CITATION: 2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation, 2014 ONSC 5812
COURT FILE NO.: 06-CV-311330CP
DATE: 20141006

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
2038724 ONTARIO LTD. and 2036250 ONTARIO INC. Plaintiffs	*Jean-Marc Leclerc* and *Shane P. Murphy* for the Plaintiffs
– and –	
QUIZNO'S CANADA RESTAURANT CORPORATION, QUIZ-CAN LLC, THE QUIZNO'S MASTER LLC, CANADA FOOD DISTRIBUTION COMPANY, GORDON FOOD SERVICE, INC. and GFS CANADA COMPANY INC.	*Geoffrey B. Shaw* and *Christopher Horkins* for the Defendants, Quizno's Canada Restaurant Corporation, Quiz-Can LLC, The Quizno's Master LLC and Canada Food Distribution Company
Defendants	*Katherine L. Kay* and *Mark Walli* for the Defendants, Gordon Food Service, Inc. and GFS Canada Company Inc.
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: October 2, 2014

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION AND OVERVIEW

[1] This action is a certified class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. The Representative Plaintiffs, 2038724 Ontario Ltd. and 2036250 Ontario Inc., move for approval of a Settlement Agreement.

[2] For the reasons that follow, I dismiss the approval motion, sometimes called a fairness hearing.

[3] In my opinion, because of an overbroad unfair release, the proposed settlement is not fair and reasonable and it is not in the best interests of the class as a whole.

B. FACTUAL BACKGROUND

[4] In 2006, the Representative Plaintiffs, 2038724 Ontario Ltd. and 2036250 Ontario Inc., which are franchisees, sued their franchisor, Quizno's Canada Restaurant Corporation, Quiz-Can LLC, The Quizno's Master LLC, and Canada Food Distribution Company.

[5] The Plaintiffs also sued Gordon Food Service, Inc. and GFS Canada Company Inc., which was the main food supplier to the franchisor's chain of restaurants.

[6] The Plaintiffs allege that the franchisor, Quiznos, knowingly attempted to influence upward, or to discourage the reduction, of the prices for supplies charged by the designated supplier, Gordon Food Service, Inc. and GFS Canada Company Inc., to franchisees by using agreements, promises, threats, or other like means, to ensure that the pricing to franchisees remained at levels that were commercially unreasonable, contrary to s. 61 of the *Competition Act*, R.S.C. 1985, c. 19 (2nd Supp.). The Plaintiffs allege an ongoing conspiracy persisting to this day.

[7] The Plaintiffs also allege that Quiznos breached its franchise agreements with its franchisees by failing to ensure they were offered products at commercially reasonable prices and otherwise failing to abide by their common law duty of good faith and that Quiznos breached provincial franchise statutes, including s. 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3.

[8] As already noted, the action was commenced in 2006, and the Plaintiffs' motion for certification was refused. (See (2008), 89 O.R. (3d) 252 (S.C.J.).) But this decision was reversed by the Divisional Court, which on April 27, 2009 certified the action as a class action. (See [2009] O.J. No. 1874 (Div. Ct.).)

[9] On June 24, 2010, the Court of Appeal affirmed the Divisional Court's decision. (See 2010 ONCA 466, leave to appeal to the S.C.C. refused [2010] S.C.C.A. No. 348.)

[10] From July to October, 2011, there were examinations for discovery in anticipation of the common issues trial.

[11] In December 2011, a two-day mediation session with Justice Strathy as mediator was unsuccessful at reaching a settlement and the action continued.

[12] In November 2012, all parties brought refusals motions arising from the examinations for discovery. (See 2012 ONSC 6549.)

[13] At the hearing of the refusals motion, at the request of the Defendants, I scheduled summary judgment motions for the week of November 4, 2013.

[14] Meanwhile, the law governing the Plaintiffs' claims was undergoing transformation. Section 61(1) of the *Competition Act* was repealed in 2009, and instead of creating sanctions for attempting to influence prices, claimants would be required to show that prices were in fact influenced. And, in a 2012 summary judgment decision, *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252, which was later affirmed by the Court of Appeal, 2012 ONCA 867, leave to appeal to S.C.C. refused [2013] S.C.C.A. No. 47, Justice Strathy dismissed a claim brought by a group of franchisees under s. 61(1) of the *Competition Act*.

[15] At a case conference on September 26, 2013, the summary judgment motions were rescheduled to be heard in July, 2014. The parties readied themselves for the summary judgment motion.

[16] The next major development occurred on March 14, 2014, when 15 U.S.-based Quiznos entities filed for Chapter 11 protection with the United States Bankruptcy Court for the District of Delaware. The Defendant parent companies of the Canadian Quiznos-affiliated Defendants, Quizno's Canada Restaurant Corporation and Canada Food Distribution Company, were among the bankrupt entities. The financial status of Quiznos became uncertain, as the U.S.-based Quiznos entities, including the defendants, Quiz-Can LLC and The Quizno's Master LLC, went under bankruptcy protection.

[17] However, the Canadian Quiznos entities remained financially viable.

[18] It appears that the financial circumstances of some of the Quiznos Defendants prompted renewed settlement discussions. I pause here to note that since the Canadian entities appear to be financial sound, I regard the financial circumstances of the parent corporations as a neutral factor to determining the reasonableness of the settlement.

[19] Following the bankruptcy of Quiznos in the United States, settlement negotiations resumed, and the Settlement Agreement was signed in July, 2014.

[20] The main terms of the Settlement Agreement are as follows:

- Payment from Quiznos to the Plaintiffs in the amount of $275,000.00 as compensation for disbursements incurred by Class Counsel in the prosecution of the action.
- A full and final release from Class Members of all claims against Quiznos or Gordon Food Service, Inc. and GFS Canada Company Inc. relating to the purchase, sale, distribution, promotion or marketing of Supplies (as defined in the Statement of Claim); and
- Quiznos will release the Plaintiffs from any and all claims they may have against them related to their operation of Quiznos restaurants.

[21] With respect to releases, the Settlement Agreement states:

> *Section D. Effect of Settlement*
>
> 11. "Released Claims" means any and all claims, demands, actions, suits, causes of action, whether class, individual or otherwise in nature, including assigned claims, whether known or unknown, asserted or unasserted, regardless of the legal theory, existing now or arising in the future by any and all of the Plaintiffs or the Class Members, arising out of or relating to the purchase, sale, distribution, promotion or marketing of Supplies (as defined in the Statement of Claim). Released Claims include, without limitation, all claims for damages including, but not limited to punitive, aggravated, statutory and other multiple damages or penalties of any kind; or remedies of whatever kind or character, known or unknown, that are now recognized by law or equity or that may be created and recognized in the future by statute, regulation, judicial decision, or in any other manner; injunctive and declaratory relief; economic or business losses or disgorgement of revenues or profits; costs or lawyers' fees; and prejudgment and post-judgment interest.
>
> 12. "Releasees" means the Defendants and each of their respective direct and indirect parents, subsidiaries, affiliates, and divisions, along with each of their respective current and former officers, directors, employees, trustees, representatives, lawyers, agents and insurers; any and all

predecessors, successors, and/or shareholders of the Defendants and each of their direct and indirect parents, subsidiaries, affiliates, and divisions.

13. "Releasers" means the Plaintiffs and the Class Members and their respective heirs, executors, trustees, administrators, assigns, attorneys, representatives, partners and insurers and their predecessors, successors, heirs, executors, trustees, administrators and assignees.

14. Upon the issuance of the Approval Order, the Releasers forever and absolutely release the Releasees from the Released Claims.

15. Upon the issuance of the Approval Order, the Quiznos Defendants forever and absolutely release the Plaintiffs from any and all any and all claims, demands, actions, suits, causes of action, whether class, individual or otherwise in nature, including assigned claims, whether known or unknown, asserted or unasserted, regardless of the legal theory, existing now or arising in the future by any and all of the Quiznos Defendants, arising out of or relating to the Plaintiffs ownership or operation of a Quiznos franchise. This release includes, without limitation, all claims for damages including, but not limited to punitive, aggravated, statutory and other multiple damages or penalties of any kind; or remedies of whatever kind or character, known or unknown, that are now recognized by law or equity or that may be created and recognized in the future by statute, regulation, judicial decision, or in any other manner; injunctive and declaratory relief; economic or business losses or disgorgement of revenues or profits; costs or lawyers' fees; and prejudgment and post-judgment interest (the "Quiznos Released Claims")

16. Upon. the issuance of the Approval Order, the Releasors, and Class Counsel shall not now or hereafter institute, continue, maintain or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other person, any action, suit, cause of action, claim or demand against any Releasee or any other person who may claim contribution or indemnity or other claims over for relief from any Releasee in respect of any Released Claim or any matter related thereto.

17. The Settlement Agreement shall be binding upon, and enure to the benefit of, the Plaintiffs, the Class Members, the Defendants, the Releasees, and the Releasors. Without limiting the generality of the foregoing, each and every covenant and agreement made herein by the Plaintiffs shall be binding upon all Releasors and each and every covenant and agreement made herein by the Defendant shall be binding upon all of the Releasees.

[22] Class Counsel and the Representative Plaintiffs recommend the approval of the settlement.

[23] The Defendants, obviously, support the settlement.

[24] The court-approved Notice to Class Members of the motion for settlement approval was sent to approximately 702 Class Members on or around July 14, 2014.

[25] One Class Member, David L. Randell, CA, the owner of Meadow Enterprises Inc., a franchise in Mount Pearl, Newfoundland and Labrador, at the eleventh hour, i.e. just before the approval hearing, submitted a written objection to the Settlement Agreement.

[26] One Class Member, John Hannan, appeared at the approval hearing to voice objections to the settlement. Mr. Hannan's objection was that only Class Counsel was recovering something for the expense of prosecuting the Class Action but he and other Class Members had incurred wasted expenses to maintain their status as Class Members, and thus he suggested that consideration should be given to sharing the recovery with Class Members of the $275,000.00 compensation for disbursements.

[27] Mr. Randell first contacted Class Counsel by email on September 23, 2014 and inquired whether the settlement would preclude any franchisees from bringing up any issues in the future that would have been covered by the release. He wrote:

> … Since such wording was somewhat vague and broad in its coverage, this could preclude a significant volume of potential future lawsuits, and not just the current action. With this in mind, it would be most appropriate, professionally and otherwise, for your firm to fully explain the potential repercussions of this settlement offer. Additionally, Quiznos Canada would benefit, by greatly reduced future claims, to a far greater degree through this settlement than merely the extent of the current funds on the table, and our franchisees should also be made aware of this.

[28] Mr. Shane Murphy of Class Counsel replied by email of September 26, 2014, and wrote:

> With respect to the repercussions of accepting the agreement, those are set out in the Notice to Class and the Settlement Agreement which was sent by mail and posted on our website:
>
> > Class Members will release any claim that they may have against the defendants in relation to the matters alleged in the class action. This means that if the Settlement Agreement receives Court approval, you will not be able to start or continue with any other claim or legal proceeding against Quiznos in relation to the matters alleged in the class action.

[29] Mr. Murphy followed up with another email on September 29, 2014 enclosing a copy of the Settlement Agreement. He wrote:

> If you have any concerns after reviewing the release contained within the Settlement Agreement, you can submit comments to me in writing even though the deadline has passed. We will provide your comments to the judge at the hearing on Thursday. Clearly, it is not the intention of the Settlement Agreement to release any claims which are unrelated to the class action.

[30] Mr. Randell was not assuaged by this response from Class Counsel, and he wrote a letter of objection, which stated:

> The certification order defines the class as "All persons, including firms and corporations, carrying on business in Canada under a "Quiznos" Franchise Agreement at any time between May 12, 2006 and November 23, 2009.
>
> Although the class consists of only those franchises, the claims which are subject to the Settlement release could continue past 2009 and indefinitely into the future. It would be unjust, unfair and inconceivable that all Quiznos franchises, operating under an existing franchise agreement and related contractual arrangements could be forced as a result of this Settlement Agreement alone to accept unfair pricing policies in perpetuity, policies which are not actionable because they were included in this settlement agreement and subject to a blanket release.
>
> ….
>
> The settlement offer gives Quiznos Canada carte blanche, a virtual free hand, to do whatever it wishes with respect to the pricing charged to franchisees for all supplies (food, paper) in perpetuity. We would suggest that this is contrary to the essence of contract law and in contravention of existing contracts (franchise and other) between the franchisor and its franchisees.
>
> In essence, acceptance of this Settlement Agreement provides Quiznos with the unlimited ability and power to make or break a franchise financially, and to determine a franchisee's success and survival regardless of the efforts of the franchisee. To permit a Settlement which gives Quiznos Canada the power to do as they wish with these "supplies" is financial and operational suicide for

> all franchisees, now and forever into the future, and we must voice our objections strongly to the fact that it would even be considered by the franchisees and their representatives.

C. DISCUSSION AND ANALYSIS

[31] Section 29(2) of the *Class Proceedings Act, 1992* provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para. 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.) at para. 43; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[32] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and, (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. See: *Fantl v. Transamerica Life Canada*, *supra* at para. 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.) at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, *supra*, at para. 45; *Kidd v. Canada Life Assurance Company*, *supra*.

[33] In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10. An objective and rational assessment of the pros and cons of the settlement is required: *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.) at para. 23.

[34] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation: *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 70; *Dabbs v. Sun Life Assurance Company of Canada*, (1998), 40 OR (3d) 429 (Gen. Div.). A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally: *Fraser v. Falconbridge Ltd.* (2002), 24 CPC (5th) 396 at para. 13; *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 (Ont. S.C.J.) at para. 17.

[35] The design of the approval process requires the court to carefully scrutinize any proposed settlement. The design of the approval process: (a) requires the proponents of the settlement to justify it; (b) provides an opportunity for those affected by the settlement to be heard; and (c) requires the court to evaluate the settlement and make a formal order. This design is meant both

to deter bad settlements and also to ensure good ones that achieve the goals of the class action regime; namely: access to justice, behaviour modification, and judicial economy.

[36] Of these goals of class actions, the most important for the approval process is access to justice, because a settlement always achieves judicial economy, and a settlement may sometimes not achieve behaviour modification yet still be a good settlement. However, a settlement will be a bad settlement if it does not achieve procedural and substantive access to justice. The court's job is to review a proposed settlement to ensure that the class members have achieved access to justice through a representative action.

[37] In *AIC Limited v. Fischer*, 2013 SCC 6 at paras. 24-34, the Supreme Court of Canada emphasized that access to justice must contain both a procedural and a substantive component. In other words, the justness and fairness of the substantive outcome of the class action for class members genuinely matters.

[38] In my opinion, but for the matter of the release, the proposed settlement in the case at bar would be fair and in the best interests of the Class Members.

[39] Putting aside the release, for the competition law claims, it is doubtful that the Plaintiffs would achieve a better result than what is contained in the Settlement Agreement, even if this matter does proceed to trial.

[40] A review of the competition law, which has changed since the action was commenced, indicates that the competition law claims against the Defendants likely have little chance of success. Further, insofar as the breach of franchise law claims are connected to the competition law claims, the chances of successes of these claims are also unlikely.

[41] To the extent that the Plaintiffs' breach of franchise law claims are detached from the competition law claim, it is very difficult to assess the Plaintiffs' chance of success.

[42] What can be said about the franchise law claims is that the Plaintiffs' claims for breaches of contract and franchise law have been strenuously defended by Quiznos, which was confident enough in its defence to bring a summary judgment motion. And, it appears conversely that Class Counsel do not have much confidence in the merits of the franchise law claims detached from the competition law claims.

[43] Very experienced Class Counsel and the Representative Plaintiffs recommend the settlement, which comes close to being more a discontinuance than a settlement, and their recommendation is a weighty factor for a court to consider when deciding whether to approve a settlement. After ten years of litigation and the changed financial circumstances of some of the Defendants, Class Counsel's views of the Settlement Agreement are a significant factor in favour of approving the settlement.

[44] However, even putting aside the matter of the release, the outcome of this class action by settlement is very poor for the Class Members, who have gained nothing. Because of the $275,000 payment, there is some saving of face and perhaps some notional behaviour modification, but that's about it for a ten-year struggle, and the Defendants continue to vehemently deny that they did, are doing, or will do anything wrong in their treatment of the Class Members.

[45] Despite the poor income and but for the release, I, nevertheless, would have approved the settlement as in the best interests of the Class Members. To varying degrees, class actions are risky and expensive litigation, and right from the get go, this particular class action presented enormous forensic challenges. With the changes in competition law and the chilling effect of *Fairview Donut Inc. v. The TDL Group Corp.*, *supra*, the Class Members have come to their Dunkirk, and it is time to beat a strategic retreat from the litigation battlefield. But for the release, my opinion is that it would be fair and reasonable and in the best interests of the Class Members to approve the Settlement Agreement. In the circumstances of this case, the Class Members should not expect Class Counsel or the Representative Plaintiffs to proceed with a very risky action with a very uncertain outcome and fears about a financially dry judgment.

[46] Although I can understand why Mr. Hannan would object to the allocation of the settlement funds under the Settlement Agreement, I do not think the allocation is unfair or unreasonable in the circumstances of this case. Class Counsel get no recovery for their enormous investment in the case. Notwithstanding Mr. Hannan's objection and but for the release, I would have approved the proposed settlement.

[47] This brings me to the matter of the release, but before I explain why it is fatal to the approval of the settlement, I wish to make it clear that nothing that I have said above should be taken as an assessment of the actual merits of the Plaintiffs' claims against the Defendants in the case at bar, particularly the claims as against Quiznos. Each case depends upon its own particular facts, and *Fairview Donut Inc. v. The TDL Group Corp.* is just one case, and it may be distinguishable and, in any event, it does not end viable franchise law claims by franchisees against franchisors.

[48] That last comment about future franchise law litigation is a segue to the fundamental problem about the release, which has been identified by Mr. Randell. Under the release, the Class Members release all causes of action existing now or arising in the future out of or relating to the purchase, sale, distribution, promotion or marketing of "Supplies" as defined in the Statement of Claim.

[49] The oral argument at the hearing revealed that the parties were not of one mind what the proposed release meant in relation to claims arising in the future with respect to the purchase, etc. of supplies as defined in the Statement of Claim.

[50] Class Counsel understood the release to operate narrowly. In its view, the release would bar future claims based only on the existing alleged misconduct identified in the Statement of Claim.

[51] The Defendants, however, were frank to state that they did not view the release so narrowly, and in the Defendants' interpretation, the release barred claims of the types identified in the Statement of Claim.

[52] An expansive scope of the release was vital for the Defendants, because they were continuing to carry on the supply of supplies, etc. in the same manner as they had in the past and the Defendants did not want to risking going through another class action based on their continuation of their impugned conduct.

[53] The risk of another class action was particularly acute for Quiznos, because while competition law claims based on influencing pricing, always difficult, would be even more difficult in the future, and thus Gordon Food Service, Inc. and GFS Canada Company's risk of

being sued had been attenuated for future claims by recent developments in the law, the risk of Quiznos being sued for future breaches of the franchise agreement remained a quite significant risk.

[54] While I can understand why the Defendants would want an expansive release to preclude future claims, and while such a release would be reasonable from their point of view, there is, nevertheless, substance to Mr. Randall's objection that the release in the case at bar is overbroad and unfair to Class Members.

[55] The scope of the release is too broad. In my opinion, it is fair to have Class Members release their existing claims against the Defendants. And it would have been fair to bar claims that are a continuation of the particular existing claims. However, in my opinion, it is unfair to categorically bar all future claims of the types identified in the Statement of Claim, which is a possible interpretation of the proposed release.

[56] Interpreting how the release would apply in the future is, of course, speculative at best because the factual nexus for the application of release is unknown. However, by way of analogy, if the Plaintiffs' current claim against the Defendants was a nuisance claim, it would be fair to bar future claims based on the existing nuisance or it might be fair to bar future claims based on a continuation of the existing nuisance, but, in my opinion, it would not be fair or reasonable to bar all future claims based on presently unknown new nuisances perpetrated by the Defendants in the future.

[57] That a release may be unfair depending on its interpretation is demonstrated by the quaint old case of *Drew v. Baby* (1841), 1 U.C.R. 438, [1841-1860] O.J. No. 31 (U.C.Q.B.), which involved an action for nuisance by one innkeeper against another who was obstructing traffic to the plaintiff's premises. The defendant relied on a release signed by the plaintiff's predecessor who had released all claims concerning a road between François Baby's house and the defendant's house or any other matter, cause, or thing whatsoever, from the beginning of the world to that day. Chief Justice Robinson, however, refused to interpret the release in the way proposed by the defendant. On the matter of fairness, the Chief Justice stated at para. 2:

> The first question is, has this release the effect contended for? We think it has not; and so it appeared to me at the trial. … House had some time before bought the land of this defendant, and was then about transferring it to these plaintiffs, on a contract previously made. If he really designed, by giving a paper of this kind to the defendant, to deprive the persons, who were about purchasing from him, of all power of obtaining compensation for an injury that made the property almost useless, it was certainly a very unfair proceeding. If, on the other hand, this defendant, knowing that it was not intended to have such an effect, still advanced it for that purpose, that made the proceeding still more unfair. It is plain, however, that is only a discharge of the prosecution (so far as House could discharge it), which has already been commenced by indictment for the nuisance, and a release of whatever rights of action House might then have against this defendant. It does not prevent these plaintiffs from bringing this action for damages sustained by them as owners of the fee.

[58] I appreciate that like Chief Justice Robinson, a future court might interpret the proposed release in a way that was fair and reasonable to the Class Members; however, since the matter of the release's interpretation is arguable as it is currently worded, it is also possible that a future court might interpret the proposed release in the expansive way understood by the Defendants, and that interpretation would be unfair to Class Members. As settlements of matrimonial and other relationship litigation demonstrate, it is certainly not impossible to release future claims.

[59] Moreover, an expansive definition of the scope of the release in the future would be unfair to Class Members who would be unable to join cause with new franchisees with new complaints of alleged common breaches of the franchise agreement that would not be barred because the new franchisees would not have been Class Members.

[60] In my opinion, if the proposed release in the Settlement Agreement is interpreted in the expansive way proposed by the Defendants, which is, at least, possible, then an otherwise fair and reasonable settlement becomes unfair and unreasonable and not in the best interests of Class Members.

[61] It is one thing for Class Members to not have gained anything by a class action, it is another thing to give up rights as the price for settling the Class Action, and such a settlement would not be in the Class Members' best interests. See *Waldman v. Thomson Reuters Canada Limited*, 2014 ONSC 1288.

D. CONCLUSION

[62] For the above reasons, I dismiss the settlement approval motion. There shall be no order as to costs.

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Perell, J.

Released: October 6, 2014

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Plaintiffs

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Defendants

REASONS FOR DECISION

PERELL J.

Released: October 6, 2014