CITATION: 1291079 Ontario Limited v. Sears Canada Inc., 2014 ONSC 5190
COURT FILE NO.: 3769/13
DATE: 2014-09-08

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
1291079 ONTARIO LIMITED	)	
	)	David Sterns and Andy Seretis, Counsel for
Plaintiff	)	the Plaintiff
	)	
– and –	)	
	)	
SEARS CANADA INC. and SEARS, ROEBUCK AND CO.	)	Peter F.C. Howard and Samaneh Hosseini, Counsel for the Defendants
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** June 11, 2014

REASONS FOR JUDGMENT

GRAY J.

[1] The plaintiff was a "Sears Hometown Store" operator. Sears is a well-known, large retailer.

[2] This case has to do with the relationship between operators of Hometown Stores and Sears. In substance, it is alleged that Sears has taken inappropriate and undue advantage of its position, to the unlawful disadvantage of the store operators.

[3] In this motion to certify an action as a class proceeding, the plaintiff seeks to represent a class of persons who had, or have, Hometown Store contracts with Sears. It is said that the contractual arrangements constitute the members of the class as "franchisees" and the defendants as "franchisors", thus making applicable the provisions of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3. If so, the provisions of that *Act* bring into play certain disclosure obligations that have not been fulfilled, and a number of substantive provisions that

give rise to statutory causes of action and potential damages. In the alternative, it is alleged that the defendants have breached their common-law obligation of exercising discretion under the agreements in good faith, thus giving rise to damages.

[4] For the reasons that follow, the motion is granted and this action is certified as a class proceeding.

Background

[5] As I will discuss more fully later, the plaintiff is required to satisfy the requisites of section 5(1) of the *Class Proceedings Act*, S.O. 1992 c.6, as amended. With respect to the issue of whether a cause of action is disclosed, only the pleadings are to be examined. Regarding the other criteria, it is incumbent on the plaintiff to show that there is some basis in fact to support the conclusion that each criterion has been met.

[6] With these requirements in mind, I will discuss the basis of the claim and the defences as outlined in the pleadings, and some of the evidence that is relevant to the other criteria.

[7] The plaintiff alleges that the members of the class comprise a network of approximately 260 "Sears Hometown Stores" pursuant to a standard Dealer Agreement. The plaintiff alleges that the Dealer Agreement is a franchise agreement within the meaning of the *Arthur Wishart Act*.

[8] The plaintiff alleges that Sears uses its discretionary powers under the Dealer Agreement to make it virtually impossible for a dealer to realize a profit unless it achieves unattainable revenues. The plaintiff alleges that Sears is aware that the Hometown Store program is not economically viable for the dealers.

[9] The plaintiff alleges that the Hometown Store program is profitable for Sears. It is alleged that Sears realizes high profit margins on sales made through the Hometown Stores while downloading high costs onto the dealers. While Sears maintains unilateral, discretionary power under the agreement to adjust the dealers' financial compensation, Sears has ignored repeated pleas to exercise its discretion to increase compensation to a sustainable level.

[10] The plaintiff alleges that Sears conceals the economic reality about the Hometown Store program from prospective dealers. It disregards franchise disclosure laws designed, among other things, to provide full disclosure of all material facts related to the franchise system. Instead of disclosing the truth about the economics of the system, it provides a common information package to prospective dealers which touts the system as "brilliant", "better than a franchise", and "a smart business model".

[11] The plaintiff alleges that once the Dealer Agreement is signed, Sears exploits the dealer by maintaining a compensation structure that does not allow the dealer to make a living wage, let alone a return on its investment and efforts; Sears poaches sales in the dealers' Market Areas by selling goods directly to customers; Sears charges an unauthorized "handling fee" on goods purchased online or by telephone and shipped to the dealers' stores; and Sears has introduced new programs that actually claw back for many dealers what little economic benefits the program delivers to the dealers.

[12] The plaintiff alleges that these actions of Sears are contrary to its contractual duty of good faith and statutory duty of fair dealing.

[13] The plaintiff alleges that on goods sold through a Hometown Store, Sears realizes a gross margin of approximately 36 per cent. It is alleged that out of that amount, Sears pays the dealer approximately 10 per cent. Out of that commission, the dealer must pay rent, its employees, utilities and all other expenses. It is alleged that the vast majority of dealers barely earn enough commissions to cover their expenses and pay minimum wage to the principals.

[14] The plaintiff alleges that under the Dealer Agreement, the commissions can be changed by Sears in its sole discretion on 90 days notice. The plaintiff alleges that Sears has a duty of good faith and a statutory duty of fair dealing under the *Arthur Wishart Act* to exercise its discretion in a manner which is fair and commercially reasonable. Instead, it is alleged that Sears has perpetuated a predatory system of under-compensation. The plaintiff alleges that the commissions need to be increased to at least 15 per cent in order for the network to be viable. Instead, Sears has lowered commission rates and unlawfully competed within the dealers' Market Areas by shipping directly to customers, and offered lowered prices through direct selling channels while prohibiting dealers from matching prices.

[15] Specifically, the plaintiff alleges that in August 2012, Sears reduced the average retail commission rates paid to dealers.

[16] The plaintiff alleges that the Dealer Agreement does not permit Sears to compete in the dealers' Market Areas using direct shipping through direct channels. Despite this, it is alleged that Sears actively competes by selling through direct channels and shipping directly to customers in the dealers' Market Areas. In the event that the Dealer Agreement does not specifically prohibit Sears from acting in this way, it is alleged that Sears has failed to take the dealers' reasonable commercial interests into account or comply with the duties of good faith and fair dealing.

[17] The plaintiff alleges that Sears charges a $3.95 flat handling fee for customers that purchase items through a direct channel and choose to ship to a Hometown Store for pick up. This fee is kept by Sears and not by the dealer. The plaintiff alleges that the imposition of the fee is a breach of the Dealer Agreement or alternatively it constitutes a breach of the duties of good faith and fair dealing.

[18] The plaintiff alleges that Sears has changed the method of sharing advertising costs with the dealer, the result of which is that dealers are now paying more for local advertising. It is alleged that these changes are a breach of the Dealer Agreement, or alternatively they constitute a breach of the duties of good faith and/or fair dealing.

[19] The plaintiff alleges that Sears is a franchisor under the *Arthur Wishart Act*, and each dealer is a franchisee. Thus, it is alleged that Sears owes the class members a duty of fair dealing in the performance and enforcement of the Dealer Agreement under section 3 of *Act*. It is alleged that the actions of Sears constitute violations of these duties.

[20] The plaintiff alleges that pursuant to the *Arthur Wishart Act*, Sears was required to deliver to prospective dealers a statutorily prescribed disclosure document. It is alleged that Sears did not do so. Had it done so, Sears would have to had to disclose materials facts, including:

a) over 70 per cent of dealers are not profitable;

b) many dealers exhaust their resources and cease operating within a few years;

c) revenues of Hometown Stores have been steadily declining;

d) Sears competes directly by selling into dealers' Market Areas through direct channels;

e) Sears charges an improper handling fee of $3.95 for items purchased through a direct channel for shipment to a Hometown Store;

f) Sears does not share the cost of local advertising undertaken by the dealer.

[21] The plaintiff claims that each dealer is entitled to damages pursuant to sections 3 and 7 of *Arthur Wishart Act*.

[22] In the event that the *Arthur Wishart Act* does not apply, the plaintiff claims that the members of the class are entitled to damages for breach of contract, including breach of the duty of good faith; and disgorgement of profits unreasonably retained as a result of Sears' unjust enrichment. It is pleaded that Sears has retained those profits unjustly, to the detriment of dealers and without juristic reason.

[23] The plaintiff claims that Sears has violated the Dealer Agreements by failing to account for commissions, and now claims a complete accounting of all commissions since the inception of the Dealer Agreements, and judgment for any shortfall arising therefrom.

[24] In the statement of defence, it is asserted that Sears Canada Inc. is a leading retailer of general merchandise in Canada. It is asserted that Sears, Roebuck and Co. does not carry on business in Canada. It is asserted that Sears, Roebuck is only a party to the Dealer Agreements because it is the owner of several Sears trademarks. Otherwise, Sears, Roebuck has no other duties or obligations under the Dealer Agreements.

[25] The defendants assert that the *Arthur Wishart Act* does not apply to the Sears Hometown Stores. It is asserted that the operators of the Hometown Stores are not franchisees within the meaning of the *Act*.

[26] The defendants deny that dealer commissions have been reduced. In fact, it is asserted that the August, 2012 changes to the compensation structure resulted in an increase to the average commission. It is asserted that direct sales have been part of Sears' business for many years, and there is nothing in the Dealer Agreement that precludes Sears from engaging in this practice. It is asserted that Sears provides a 4.5 per cent commission to dealers on catalogue and internet sales shipped to their stores. It is asserted that the changes to advertising subsidies led to the reduction of advertising expense for the dealers.

[27] The defendants deny that any amendments to the dealer compensation structure and advertising subsidies were detrimental to the dealers, or amounted to a breach of contract, breach of a duty of good faith (or breach of the statutory duty of fair dealing in the event that the *Arthur Wishart Act* applies, which is denied) or unjust enrichment.

Section 5(1) of the *Class Proceedings Act*

[28] As noted earlier, the plaintiff must satisfy the requisites of section 5(1) of the *Class Proceedings Act*. That subsection provides as follows:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interest of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[29] I will discuss each requirement of section 5(1) in turn.

i. Do the pleadings disclose a cause of action?

[30] Under this requirement, all that is to be examined are the pleadings. No evidence is to be considered. With respect to the other requirements of section 5(1), the plaintiff must show that there is some basis in fact for each of those requirements.

[31] It is not in dispute that the test under section 5(1)(a) of the *Class Proceedings Act* is the same as the test under Rule 21.01(1)(b), as to whether a pleading discloses a reasonable cause of action: that is, whether it is "plain and obvious" that the pleading does not disclose a reasonable cause of action: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; and *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.). In assessing the claims made in the pleading, it is to be read generously, with allowances for deficiencies: see *Healey v. Lakeridge Health Corp.* (2006), 38 C.P.C. (6th) 145 (Ont. S.C.J.), at para. 26.

[32] The assertion that the *Arthur Wishart Act* applies to the relationship between Sears and the plaintiff is clearly a proper cause of action. The defendants do not contend otherwise, and indeed they concede that this allegation is properly a common issue. If the *Act* applies, the claims for damages under sections 3 and 7 of the *Act* are clearly appropriate as well.

[33] The defendants also do not deny that the plaintiff has pleaded valid causes of action based on the implied duty of good faith, and unjust enrichment.

[34] I should note that the plaintiff has asserted a cause of action based on negligent misrepresentation, but counsel advised me at the hearing of the motion that that cause of action will be abandoned and the statement of claim amended accordingly. I also note that it is agreed that if the *Arthur Wishart Act* applies, it will be applicable to all operators of stores, both within and outside Ontario.

[35] In the final analysis, the plaintiff has pleaded valid causes of action and accordingly section 5(1)(a) has been satisfied.

[36] I note that while Sears alleges that there is no cause of action against Sears, Roebuck, that is best determined on a motion for summary judgment if one is brought.

(ii) Is there an identifiable class of two or more persons?

[37] The class proposed by the plaintiff consists of all corporations, partnerships, and individuals carrying on business as a Sears Hometown Store under a Dealer Agreement with Sears at any time from July 5, 2011 to the date of sending of the notice of certification.

[38] The requirements of a class capable of certification were summarized by Strathy J. (as he then was), in *Fairview Donut Inc. v. The TDL Group Corp*, [2012] O.J. No. 834 (S.C.J.), at para. 220, as follows:

> (a) membership in the class should be determinable by objective criteria without reference to the merits of the action;
>
> (b) the class criteria should bear a rational relationship to the common issues asserted by all class members, but all class members need not share the same interest in the resolution of the asserted common issues;
>
> (c) the class must be bounded and not of unlimited membership;
>
> (d) there is a further obligation, although not onerous, to show that the class is not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues;
>
> (e) membership in a class may be defined by those who make claims in respect of a particular event or alleged wrong, without offending the rule against the class description being dependent on the outcome of the litigation; and
>
> (f) a proper class definition does not need to include only those persons whose claims will be successful.

[39] The defendants attack the proposed class definition, primarily on the basis that it does not distinguish between dealers who signed Dealer Agreements before and after August, 2012 when changes were made to the commission structure and advertising subsidies. Specifically,

the defendants assert that claims based on the August, 2012 changes are not tenable for the following groups of dealers:

(a) dealers who terminated Dealer Agreements prior to August, 2012;
(b) dealers who had Dealer Agreements as of 2012, and have allowed their agreements to be renewed since then; and
(c) dealers who entered into Dealer Agreements after August, 2012.

[40] The defendants also argue that the class definition should exclude dealers who entered into Dealer Agreements with knowledge of this action.

[41] I disagree with the defendants, and in my view the class definition as proposed is satisfactory.

[42] I do not read the claim based on the August 2012 amendments in the same way as the defendants appear to read it. Putting aside issues under the *Arthur Wishart Act*, assuming it applies, I read the allegations respecting the August 2012 amendments as examples of Sears' breaches of the obligation of good faith. As I read it, the statement of claim alleges that prior to the August 2012 amendments, Sears was already in breach of its obligation to exercise its discretion under the Dealer Agreements in good faith, and the August 2012 amendments simply resulted in further detriment to the dealers. Fundamentally, the plaintiff alleges that any dealer who was subject to a Dealer Agreement suffered in the same way, although the amount of harm at any particular point in time might have been different.

[43] I think the class as proposed is satisfactory and meets the criteria set out by Strathy J. in *Fairview Donut,* even though all class members do not share exactly the same interest in the resolution of one or more of the common issues.

(iii) Are there appropriate common issues?

[44] The term "common issues" is defined in section 1 of the *Class Proceedings Act* as

a) common but not necessarily identical issues of fact, or

b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[45] The principles concerning the definition of appropriate common issues were summarized by Strathy J. in *Fairview Donut, supra*, at paras. 229 and 230, as follows:

a. the underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis;

b. 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;

c. there must be a basis in the evidence before the court to establish the existence of common issues;

d. there must be a rational relationship between the class identified by the plaintiff and the proposed common issues;

e. the proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim;

f. a common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class;

g. the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation in the same manner, to each member of the class;

h. a common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant;

i. where questions relating to causation or damages are proposed as a common issue, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis;

j. common issues should not be framed in overly broad terms;

k. the core of a class proceeding is the element of commonality – there must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this; and

l. the common issues should be clear, neutrally-worded and fair to both parties.

[46] At the argument of the motion, I was furnished with revised proposed common issues by counsel for the plaintiff. They are as follows:

a. Have Sears Canada and Sears Roebuck, or either of them, at any time since July 5, 2011 breached their obligations under the Dealer Agreements with each of the class members, including the obligation to exercise contractual discretion in good faith by:

i. Failing to increase commissions paid to class members;

ii. Reducing commissions paid to class members in August 2012;

iii. Selling directly to customers located within the class members' Market Areas (as defined in their respective Dealer Agreements), or, alternatively, by failing to pay commissions to the class members for good sold directly to customers located within the class members' Market Areas through direct channels (as described below);

iv. Removing or reducing local store advertising subsidies required under Schedule A, paragraph H of the Dealer Agreement;

v. Failing to provide a monthly accounting of how compensation was calculated as required under Schedule A, paragraph D of the Dealer Agreement; or

vi. Imposing handling fees payable by customers on catalogues sales made by dealers?

b. Has Sears Canada or Sears Roebuck been unjustly enriched by any of the acts or omissions in (a) (i) to (vi) above?

c. If Sears Canada or Sears Roebuck has breached its contractual duties, or been unjustly enriched, what is the appropriate measure of past damages or compensation?

d. Are Sears Canada and Sears Roebuck, or either of them, a "franchisor" or "franchisor's associate" within the meaning of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 ("*Wishart Act*") and similar provisions under franchise legislations otherwise governing any such class member? If so:

    i. Are all class members entitled to the benefit of the *Wishart Act* by virtue of the choice of law provisions in the Sears standard Dealer Agreement?

    ii. Did Sears breach the duty of fair dealing under s. 3 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member by any of the acts or omission set out in (a) (i) to (vi) above and, if so, what are the damages?

    iii. Was Sears required to deliver to each class member a disclosure document within the meaning of s. 5 of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member), at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof?

e. Did Sears fail to disclose the material facts particularized in paragraph 93 of the statement of claim to each dealer before the dealer signed the Dealer Agreement?

    i. If so, directions pursuant to s. 25(2) of the CPA for the calculation of individual damages for misrepresentation or under s.7(1) of the *Wishart Act* (or similar provisions under such franchise legislation otherwise governing any such class member); and

f. What scale and quantum of costs should be awarded?

[47] The plaintiff must show, through evidence, that there are appropriate common issues. The test is not a high one. The plaintiff must show that there is "some basis in fact" for the proposition that there are appropriate common issues: see *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 S.C.R. 477, at para. 99.

[48] It is clear from *Cloud, supra*, that the resolution of the common issue or issues need not resolve the entire action. It is sufficient if it resolves an issue or issues that will move the action some distance. The fact that there may be many individual issues left to be determined does not mean that common issues should not be certified. As Goudge J.A. stated in *Cloud* at para. 53:

> In other words, an issue can constitute a substantial ingredient of the claims and satisfy s.5(1)(c) even if it makes up a very limited aspect of the liability questions and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s.5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than elucidate the various individual issues which may remain after the common trial.

In my view, the question of whether the individual issues will unduly dominate the action is more properly part of the preferability inquiry: *Cloud*, at paras. 73-76; and *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[49] Both parties have filed extensive evidence, primarily on the commonality issue.

[50] While Sears asserts that there are some differences in the contractual arrangements, in that there were a variety of supplementary agreements with individual dealers, Sears does not argue that those differences are sufficient to disqualify reliance on the Dealer Agreement by the plaintiff as a basic common feature. Sears' argument, in the main, rests on the assertion that the plaintiff's allegations are founded on the effect of Sears' conduct on the members of the class, which will differ from dealer to dealer.

[51] Sears points out that, in its simplest terms, the plaintiff's allegation is that dealers do not make enough money. Sears asserts that each of the allegations under proposed common issue (a) involves business practices by Sears that are alleged to be breaches of the duty of good faith or unjust enrichment because they contribute to or exacerbate the inadequate state of dealer compensation.

[52] Sears submits that "adequacy" of dealer compensation is vague and subjective. In each case, what will be required is a determination of the negative impact of the alleged conduct by Sears, which is clearly an individual issue for each dealer. Determining whether there is negative impact would involve examining each dealer's revenues, expenses, and regional and local factors affecting each dealer, to determine whether the dealer is not making the requisite amount of profit, whatever that might be, and if so, whether that is due to Sears' business practices, to the dealer's own inadequate business practices, or to factors external to both parties.

[53] Alternatively, if the plaintiff is attempting to say that Sears' alleged conduct had a negative impact on the whole class, the plaintiff must adduce evidence that such harm can be determined on a class-wide basis and has failed to do so.

[54] The defendants primarily rely on *Fairview Donut, supra*; *Spina v. Shoppers Drug Mart Inc.*, [2013] O.J. No. 4979 (S.C.J.); and *909787 Ontario Ltd. v. Bulk Barns Food Ltd.* (2000), 138 O.A.C. 180 (Div. Ct.).

[55] In my view, Sears' reliance on *Fairview Donut* is misplaced. While it is true that Strathy J. held that some of the common issues were not certifiable, he did say that an issue as to whether franchisees were required to sell baked goods at "commercially unreasonable" prices could be certified if structured properly. He relied on the decision of the Divisional Court in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, (2009), 96 O.R. (3d) 252 (Div. Ct.), a decision that was affirmed by the Court of Appeal, 100 O.R. (3d) 721 (C.A.). At paras. 256 and 257 of *Fairview Donut*, Strathy J. stated:

> 256. On the other hand, in *Quizno's*, the Divisional Court was not concerned about the fact that the amount of loss or damage sustained by class members might vary from region to region or from time to time because of the "systemic" nature of the conduct potentially giving rise to liability. The system included a common contract, a common pricing system and a common distribution system. It included the addition of mark-ups and sourcing fees by the franchisor on every single product, with an additional mark-up being added by the distributor. In *Quizno's*, the complaint was not just in relation to some products acquired by franchisees; it related to all the products they sold. Moreover, the plaintiff alleged that some forty percent of *Quizno's* franchisees were operating at a loss.
>
> 257 The majority of the Divisional Court held in *Quizno's* that the breach of contract claim gave rise to common issues. The issue of the commercial

> reasonableness of the defendants' mark-ups and sourcing fees could be addressed in common by examining the franchisor's conduct, the services it provided and industry standards.

[56] I think Strathy J.'s reasoning as to the common features arising from the conduct of the defendant in that case is applicable here. As noted, the Divisional Court's decision in *Quizno's* was affirmed by the Court of Appeal.

[57] In *Spina*, Perell J. certified a number of issues as common issues but declined to hold that Shopper's Drug Mart's budgeting process gave rise to a common issue. The process itself involved setting a specific budget for each store. There was simply insufficient commonality, even on the part of the defendant's conduct, to say that there was a certifiable common issue.

[58] The Divisional Court's decision in *Bulk Barn* was considered by Strathy J. in *Fairview Donut*, at paras. 254 and 255, but he found more persuasive the Divisional Court's decision in *Quizno's*.

[59] Closer to the facts of this case is *Ontario v. Mayotte* (2010), 99 C.P.C. (6th) 229 (Ont. S.C.J.). In that case, it was alleged that the Province of Ontario had under-compensated private issuers of driver's licences.

[60] Perell J. held that the following issues were proper common issues:

a. Does the contractual relationship between Ontario and the private issuers include a duty on Ontario to ensure that Issuer compensation is, and remains fair, rational, objectively determined, and proportional to the effort required to do each transaction?

b. Does Ontario have one or more of the following contractual obligations to the private issuers in respect of compensation:

    i. to adequately increase the standard commission rate table,

    ii. to update the time series analysis on which compensation was and continues to be based,

iii. to take into consideration all steps required to perform the required transactions, and

iv. to sufficiently increase the annual stipend?

c. If so, has Ontario breached and is it continuing to breach any such contractual obligation?

d. Was Ontario under a duty to increase compensation to the private issuers following the conclusions of the report of the Ministry of Transportation dated August 28, 2003?

e. Has Ontario satisfied its duties by the increases in compensation which it has put into effect since August 28, 2003?

f. If Ontario has not breached its contractual duties to the private issuers in respect of compensation, has Ontario been unjustly enriched by having under-compensated the private issuers?

[61] The defendant in *Mayotte* argued that to determine all or some of these questions it would be required that individual findings of fact be made about the circumstances of each contractual relationship. Perell J. disagreed. At para. 75, he stated "A trial judge might conclude that in the circumstances Ontario breached its contracts with all of the private issuers as of August 28, 2003 when it is alleged that Ontario knew that the compensation rate paid to the private issuers was not fair, proportional, rational, or objective."

[62] In the action before me, it is alleged that there is a common Dealer Agreement; dealers' compensation is fixed by a common formula; advertising subsidies are commonly fixed, with a few exceptions; and Sears sells directly into each dealer's Market Area. It is alleged that Sears knows that these features result in unreasonable rates of renummeration to dealers, which violates Sears' obligation to exercise its discretion under the dealers' agreements in good faith. In the alternative, it is alleged that Sears is unjustly enriched. If the *Arthur Wishart Act* applies, there are common questions as to whether it has been complied with. The resolution of the common issues will move the action a long way: *Cloud* at para. 82.

[63] As did Perell J. in *Mayotte*, I think the questions set out in proposed common issues (a) and (b) are suitable common issues. However, there are amendments I will make in order to make them more neutral and fair to both sides.

[64] As was the case in *Cloud*, there will be individual issues that must be determined. Assuming the plaintiff succeeds on the common issues, or some of them, the measure of damages for each member of the class will depend not only on the effect of Sears' conduct, but on the individual circumstances of each dealer. However, the common issues trial judge will have ample tools at his or her disposal to determine appropriate damages on a class-wide basis, or an individual basis, or both: see *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.). As was the case in *Markson*, damages can be certified as a common issue, but might also be determined individually. The common effect of Sears' conduct may give rise to damages that can be attributed to the class as a whole. There will likely also be damages that must be determined individually. That is something to be determined by the common issues trial judge after deciding the common issues.

[65] Costs are not a common issue.

[66] I have revised the proposed common issues, and they are attached to these reasons as Appendix A.

[67] I am prepared to consider further revisions, which will be discussed at the next case conference.

iv. Is a class proceeding the preferable procedure for resolving the common issues?

[68] The preferability inquiry involves answering two questions: first, would the class action be a fair, efficient and manageable method of advancing the claim? Second, would the class action be preferable to other reasonably available means of resolving the claims of class members? See *Cloud, supra*; and *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.).

[69] As noted earlier in my discussion of *Cloud*, the preferability inquiry largely involves a determination of whether individual issues will overwhelm the common issues.

[70] For the reasons discussed earlier, I do not think the individual issues will overwhelm the common issues. Undoubtedly, there will be a number of individual matters that need to be addressed after the resolution of the common issues, assuming the plaintiff is successful. As noted, damages will need to be assessed, and to some extent at least this will involve individual determinations.

[71] However, as pointed out in *Markson*, the common issues trial judge has many tools at his or her disposal to deal with such issues once the common issues have been addressed.

[72] I am not persuaded that the individual issues will overwhelm the common issues. As noted earlier, I think the resolution of the common issues will move the action a long way.

[73] Assuming the common issues are proper and that the individual issues will not overwhelm them, the defendants do not suggest that there is any other reasonably available means of resolving the claims of class members. There is no alternative procedure required by legislation. The only issue is whether a common issues trial is the preferable method, or whether individual trials commenced by individual members of the class are preferable. In my view, a common issues trial is the preferable method.

v. Is the plaintiff an appropriate representative plaintiff?

[74] The plaintiff no longer operates a Hometown Store. Thus, it has no ongoing stake in the result of the litigation. At most, it will have a right to past damages.

[75] The defendants point out that the plaintiff is now essentially a shell company, with no ability to satisfy a costs order.

[76] James Kay, the principal of the plaintiff, swears that the plaintiff operated a Hometown Store from June, 2007 until it gave notice of termination of the Dealer Agreement in August, 2013, and the Agreement terminated effective December 14, 2013. He swears he has a real and genuine interest in resolving the issues in the lawsuit for himself and for the benefit of all dealers. He swears that the termination of the Dealer Agreement in no way affects his willingness and ability to be the class representative.

[77] Mr. Kay swears that he is aware of the duties owed by the class representative to the class and he is committed to contributing his time, knowledge, energy and leadership to bringing the case to a successful conclusion.

[78] Mr. Kay swears that neither he nor the corporate plaintiff have any interest in conflict with any of the members of the proposed class.

[79] Mr. Kay has proposed a plan for proceeding with the action. He sets out a plan of proceeding which sets out a method of advancing the case on a timely basis, including notice to be sent to the class members; the furnishing of affidavits of documents and productions; examinations for discovery and motions arising therefrom; the exchange of expert reports; mediation; a pre-trial conference; and a common issues trial. Individual hearings, if any, would be conducted after the common issues trial.

[80] Counsel for the defendants submits that the plaintiff is not a proper representative plaintiff. Counsel submits that the plaintiff has a conflict with other members of the class, in that it is no longer the operator of a Hometown Store. Counsel also submits that the plaintiff has no ability to satisfy a costs award. Counsel relies on *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 S.C.C. 46, at para. 41, where McLachlin C.J.C. stated:

> In assessing whether the proposed representative is adequate, the court may look to 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). [Emphasis added]

[81] In my view, that statement by McLachlin C.J.C. must be considered in light of the decision of the Court of Appeal in *Pearson, supra,* and the decision of Cullity J. in *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338 (S.C.J.).

[82] At para. 95, of *Pearson*, Rosenberg J.A. stated:

> [95] I agree with the comments of Cullity J. in *Mortson v. Ontario Municipal Employees Retirement Board*, [2004] O.J. No. 4338. In referring to the reasons of the motions 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 the CPA. The interpretation placed on them by defendant's counsel in this case would have the 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 s.5(1)(e) of the CPA.
>
> *****
>
> 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 s.5(1)(e) – should be considered to require them to demonstrate this.

[83] It is always open to the defendants to move under rule 56.01(1)(d) for security for costs, subject to any special considerations that may apply to class proceedings: see *Peter v. Medtronic Inc.* (2008), 66 C.P.C. (6th) 274 (Ont. S.C.J.); and *Dean v. Mister Transmission (International) Ltd.* (2009), 79 C.P.C. (6th) 181 (Ont. S.C.J.). In the meantime, I do not think the plaintiff should be disqualified as an appropriate representative plaintiff in a class proceeding simply on the basis that it does not have the ability to pay costs.

[84] I do not think the plaintiff has any conflict of interest with the other class members. Its interests may not go as far as those of some other class members, but there is no conflict.

[85] As far as the litigation plan is concerned, the defendants have not made any particular criticism of it, other than to submit that it is generic. It is clear that a motion to certify a class proceeding should not be defeated simply on the basis of deficiencies in a litigation plan. I am prepared to entertain any suggestions for amendments to the plan at the next case conference.

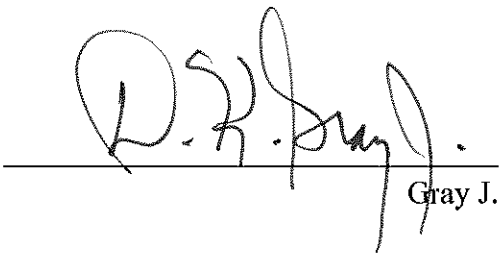
[86] I am satisfied that the plaintiff is an appropriate representative plaintiff.

Disposition.

[87] For the foregoing reasons, this action is certified as a class proceeding.

[88] I assume that the parties can agree on the form and content of the formal order. If so, they should bring it to the next case conference and I will sign it. If they cannot agree, I will deal with any issues at the case conference.

[89] I will entertain written submissions with respect to costs, not to exceed five pages together with a costs outline. Counsel for the plaintiff shall have five days to file submissions, and counsel for the defendants shall have an additional five days to respond. Counsel for the plaintiff shall have three days to reply.



Gray J.

Released: September 8, 2014

APPENDIX A

COMMON ISSUES

(a) Have Sears Canada and Sears Roebuck, or either of them, at any time since July 5, 2011 breached their obligations under the Dealer Agreements with each of the class members, including the asserted obligation to exercise contractual discretion in good faith, by:

i. Failing to increase commission paid to class members;
ii. Changing commissions paid to class members in August 2012;
iii. Selling directly to customers located within the class members' Market Areas (as defined in their respective Dealer Agreements), or, alternatively, by failing to pay commission to the class members for goods sold directly to customers located within the class members' Market Areas through direct channels;
iv. Changing local store advertising subsidies;
v. Failing to provide a monthly accounting of how compensation was calculated; or
vi. Imposing handling fees payable by customers on catalogues sales made by dealers?

(b) Has Sears Canada or Sears Roebuck been unjustly enriched by any of the acts or omissions in (a) (i) to (vi) above?

(c) If liability is established, what is the appropriate measure of damages or compensation, if any, for the class?

(d) Are Sears Canada and Sears Roebuck, or either of them, a "franchisor" of "franchisor's associate" within the meaning of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (*Arthur Wishart Act)*? If so:

i. Did Sears breach the duty of fair dealing under s. 3 of the *Arthur Wishart Act* by any of the acts or omissions set out in (a) (i) to (vi) above, and, if so, what are the damages for the class?
ii. Was Sears required to deliver to each class member a disclosure document within the meaning of s. 5 of the *Arthur Wishart Act* at least fourteen days before the class member signed a Dealer Agreement or any material amendment thereof, and if so, were the provisions of s.5(3) of the *Act* otherwise complied with? If s.5 was not complied with, what are the damages for the class under s.7?

CITATION: 1291079 Ontario Limited v. Sears Canada Inc., 2014 ONSC 5190
COURT FILE NO.: 3769/13
DATE: 2014-09-08

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

1291079 ONTARIO LIMITED

Plaintiff

– and –

SEARS CANADA INC. and SEARS, ROEBUCK AND CO.

Defendants

REASONS FOR JUDGMENT

Gray J.

Released: September 8, 2014