions of the *Author Wishart Act (Franchise Disclosure), 2000* qualifies. The Quiznos Defendants submit that this claim is not at the heart of the Plaintiffs' action, which concerns the alleged contravention of s. 61 of the *Competition Act*, and thus does not justify refusing the stay.

[64] Confronted with the contracts they signed, the Plaintiffs submit, however, that any contracting out of the *Class Proceedings Act, 1992* is illegal because it is contrary to the "right to associate" under s. 4 of Ontario's *Author Wishart Act (Franchise Disclosure), 2000.* Section 4 of this Act states:

Right to associate

4. (1) A franchisee may associate with other franchisees and may form or join an organization of franchisees.

Franchisor may not prohibit association

(2) A franchisor and a franchisor's associate shall not interfere with, prohibit or restrict, by contract or otherwise, a franchisee from forming or joining an organization of franchisees or from associating with other franchisees.

Same

(3) A franchisor and franchisor's associate shall not, directly or indirectly, penalize, attempt to penalize or threaten to penalize a franchisee for exercising any right under this section.

Provisions void

(4) Any provision in a franchise agreement or other agreement relating to a franchise which purports to interfere with, prohibit or restrict a franchisee from exercising any right under this section is void.

Right of action

(5) If a franchisor or franchisor's associate contravenes this section, the franchisee has a right of action for damages against the franchisor or franchisor's associate, as the case may be.

[65] To this assertion of illegality, the Quiznos Defendants reply that the right to associate does not include the right to sue. They rely on the Supreme Court of Canada's decision in *Pednault c. Compagnie Wal-Mart du Canada*, 2006 QCCA 666, at para. 47 for the proposition that the protection of the right to associate extends only to associating but not to the activities or the objectives of an association. Thus, once again, they submit that as a matter of freedom of contract, there is no reason not to enforce the agreement of the parties to contract out of class proceedings. In the alternative, the Quiznos Defendants submit that if the limitation of liability clause were held to be ineffective because of s. 4 of the *Wishart Act*, then that ineffectiveness would apply only to the actions of franchisees located in Ontario and this action, therefore, should be stayed with respect to all franchisees located outside of Ontario.

[66] These competing arguments of the Quiznos Defendants for the stay and against it by the Plaintiffs raise extraordinarily difficult problems about the nature of the right to associate under the franchise legislation and the scope of this right to protect activities and purposes, and in very short order these arguments move the debate into very difficult jurisprudence about the nature of the right to associate under the *Charter of Rights and Freedoms*.

[67] It is not necessary for me to move the discussion into this challenging jurisprudence, because there are, in my opinion, other compelling public policy factors that are engaged by the Quiznos Defendants' motion to have the proposed class proceeding stayed that should govern the outcome of that motion. These compelling public policy factors, which underlie the *Class Proceedings Act, 1992* itself, are access to justice, judicial economy, and the behaviour modification of civil wrongdoers.

[68] In *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 26-29, the Supreme Court of Canada identified the public policy factors engaged by class proceedings legislation. The advantages of class proceedings over a multiplicity of individual suits are threefold: (1) by aggregating similar individual actions and by avoiding unnecessary duplication in fact-finding and legal analysis, class actions make the administration of justice more efficient, reduce the costs of litigation for litigants, and thus serve judicial economy; (2) by distributing litigation costs over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims otherwise unaffordable; and (3) by improving access to justice, class actions change the behaviour of wrongdoers or potential wrongdoers because they may be deterred from wrongdoing and will be disabused of the assumption that minor but widespread harm would not result in litigation.

[69] The contract provisions of the franchise agreements in the immediate case conflict with the *Class Proceedings Act, 1992,* and this can be quickly demonstrated. Assume that all the criteria set out in s. 5 (1) of the Act were satisfied. In that case, s. 5(1) provides that the court "shall certify." The Quiznos Defendants would have it that the courts however <u>shall stay</u> because of the contractual autonomy of the parties. Thus, the public and the administration of justice would be precluded from availing itself of the judicial economies afforded by the class proceedings legislation and the public would be denied the access to justice and behavioural modification provided by class proceedings.

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[70] In my opinion, the outcome proposed by the Quiznos Defendants is none of desirable, necessary, or in the public interest. Preferable is to adopt the approach used by courts in British Columbia and Ontario with respect to requests to stay a class proceeding on the grounds that the parties have agreed to arbitrate their disputes. The approach with respect to arbitration agreements is that the existence of an agreement to arbitrate will be considered as a factor in determining whether a class proceeding is the preferable procedure. See: *MacKinnon v. National Money Mart Co.*, [2004] B.C.J. No. 1961 (C.A.); *Smith* v. *National Money Mart Co.*, [2005] O.J. No. 2660 (S.C.J.), appeal quashed [2005] O.J. No. 4269 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 528. The same approach can be applied to the situation where the request to stay a class proceeding is made on the grounds that the parties have agreed to adjudicate their disputes without resort to the class proceedings legislation.

[71] The approach of considering the enforcement of arbitration provisions can be justified as a matter of statutory interpretation in British Columbia. Except with respect to consumer contracts (*Consumer Protection Act*, 2002, S.O. 2002, c. 30, Schedule A, s. 8.) a statutory justification is not available in Ontario with respect to an agreement to contract out of class proceedings legislation, but there are at least two juridical lines of argument that support the approach that the enforceability of any contractual provision that would preclude resort to the *Class Proceedings Act, 1992* should be determined in the context of deciding whether a class proceeding is the preferable procedure for the resolution of the common issues.

[72] The first justification is that the court is already applying this approach with respect to whether to stay an action because of an exclusive jurisdiction clause. The second justification is that this approach is a manifestation of the common law principle that courts can read down an illegal contract to make it compliant with the law: *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249.

[73] As already noted above, the Quiznos Defendants rely on *Z.I. Pompey Industries v. ECU-Line N.V.*, [2003] 1 S.C.R. 450 (S.C.C.) and several other cases for authority that an exclusive jurisdiction clause in a contract should be respected and enforced by the courts, unless there is “strong cause” to override the contract. The point to note is that notwithstanding the freedom of the parties to contract as they will, this line of authority does not categorically preclude a court from overriding the parties’ contract if there is strong cause to do so. Consistency favours applying the rule for exclusive jurisdiction clauses also to contracting out clauses, and having regard to the interests of the public and of the administration of justice, judicial economy, access to justice, and behaviour modification could provide strong cause to not enforce a contracting out clause.

[74] The second line of argument requires an express or implicit finding that the contract is illegal on the grounds of public policy. Professor Waddams in his contracts law text, *The Law of Contracts* (5th ed.), discusses common law illegality, and he discusses contracts that interfere with the administration of justice. At pages 399-400 of his text, he states:

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> Contracts that interfere with the administration of justice form another group; these embrace such different cases as maintenance and champerty, an agreement to stifle a prosecution and an arrangement to oust the jurisdiction of the court in civil matters. . . . . The rule against ousting jurisdiction is not absolute and much litigation and learning has been applied to the question of agreements to settle disputes by arbitration. The present position varies from one jurisdiction to another, and must be left to specialized works on the subject. In general, courts attempt to strike a balance between the interests of the parties in quick settlement and the interest of every citizen in free access to the ordinary courts of law. Obviously, both are "public policies." The process is not one of striking down an obvious evil but of balancing of competing public interests.

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[75] Technically speaking, an agreement to preclude class proceedings but to allow individual proceedings does not oust the jurisdiction of the court but, practically speaking, it may have that same effect, because if victims of wrongdoing do not have access to justice without the procedural vehicle of a class proceeding, the court will not have an opportunity to exercise its jurisdiction.

[76] In any event, whether or not the jurisdiction of the court is ousted, a contract that precludes class proceedings interferes with the administration of justice. As already noted, such an agreement denies the administration of justice the opportunity of economies of judicial resources and it denies the public the access to justice and behavioural modification provided by class proceedings.

[77] I agree with the notions expressed by Professor Waddams in this text. An agreement to preclude class proceedings is not an obvious evil, and its enforcement should be determined by the balancing of public interests. An appropriate place to do that balancing is in the context of determining the preferable procedure.

[78] In the case at bar, for the purposes of deciding the stay motion, I have assumed that the criteria for certification were satisfied. In that context, the Quiznos Defendants, upon whose contractual rights the other defendants would coattail, offer nothing but their contractual right as justification for staying the litigation. In my view, this is insufficient to justify a stay, and I would not grant one.

[79] I wish to be clear that in refusing a stay, I am not categorically striking down agreements that contract out of the *Class Proceedings Act, 1992*. There may be instances where contracting parties may be able by contract to shape the contours of a class proceeding in whole or in part. The case at bar, however, is not one of those cases.

Discussion: The Motion for Certification – Introduction and Overview

[80] I turn now to discuss the motion to certify and several interlocutory matters.

[81] The purpose of a certification motion is to determine how the litigation is to proceed and *not* to address the merits of the plaintiff's claim, and there is to be no preliminary review of the merits of the claim: *Hollick v. Toronto (City)*, [2001] 3 S.C.R.

158 at paras. 28-9; *Morston v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338 at para. 33 (S.J.C.); *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 (S.C.J.) at para. 20, leave to appeal refused, [2007] O.J. No. 1991 (S.C.J.). On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits but whether the claims in the action can appropriately be prosecuted as a class proceeding: *Hollick v. Toronto (City),* [2001] 3 S.C.R. 158 at para. 16.

[82] Pursuant to s. 5 (1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[83] For certification, the plaintiff in a proposed class proceeding must show some basis in fact for each of the certification requirements, other than the requirement that the pleading discloses a cause of action: *Hollick v. Toronto (City),* [2001] 3 S.C.R. 158 at para. 25; *Ducharme v. Solarium de Paris Inc.*, [2007] O.J. No. 1659 (S.C.J.); *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Div. Ct.).

[84] In the case at bar, by way of overview, the Plaintiffs' major problems for certification concern the common issue requirement, the preferential procedure requirement, and certain aspects of the adequacy of the Representative Plaintiffs.

<u>*Disclosure of Cause of Action*</u>

[85] The first criterion for certification is the disclosure of a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959, which is used for Rule 21 motions, is used to determine whether the proposed class proceedings discloses a cause of action, and a claim will be satisfactory unless it has a radical defect or it is plain and obvious that it could not succeed: *Anderson v. Wilson* (1999), 44 O.R. (3rd) 673 (C.A.) at p. 679, leave to appeal to S.C.C. denied, [1999] S.C.C.A. No. 476; *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 19, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Healey v. Lakeridge Health Corp.*, [2006] O.J. No. 4277 (S.C.J.) at para. 25.

[86] The Plaintiffs submit that their pleadings disclose causes of action for claims for breach of contract, breach of fair dealing under franchise legislation, breach of s. 61 of the *Competition Act*, which grounds a claim under s. 36 of the *Competition Act*, and for civil conspiracy. Thus, they submit that they have satisfied the first criterion for certification under s. 5 (1) of the *Class Proceedings Act*.

[87] The Quiznos Defendants do not challenge that s. 5(1)(a) of the Act has been satisfied, but the GFS Defendants, who are only sued with respect to civil conspiracy,

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submit that the Plaintiffs' pleading does not satisfy the first criterion for certification. The GFS Defendants also dispute that this point was decided against them by an order made by Hoy, J. in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2007] O.J. No. 1136 (S.C.J.), leave to appeal refused [2007] O.J. No. 2404 (Div. Ct.), one of the interlocutory motions brought by the Defendants in advance of the certification motion. Conversely, the Plaintiffs rely on Hoy, J.'s judgment as closing off the debate on this point.

[88] As I read, Hoy, J.'s judgment, she decided what I would describe as the Rule 21 aspects of the objection to the Plaintiffs' pleading but left to be determined whether the Plaintiffs' statement of claim was sufficiently particularized. In other words, she decided that the statement of claim should not be struck out on the ground that the Plaintiffs had not pleaded a reasonable cause of action for conspiracy, but she decided that the other aspects of the adequacy of the pleading should be heard at the certification hearing.

[89] I therefore conclude that the Plaintiffs have satisfied the first criterion for certification but I will address as an interlocutory motion what amounts to a demand for particulars by the GFS Defendants. (As it turns out, this motion for particulars is relevant to and sheds some light on the certification criteria of common issues and preferable procedure.)

[90] As a matter of particulars, an action for conspiracy must include, with clarity and precision, particulars of: (1) the parties and their relationship; (2) an agreement to conspire; (3) the precise purpose or objects of the alleged conspiracy; (4) the overt acts that are alleged to have been done by each of the conspirators; and (5) the injury and particulars of the special damages suffered by reason of the conspiracy: *Aristocrat Restaurants Ltd. v. Ontario*, [2003] O.J. No. 5331 (S.C.J.); *Normart Management Ltd. v. Nest Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.); *D.G. Jewellry Inc. v. Cyberdiam Canada Ltd.*, [2002] O.J. No. 1465 (S.C.J.); *Cineplex Corporation v. Viking Rideau Corporation* (1985), B.L.R. 212 (Ont. H.C.J.).

[91] In my opinion, analyzed from the perspective of whether sufficient particulars have been pleaded so that the GFS Defendants are able to plead to the case they are asked to meet, the only problem is the matter of the particularization of the special damages. In this regard, the pleading must allege damages resulting from the conspiracy that are separate and distinct from those allegedly suffered as a result of the tort itself. The present pleadings want for this particular from the Representative Plaintiffs.

[92] Since the action will proceed as an individual action, I order the Representative Plaintiffs to provide particulars of their special damages.

[93] If I had certified this action as a class proceeding, I would not have asked for particulars of special damages beyond the Representative Plaintiffs. That level of particularity is a matter for the individual assessments of loss after the common issues have been determined. Each of the 426 franchisees would eventually have had to prove their special damages from the price maintenance conspiracy. (It may be noted here that

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this reality of the individual claims is what is relevant to the discussion of common issues and preferable procedure below.)

Identifiable Class

[94] The next criterion is the identification of a class on whose behalf the class proceeding is brought. The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; (3) it describes who is entitled to notice: *Bywater v. T.T.C.*, [1998] O.J. No. 4913 (Gen. Div.); *Phaneuf v. Ontario,* [2007] O.J. No. 352 (S.C.J.) at para. 48.

[95] With a slight modification, there is no issue that the Plaintiffs have identified a class that satisfies the requirements for certification.

[96] As already noted above, the definition of the class is: "all persons, including firms and corporations, carrying on business in Canada under a "Quiznos" Franchise Agreement on or after May 12, 2006."

[97] The slight modification of this definition is that it requires a date for closure of class membership, which can be the date that notice of certification is given. To ensure that notification is effective, membership in the class should close no later than the time at which the notice of certification is given: *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.) at para. 86.

Common Issues

[98] The Plaintiffs propose the following common issues be certified:

> (a) Have the Quiznos Defendants, or any of them, engaged in conduct contrary to section 61 (1) of the *Competition Act*?
>
> (b) Have the Defendants, or any of them, engaged in conduct that amounts to civil conspiracy?
>
> (c) Have the Quiznos Defendants, or any of them, breached their duty of fair dealing under s. 3 of the *Arthur Wishart Act (Franchise Disclosure)* and s. 7 of the *Franchises Act*? [as explained above, consideration deferred]
>
> (d) Have the Quiznos Defendants, or any of them, engaged in conduct which constitutes a breach of their contractual obligations to the class members?
>
> (e) Have the class members suffered loss or damage as a result of any of the conduct referred to in issues (a), (b), (c), or (d)? If so, what is the appropriate measure or amount of such loss or damages?

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(f) Should the court award an aggregate assessment of monetary relief on behalf of some or all class members? If so, what is the amount of the aggregate assessment and how should the class members share in the award?

(g) Should the Defendants pay punitive, exemplary or aggravated damages to the class members? Should such damages be assessed in the aggregate? If so, what is the amount of such damages including pre-and post-judgment interest thereon?

(h) Are the class members entitled to recover from Quiznos the full costs of their investigations and the full costs of this proceeding, including contingent legal fees on a complete indemnity basis, under s. 36 (1) of the *Competition Act*?

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[99] A plaintiff must adduce some basis in fact to show that issues are common: *Hollick v. Toronto (City)* [2001] 3 S.C.R. 158 at para. 25. As already noted above, the criterion of identifying one or more common issues and the criterion of a preferable procedure present major problems for the Plaintiffs.

[100] For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick v. Toronto (City),* [2001] 3 S.C.R. 158 at para. 18. The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 53, leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.). The underlying question of a common issue is whether the resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton* [2001] 2 S.C.R. 534 at para. 39.

[101] A common issue, however, cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 (S.C.J.) at para. 39, aff'd [2001] O.J. No. 4952 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.); *Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110 (S.C.J.), aff'd [2003] O.J. No. 3918 (Div. Ct.).

[102] That the situation of individual class members has an element of similarity or commonality does not necessarily mean that there is a common issue because the particularities of their individual situations may be such that there is no common issue the resolution of which would advance the litigation: *Controltech Engineering Inc. v. Ontario Hydro*, [1998] O.J. No. 5350 (Gen. Div.); *Huras v. COM DEV Ltd.* [1999] O.J. No. 2560 (S.C.J.); *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 (S.C.J.), aff'd [2001] O.J. No. 4952 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.); *Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110 (S.C.J.), aff'd [2003] O.J. No. 3918 (Div. Ct.).

[103] In paragraph 4 of their factum, the Plaintiffs categorically assert that "every element of this action is common to the class members" and in paragraph 5, they assert that "every significant aspect of this dispute speaks of commonality" and there is "overwhelming commonality". Thus, paragraph 4 of their factum states:

> 4. Every element of this action is common to the class members. All 427 franchisees have a common franchise agreement. They buy supplies from common sources, delivered to them by common distributors, dictated to them by the franchisor. They use those supplies to make identical menu items, sold through a common retail system based on common procedures and manuals, at common maximum prices dictated to them by the franchisor. The scheme to inflate the costs of goods and remit the overcharge to the Quiznos defendants is a common system directed at all Quiznos franchisees.

[104] There is no doubt that there is a great deal that is in common to the 427 class members, and their list of commonalities could be expanded infinitely, but it is not the case that "every element of this action is common to the class members." Moreover, and, in any event, it is the quality not the quantity of commonalities that is relevant to the common issues criterion of s. 5(1) (c) of the *Class Proceedings Act*. Further - and this is a very serious problem for the certification of the franchisees' action as a class proceeding - assuming that they all have been wronged by their franchisor, their suffering is individual and damages are a constituent element of the franchisee's central claims.

[105] From a cause of action point of view, each franchisor must prove both as a matter of liability and also as a matter of quantum their own damages. As to liability, damages must be proven as constituent element of each franchisee's claim under s. 36 of the *Competition Act*. Damages are a constituent element of each franchisee's claim for the tort of conspiracy.

[106] The quantum of damages for breach of contract of each franchisee is individual. For example, some franchisees, like Mr. May's franchise, may have suffered more than others. Major problems thus arise because ultimately the franchisees need to prove damages both from and as a result of the alleged price-maintenance conspiracy. In some instances, damages are a substantive element of a cause of action. Thus, damages are a constituent element of a claim under s. 36 of the *Competition Act*. In other instances, the proof of damages is the reason d'être for the franchisee's claim. Thus, while damages are strictly speaking not a constituent element for a breach of contract claim because if a breach is proven, the court may award nominal damages, practically speaking, the franchises are not litigating for the prize of nominal damages for a breach of contract. Rather, they advance a $50 million claim.

[107] The major problem for the Plaintiffs is the Defendants' sound contention that the element of damages is an individual issue for each franchisee and thus unsuitable as a common issue for all franchisees. The Plaintiffs response is to contend that damages may be determined globally as a common issue.

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[108] Relying on the evidence of economist Dr. Andy Baziliauskas, the Plaintiffs submitted that the franchisees' damages can be assessed in the aggregate. Dr. Baziliauskas opined that the overcharge from a price maintenance conspiracy may be determined by the difference between "actual prices" and the prices that would have existed but for the price maintenance conspiracy. The measure of aggregate damages is thus the difference between "but for" prices, which are extrapolated from industry data of comparables and "actual prices," which are determined from historical data that quantifies the expense to the Quiznos franchises of purchasing products. The Plaintiffs submit that the formula can be applied on a class-wide basis.

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[109] The Defendants submit that "actual prices" cannot be determined on a class-wide basis; i.e. "actual prices" want for commonality because the expense of food as a cost of doing business varies from franchisee to franchisee and depends on such factors as: (a) whether food is obtained outside of the authorized distribution system, (b) whether the franchisee qualifies for a rebate from the Quiznos Defendants (there are rebate programs); (c) credit terms; (d) waste; (e) employee theft; and (f) sharing among franchisees. The Defendants criticized Dr. Baziliauskas for ignoring these factors and for rather focusing his attention on the prices in the Buyers Guides for the "actual price" part of the allegedly common class-wide damages assessment.

[110] Further, the Defendants also submit that "but for" prices cannot be determined on a class-wide basis because factors particular to individual franchisees including location, financial capacity, and purchasing power alone or with others cannot be reduced to some common factor across the class of franchisees. In particular, relying on the expert evidence of economist Dr. Roger Ware, the Defendants disputed Dr. Baziliauskas' opinion that in the "but for" world, the franchisees would form a buyer's group and the franchisee's buying group would purchase at uniform prices.

[111] It was Dr. Ware's opinion that there is no basis to assume that the alleged price maintenance has had a common impact of franchisees across Canada. In his opinion, the impact, if any, would have to be analyzed on an individual franchise and product by product basis over the relevant time period.

[112] Thus, relying on the critique of Dr. Ware, the Defendants disputed Dr. Baziliauskas' opinion that that there were three methodologies for extrapolating "but for" prices on a class-wide basis; namely: (1) by using "benchmark prices," which are prices paid for substantially similar products purchased by a comparator coalition of buyers where there is no price maintenance agreement between the franchisor and its distributor; (2) by using a "servicing fee" analysis, which is to take the difference between the sourcing and markups charged under the distribution agreement under which GFS-Canada supplied goods and the fees charged by other franchisors in similar circumstances but where there is no price maintenance; and (3) by using a "before and after comparison," which is to compare the prices charged to the Quiznos franchises before and after the purported price maintenance began.

[113] I agree with the criticisms of the Defendants that: (a) Dr. Baziliauskas has not shown that a comparator group of franchisees or a comparator franchisor can be

identified; (b) he has not explained how it could be determined that a comparator group of franchisees was paying for product free of price maintenance by its franchisor; and (c) with respect to the before and after methodology, he has not shown that there was or that it could be determined that there was a time before price maintenance began. In my opinion, these omissions make his three methodologies conceptually unsound and not feasible to measure a class-wide impact of price maintenance.

[114] The onus of showing that there is some basis in fact for an issue being common falls on the Plaintiffs and, in my opinion, Dr. Bazilauskas' opinion is not persuasive. A weakness in his opinion, not entirely of his own making, is that his opinion is based on so many assumptions that it becomes speculative and unreliable. Thus, Dr. Bazilauskas assumed or was asked to assume, among other things, that: (a) there was price maintenance by Quiznos; (b) there was damages as a consequence of the price maintenance; (c) in the "but for" world, the franchisees had the capital resources to form a buying group; (d) in the "but for" world, the franchisees could lawfully form a buying group; (e) in the "but for" world all the necessary goods would be available to the buyers' group; (f) there were candidate franchisors to provide benchmark comparator groups for a "but for" analysis; and (g) there were comparator distributor networks whose markups may be appropriate for use as benchmarks.

[115] I conclude that it was not shown by the Plaintiffs that damages or the impact of the alleged price maintenance, if any, suffered by the franchises can be proven in the aggregate or on a class-wide basis. This conclusion removes proposed common issue (f) as a common issue and has the effect of an avalanche that buries the proposed common issues with an absence of commonality and a proliferation of individual issues. Thus, for instance, proposed common issues (a) and (b) above (namely: (a) Have the Quiznos Defendants, or any of them, engaged in conduct contrary to section 61 (1) of the *Competition Act*? and (b) Have the Defendants, or any of them, engaged in conduct that amounts to civil conspiracy?) depend upon showing: individual instances of price maintenance; individual instances of suffering loss in the "but for" world in order to measure the impact of losses; and individual claims of damages for the tort of conspiracy. Similarly, proposed common issues (d), and (e) are individual not common issues. Proposed common issues (g) and (h) have commonality but, standing alone, they would not sufficiently advance the litigation to qualify as common issues.

[116] I wish to be clear that I am not concluding that price maintenance conspiracies or competition offences cannot yield a common issue or that actions asserting such claims are inherently unsuitable for a class proceeding. I simply conclude that a common issue has not been made out in this case, and I also conclude that even if it were possible to isolate some discrete element or elements of the causes of action as a common issue or issues that would advance the litigation, in the case at bar those common issues would be substantially overmatched by the individual issues of the members of the class. This last conclusion is material to the discussion of preferable procedure that follows.

[117] There are other cases where similar types of allegations of overpricing or price-fixing or price maintenance have been found unsuitable for certification as a class proceeding, but I regard these cases as applications of the general principles associated

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with the certification criteria and not as authorities that would necessarily preclude a class proceeding in the area of wrongdoing of economic offences. See: *909787 Ontario Ltd. v. Bulk Barn Foods Ltd.*, [2000] O.J. No. 3649 (Div. Ct.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 106, aff'g (2001), 54 O.R. (3d) 520 (Div. Ct.); *Price v. Panasonic Canada Inc.* (2002), 22 C.P.C. (5th) 379 (Ont. S.C.J.); *Harmegnies c. Toyata* 2007 Carswell Que 926 (S.C.) aff'd February 26, 2008 (Que. C.A.).

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[118] See also *Axiom Plastics Inc. v. E.I. Dupont Canada Co.* (2007), 87 O.R. (3d) 352 (S.C.J.), which, although it is under appeal, is an example of a case where the claims against the defendant with respect to one alleged price maintenance offence were found suitable for certification while the claims against the defendant with respect to a second price-maintenance offence were found not to satisfy the criteria for a class proceeding.

[119] Notwithstanding the Plaintiffs' submissions to the contrary, in the case at bar, the Plaintiffs are not assisted in establishing a common issue by sections 23 (1) and 24(1) of the *Class Proceedings Act, 1992*. These sections state:

> *Statistical evidence*
>
> 23. (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.
>
> *Aggregate assessment of monetary relief*
>
> 24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[120] Section 23 (1) of the *Class Proceedings Act, 1992* is available "for the purposes of determining issues relating to the amount or distribution of a monetary award." Once a global monetary award is determined, then statistical information may be used to distribute the monetary award. To speak metaphorically, s. 23 (1) is about dividing the pie not about determining whether the pie exists or about the size of the pie. Section 23 of the Act deals with the admissibility and use of statistical evidence for the purposes of

determining issues relating to the amount or distribution of a monetary award, and it does not render otherwise inadmissible statistical evidence admissible for other purposes, such as determining liability: *Chadha v. Bayer Inc*. (2001), 54 O.R. (3d) 520 (Div. Ct.) at para. 25, which reversed (1999), 45 O.R. (3d) 29 (S.C.J.), aff'd (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 106; *Price v. Panasonic Canada Inc*., [2002] O.J. No. 2362 (S.C.J.). The provisions of s. 23 do not permit a defendant's liability to be based on statistical probabilities or percentages; the statute is procedural and does not depart from the general rule that a defendant will be found liable only to those who can prove their claims: *Risorto v. State Farm Mutual Automobile Insurance Co.* [2007] O.J. No. 676 (S.C.J.) at para. 77. Thus, s. 23 (1) does not assist the Plaintiffs in demonstrating a common issue.

[121] The court's right to make an aggregate assessment under s.24 (1) is only available if certain preconditions are satisfied. After some liability and some entitlement are established, resort may be had to s. 24 of the Act: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 41, rev'g (2005), 78 O.R. (3d) 39 (Div. Ct.), which aff'd (2004), 71 O.R. (3d) 741, (S.C.J.), leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 346. Section 24 provides a method to assess the quantum of damages on a global or aggregate basis, but not the fact of damage: *Chadha v. Bayer Inc*. (2003), 63 O.R. (3d) 22 (C.A.), at para. 49, leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 106; *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (S.C.J.) at paras. 52-55.

[122] One of the preconditions for s. 24 (1) is that "no questions of fact or law remain to be determined in order to establish the amount of the defendant's monetary liability." The exception to this precondition is that questions of fact or law relating to the assessment of monetary relief can remain to be determined. In the immediate case, questions of fact and law other than those relating to the assessment of monetary relief do remain to be determined in order to establish the amount of the defendants' monetary liability. For instance, liability itself remains to be determined.

[123] In *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 48, Rosenberg, J.A. stated that the preconditions for use of s. 24 (1) can be satisfied "where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments." In the case at bar, I have found that the Plaintiffs have not shown that potential liability can be established on a class-wide basis and liability requires an individual assessment of damages. Thus, s. 24 (1) is not available to assist the Plaintiffs in showing that there is a common issue.

Preferable Procedure

[124] On the assumption that I am wrong and there are common issues to be proven, I will consider the preferable procedure criterion. And this context, I will assume that the deferred common issue about the duty of fair dealing under the franchise legislation is a common issue.

[125] For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that

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is preferable to any alternative method of resolving the claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at paras. 73-75, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Baxter v. Canada (Attorney General)* (2006). 83 O.R. (3d) 481 (S.C.J.) at para. 23.

[126] In determining whether a class proceeding is the preferable procedure for resolving the common issues, the court must consider not just the common issues but, rather, the claims of the class in their entirety: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 29.

[127] In considering the preferable procedure criterion, the court should consider: the nature of the proposed common issue(s); the individual issues which would remain after determination of the common issue(s); the factors listed in s. 6 of the Act; the complexity and manageability of the proposed action as a whole; alternative procedures for dealing with the claims asserted; the extent to which certification furthers the objectives underlying the Act; and the rights of the plaintiff(s) and defendant(s): *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Div. Ct.) at para. 16, which reversed (1999), 45 O.R. (3d) 29 (S.C.J.), aff'd (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 106; *Price v. Panasonic Canada Inc.*, [2002] O.J. No. 2362 (S.C.J.) at para. 43.

[128] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole including the individual issues: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69, rev'g (2005), 78 O.R. (3d) 39 (Div. Ct.), which aff'd (2004), 71 O.R. (3d) 741, (S.C.J.), leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158; *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.).

[129] A class proceeding will not satisfy the requirement that it be the preferable procedure to resolve the common issues if the common issues are overwhelmed or subsumed by the individual issues such that the resolution of the common issues will, in substance, mark just the beginning of the process leading to a final disposition of the claims of class members: *Western Canadian Shopping Centre, Western Canadian Shopping Centres Inc. v. Dutton* [2001] 2 S.C.R. 534 para. 39; *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.) at paras. 134, 135; *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.); *Risorto v. State Farm Mutual Automobile Insurance Co.* [2007] O.J. No. 676 (S.C.J.); *Moyes v. Fortune Financial Corp*. (2002), 61 O.R. (3d) 770 (S.C.J.); *909787 Ontario Ltd. v. Bulk Barn Foods Ltd*., [2000] O.J. No. 3649 (Div. Ct.); *Price v. Panasonic Canada Inc*., [2002] O.J. No. 2362 (S.C.J.); *Gariepy v. Shell Oil Co.* [2002] O.J. No. 2766 (S.C.J.), aff'd [2004] O.J. No. 5309 (Div. Ct.).

[130] In my opinion, the case at bar is an example of those cases where the quality and quantity of the individual issues overwhelms any common issues and the extent and quality of the individual issues stand in the way of satisfying the preferable procedure

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criterion of the prerequisites for certification. I therefore conclude that this criterion is not satisfied for the case at bar.

Representative Plaintiff and Litigation Plan

[131] Pursuant to s. 5(1) (e) of the *Class Proceedings Act,* the final certification criteria to consider are the qualifications of the Representative Plaintiff and the adequacy of his or her litigation plan.

[132] In *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 41, McLachlin, C.J.C. described the qualities of a class representative:

> The motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class.

[133] In the case at bar, putting to the side for the moment the contentious issue associated with their respective abilities to satisfy a costs award, I am satisfied that the Windsor-Plaintiff and the Oakville-Plaintiff are satisfactory Representative Plaintiffs. I, however, am not satisfied with the proposed litigation plan, but the problems are likely capable of being addressed, and I would not have denied certification because of the infelicities of the current litigation plan.

[134] Although Representative Plaintiffs need not be typical of the class, it appears to me that these Representative Plaintiffs are typical of the franchisees and that through their principals, Mr. May and Mr. Johnson, they understand and have experienced the grievances for which the franchisees seek redress. They are suitable spokespersons for their comrade franchisees and they have demonstrated a willingness to make common cause to voice their grievances with the Quiznos Defendants. Mr. May's restaurant allegedly went out of business because of the alleged wrongdoing and thus he represents the hardest hit of the class members. The Plaintiffs have retained competent and experienced class counsel, and the Plaintiffs adequately participated in the course of the litigation leading up to the certification motion.

[135] The Quiznos Defendants submitted that the Plaintiffs' had a conflict with the other franchisees that would disqualify them as representative plaintiffs because their position would be different than other franchisees in the formation of buyer's groups in the "but for" world posited by Dr. Baziliauskas. Apart from the fact that the Quiznos Defendants also took the position that Baziliauskas' "but for" world never happen, the "but-for" world is an idea for the purposes of calculating damages; it is not a reality and the suggested disqualifying conflict of interest is notional at best. In any event, I see no conflict that would disqualify the Plaintiffs as Representative Plaintiffs.

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[136] The only serious and contentious objection to the Plaintiffs being Representative Plaintiffs is that they have more or less admitted that they would not be able to pay costs to the Defendants assuming the Defendants were awarded costs.

[137] One answer to this objection would be to add more Representative Plaintiffs as a condition of certifying the class proceeding, and it was not suggested that the court would not have the jurisdiction to impose this term. Relying on *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.), the Plaintiffs, however, submitted that it would be improper to do so. In the *Pearson* case, Rosenberg, J.A. stated in paras. 94 and 95 of his judgment:

> [94] In this case, the motion judge unreasonably emphasized the appellant's ability to pay any costs incurred. As the motion judge recognized, the appellant was unable to access funding through the Class Proceedings Committee because Inco and the other [then] defendants had not filed a statement of defence. Nevertheless, the appellant had paid significant cost orders made against him, albeit somewhat tardily. It was an error in principle to hold, as the motion judge did, that it was incumbent on the appellant to have "concrete and specific alternative funding arrangements in place and to provide the specifics of those arrangements in the certification material" (at para. 143). There is nothing in the legislation itself that imposes such a rigorous requirement on the plaintiff. The capacity of the representative plaintiff to fund the litigation is merely one factor in determining whether the plaintiff can adequately represent the class.
>
> [95] I agree with the comments of Cullity, J. in *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338 (S.C.J.). In referring to the reasons of the motion judge in this case and the statement from *Western Canadian Shopping Centres* about the capacity of the representative plaintiff to bear costs orders, Cullity J. said the following, at paras. 91 and 94:
>
>> The statements in [Western Canadian Shopping Centres] and Pearson are routinely relied on by defendants' counsel on motions for certification under [page 674] the CPA. The interpretation placed on them by defendant's counsel in this case would have a result of defeating, or frustrating, the legislative objective of access to justice. It would, in effect, limit recourse to class proceedings to cases where the proposed representative plaintiffs were either wealthy or could demonstrate that a commitment for funding assistance was in place -- a sort of halfway house towards requiring security for costs. Until further authoritative guidance is provided, I do not believe I am compelled to accept such an interpretation of section 5(1) (e) of the CPA.. . . . .

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> If the plaintiffs were suing as individuals they would not be compelled to demonstrate that they have concrete and specific funding arrangements in place to satisfy an award of costs that might be awarded against them in the future and, in the circumstances of this case, I do not believe the fact that they seek to represent a class -- or the specific terms of section 5(1)(e) -- should be considered to require them to demonstrate this.

[138] Near the beginning of this passage, Rosenberg, J.A. states that "the capacity of the representative plaintiff to fund the litigation is merely one factor in determining whether the plaintiff can adequately represent the class." Without more explanation, it is not clear what Rosenberg, J.A. meant by the "capacity to fund the litigation" and it is arguable that the "capacity to fund the litigation" might include the capacity to bear an adverse costs award, and in this regard it should be noted that that although pursuant to s. 31 (2) of the *Class Proceedings Act, 1992* class members are not liable for costs except with respect to the determination of their own individual claims, the representative party remains liable for costs under the Act. Similarly, the scope of what McLachlin, C.J.C. meant in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 41, when she referred to "the capacity of the representative to bear any costs that may be incurred by the representative," is not clear.

[139] However, Rosenberg, J.A.'s reference to Cullity, J.'s judgment in *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338 (S.C.J.) suggests that Rosenberg, J.A. meant that insofar as the aspect of having a capacity to fund the litigation was relevant, a representative plaintiff in a proposed class proceeding should be treated no better and no worse that a plaintiff in a normal action, where the capacity to bear a costs award arises in the context of a motion for security for costs. A corollary to this conclusion is that the defendant to a class proceeding should be in no better and no worse a position than it would be in a normal litigation. I, therefore, conclude that the representative plaintiff's ability to pay costs to an opponent should be determined in the context of a motion for security for costs and not as an aspect of the certification motion.

[140] As I have already noted above, a motion for security for costs has already occurred in this action, and while such motions can be renewed, I would not go beyond such a motion to disqualify the Windsor-Plaintiff or the Oakville Plaintiff as Representative Plaintiffs on the grounds that they may be unable to pay an adverse costs award. Thus, I conclude that the Windsor-Plaintiff and the Oakville Plaintiff would have qualified as Representative Plaintiffs had I certified this action as a class proceeding.

[141] Finally, there is the matter of the litigation plan.

[142] Matters that may be covered in a proper litigation plan include: ongoing reporting to the class; mechanisms for responding to inquiries from class members; the collection of relevant documents from members of the class as well as others; the exchange and management of documents produced by all parties; whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries;

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the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence; the need for experts and, if needed, how those experts are going to be identified and retained; if individual issues remain after the determination of the common issues, what plan is proposed for resolving those individual issues; and, a plan for how damages or any other forms of relief are to be assessed or determined after the common issues have been decided: *Bellaire v. Independent Order of Foresters*, [2004] O.J. No. 2242 (S.C.J.) at para. 53.

[143] Matters that may be covered in a proper litigation plan include: the manner in which class members will be identified if not known already; the particulars of the notice program, including a sample notice and how and where the notice will be published and made available to the public; how those who choose to opt out will be dealt with; the scheduling of times for delivery of such things as statements of defence, productions, delivery of expert reports and trial date; the method of communication with the class; the possibility of settlement; what will happen if the common issues are decided in favour of the class; the method for valuation of damages; the details of the process for distribution of the damage award; the use of claims forms or other procedures for the distribution; what will happen to any surplus funds; how insufficient funds will be dealt with; and how the individual issues will be dealt with: *Poulin v. Ford Motor Co. of Canada* [2006] O.J. No. 4625 (S.C.J.) at para. 100.

[144] The litigation plan must provide sufficient detail that corresponds to the complexity of the litigation: *Carom v. Bre-X Minerals Ltd*. (1999), 44 O.R. (3d) 173 (S.C.J.) at p. 203.), aff'd (1999) 46 O.R. (3d) 315 (Div. Ct.), rev'd on other grounds (2000), 51 O.R. (3d) 236 (C.A.), application for leave to appeal to the S.C.C. refused October 18, 2001; *Price v. Panasonic Canada Inc*., [2002] O.J. No. 2362 (S.C.J.); *Public Service Alliance of Canada Pension Plan Members v. Public Service Alliance of Canada*, [2005] O.J. No. 2693 (S.C.J.).

[145] In the case at bar, the first problem with the litigation plan is that it was based on the supposition that all the other certification criteria have been satisfied, which I have found not to be the case. If I notionally ignore that difficulty and assess the litigation plan for its adequacy to manage a class proceeding of the type that was envisioned, then, in my opinion, the proposed litigation plan requires adjustment because the Plaintiffs have understated the complexities of the litigation and the time required to address them. For example, the schedule provides for the exchange of "preliminary expert reports, if any" within two months of the completion of discoveries. It is inconceivable to me that there would not be experts' reports in this action, and I do not think it is remotely realistic to think that the experts could deliver reports within two months of the completion of discoveries. Assuming that Dr. Baziliauskas' methodologies could be applied in some fashion, it would appear that a substantial research and analytical project would have to be undertaken before his report could be prepared.

[146] The answer to this problem and similar ones would be to require the Representative Plaintiffs to prepare a more realistic litigation plan. If I had otherwise decided that this action should be certified as a class proceeding, I would have

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conditionally certified the action subject to the Plaintiffs delivering a better litigation plan.

Conclusion

[147] For the above reasons, both motions before the court should be dismissed.

[148] Pursuant to s. 7 of the *Class Proceedings Act, 1992,* I order the proceeding to continue with CFD (Canada Food Distribution Company) added as a Party Defendant. I order the Plaintiffs to deliver particulars as set out above.

[149] If the parties cannot agree about costs, they may make submissions in writing to be delivered simultaneously on the 30th day from the release of these Reasons for Decision and then each party shall have 30 days to deliver a written reply.

[150] My final comment is to thank counsel for their argument. In effort, substance, style, and civility the argument was superb.

Perell, J.

Released: March 4, 2008

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COURT FILE NO.: 06-CV-311330CP
DATE: March 4, 2008

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

2038724 ONTARIO LTD. and 2036250 ONTARIO INC.

Plaintiffs

- and -

QUIZNO'S CANADA RESTAURANT CORPORATION,
QUIZ-CAN LLC, THE QUIZNO'S MASTER LLC,
GORDON FOOD SERVICE, INC. and GFS CANADA COMPANY INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION

Perell, J.

Released: March 4, 2008

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