

COURT FILE NO.: CV-08-00356806-CP00[Toronto]

DATE: 20081125

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

FAIRVIEW DONUT INC. and BRULE FOODS LTD.

Plaintiffs

- and -

THE TDL GROUP CORP. and TIM HORTONS INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

J. Morse & A. Lim, for the Plaintiffs/ Respondents

P. Howard, for the Defendants

L. Theall & M. Van Hoek for the Proposed Intervenor and Moving Parties,
Concerned Franchisees Group,

HEARD: November 20, 2008

ENDORSEMENT

LAX J.

[1] This is a proposed class proceeding on behalf of franchisees that own and operate Tim Hortons franchises in Canada. The substance of the action is the erosion of franchisees' margins. The plaintiffs allege breaches of license agreements with the defendants ("TDL") as a result of the conversion from a scratch bake system to an Always Fresh system in or around 2002 and/or as a result of the introduction of an expanded lunch menu. It is alleged that these changes violated provisions in license

agreements entered into before these changes were introduced and that they have resulted in reduced margins and reduced profitability for franchisees operating under these agreements.

[2] The moving parties are twenty Tim Hortons' franchisees who have come together as the Executive Committee for the Concerned Franchisees Group (the "CFG") to oppose certification of the class action. CFG launched a web-site and solicited memberships from like-minded franchisees who operate about 450 Tim Hortons stores across Canada. It brings this motion for leave to intervene as an added party in the action under Rule 13.01 of the *Rules of Civil Procedure* and seek rights as a party in respect to any interlocutory motions up to and including the certification motion.

[3] Rule 13.01 provides:

13.01 A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims:

- (a) an interest in the subject matter of the proceeding;
- (b) that the person may be adversely affected by a judgment in the proceeding; or
- (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

13.01(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

[4] Ontario courts have interpreted Rule 13 narrowly in purely private disputes and a Rule 13 order is rare in private litigation: *Authorson (Litigation Guardian of) v. Canada (Attorney-General)*, [2001] O.J. No. 2768 (C.A.) at para. 8; *Rare Charitable Research Reserve v. Chaplin*, [2008] O.J. No. 3764 (Div. Ct.) at para. 7; *Professional Indemnity Co. v. Geto Investments Ltd.*, [2002] O.J. No. 378 (S.C.J.) at para. 17. The burden on the moving party is a heavier one in these cases: *Authorson* at para. 9.

[5] Motions to intervene require consideration not only of the proposed intervenor's interest in the issue between the parties, but also the likelihood that the intervenor can make a useful addition or contribution to the resolution of the issues before the court without causing injustice to the parties: *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.*, [1990] O.J. No. 1378 (C.A.) at para. 10. Proposed intervenors must be able to offer something more than the repetition of another party's evidence or argument or a slightly different emphasis on arguments that will be before the court: *Stadium Corp. of Ontario Ltd. v. Toronto*, [1992] O.J. No. 1574 (Div. Ct.) at para. 14.

[6] Unless and until this action is certified as a class action, it remains a private dispute between the plaintiffs and TDL. Once certified, it will bind those class members, including members of CFG, who do not opt out. CFG opposes the class action on the basis that certification is detrimental to the Tim Hortons brand and to the individual and collective business interests of CFG and its franchisee members. It proposes to bring this "unique perspective" to the certification motion. In support of this position, it adduced evidence in the form of affidavits from Graham Oliver who is a member of the proposed class and a current franchisee and from Dr. Sridhar Moorthy, a professor of marketing at the Rotman School of Management at the University of Toronto.

[7] The purpose of Mr. Oliver's evidence was to show that a significant number of franchisees do not wish to see the action proceed as a class action. Evidence of a similar nature was tendered by the defendant from two franchisees opposed to certification in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*, [2002] O.J. No. 4781 (2002), 62 O.R. (3d) 535. There, as here, the affiants did not see opting out as a solution and expressed concern that taking the action forward as a class proceeding would harm their interests. In considering how the court should assess such evidence, the following comments of Winkler J. (as he then was) are apposite:

[32] ... To adduce evidence from individual class members as to the desirability of a class proceeding is to assume, as an underlying proposition, that certification motions are somehow determined through a referendum of class members. Such is not the case. The legislature has spoken with respect to class proceedings in this province. The provisions dealing with opt-outs and de-certification show that it was clearly alive to

the prospect that not all members of a proposed class would wish to participate in a class proceeding, or alternatively, that a sufficient number of defections from the class would render a class proceeding unnecessary. Conversely, there are no provisions that expressly or implicitly mandate, or even suggest, that the suitability of a class proceeding is to be determined by a polling of the class prior to the certification motion.

[8] Winkler J. concluded at para. 33 that by the opt out provision in the *CPA*, the legislature had expressed an intention that “simple dissent by some members of the class should not be sufficient to veto any efforts by others to enforce their legal rights through a class proceeding”. I agree. Moreover, there is no reliable evidence that the business interests of franchisees will be harmed by certification or that certification will result in negative media coverage adversely affecting the brand or a reduction in sales. Dr. Moorthy has undertaken no analysis to determine this.

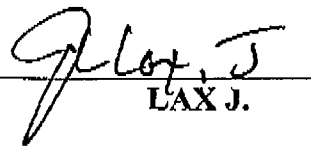
[9] It seems plain to me that adding CFG as an intervener will only serve to delay the determination of the issues and may serve to take the proceeding off into a tangent. Some of the information provided to members of CFG through the website is incorrect, (for example, that the plaintiffs are seeking a return to the scratch baking system) and some of the information appears to misunderstand the purpose of a certification motion, (for example, that CFG opposes this proceeding on the merits).

[10] CFG claims to be able to offer the court the “unique perspective of franchisees”, but has not shown how this will assist the court in determining whether the plaintiffs can satisfy the requirements for certification under section 5(1) of the *CPA*. It has not identified any evidence or argument that would differentiate its position from the position of the defendant. The introduction of “unique evidence as to the motives of the proposed representative plaintiffs as well as franchisees’ experience with the Always Fresh conversion and expanded lunch menu” is irrelevant to the certification requirements.

[11] Finally, it seems clear that CFG shares at least some of the plaintiffs’ concerns that are raised as issues in the litigation, but simply disagrees with the mechanism the plaintiffs have chosen for resolving these issues. CFG would prefer to negotiate rather than litigate. The opt out provision in the *CPA* is the proper mechanism to address these

concerns. It should not be circumvented by granting intervenor status to putative class members who see matters differently from the proposed representative plaintiffs in a class action. This will not only cause undue delay and expense, but it is antithetical to the procedure contemplated by the legislature under the *CPA*.

[12] The motion is dismissed with costs fixed in the amount of \$25,000 for fees and \$5,000 for disbursements plus applicable GST.


LAX J.

Released: November 25, 2008