Ontario Court of Appeal affirms the certification of a class proceeding against Quizno's brought by former franchisees

In a unanimous decision issued on June 24, 2010, the Ontario Court of Appeal affirmed the Divisional Court's order certifying a proposed class action against Quizno's Canada Restaurant Corporation and its affiliates (collectively, "Quiznos") and GFS Canada Company Inc. ("GFS"), brought by two former Ontario franchisees of Quiznos (the "plaintiffs"). Quiznos is a franchisor of a chain of several hundred restaurants across Canada, and GFS supplies and distributes for Quiznos food and related products such as kitchen equipment. The plaintiffs, seeking to represent all Quiznos franchisees in Canada, alleged that they have been charged inflated and commercially unreasonable prices for the food and other supplies which they are contractually required to purchase from GFS (and its affiliates), and sustained damages as a result. They further alleged that Quiznos, aided by GFS, achieved this result by establishing a price-maintenance scheme.

The plaintiffs asserted three causes of action: (1) breach of the price maintenance provisions (s. 61) of the *Competition Act*; (2) conspiracy to fix prices; and (3) breach of contract. The proposed common issues included: whether Quiznos engaged in conduct contrary to s. 61 of the *Competition Act*; whether the defendants engaged in conduct amounting to civil conspiracy; whether Quiznos breached their contractual obligations to the class members; whether the class members suffered damages as a result of such conduct; and whether the court should award damages on an aggregate basis and if so, what the amount should be and how it should be divided among the class members.

At first instance, the plaintiffs' motion for certification was dismissed by Perell J., mainly on the basis that the damages allegedly suffered by the plaintiffs could not be assessed on a class-wide basis. This, in Perell J.'s view, gave rise to major difficulties for the plaintiffs, since (1) damages are a substantive element of both a civil claim under the *Competition Act* (s. 36 of which requires damages as an element of civil action for breach of provisions such as s. 61) and a claim for civil conspiracy, and (2) while the plaintiffs need not prove damages in order to establish breach of contract, damages are the practical reason for their claim (given that the plaintiffs do not aim for an award of nominal damages but claim for $50 million in damages).

Perell J. held that the individual nature of the damages issue "has the effect of an avalanche that buries the proposed common issues with an absence of commonality and a proliferation of individual issues." Perell J. concluded 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."

Perell J. also rejected the plaintiffs' position that, in establishing a common issue in respect of damages, they could rely on ss. 23(1) and 24(1) of the *Class Proceedings Act*. (Section 23(1) authorizes the court to admit, for the purposes of determining issues relating to the amount or distribution of a monetary award, statistical evidence that would not otherwise be admissible as evidence; and s. 24(1) authorizes the court to determine the aggregate or a part of a

defendant's liability to class members if certain conditions are met.) Perell J. was of the view that s. 23(1) deals with the distribution of damages and s. 24(1) provides a method of assessing the quantum of damages on a global or aggregate basis, neither provision being concerned with the determination regarding the entitlement to damages itself.

On appeal, however, Perell J.'s decision was reversed by a split panel of the Divisional Court. The majority of the court (Hennessy and Karakatsanis JJ.) held that Perell J. erred in focusing solely on the proof of damages and failing to consider other common issues. In the majority's view, sufficient commonality existed in respect of most of the proposed common issues. The court also held that, contrary to Perell J.'s opinion, ss. 23(1) and 24(1) of the *Class Proceedings Act* were available to determine aggregate damages in the case before the court.

Swinton J., in dissent, would have dismissed the appeal. She held that Perell J. did not err in his analysis regarding common issues, and that, even if he had erred in that respect, there was no basis to interfere with his conclusion that a class proceeding was not the preferable procedure.

On further appeal, the Ontario Court of Appeal (Armstrong, Blair, and Juriansz JJ.A.) unanimously upheld the Divisional Court's decision, agreeing that Perell J. erred in focusing on the damages issue and conducting no separate analysis of the remaining proposed common issues. Following are some of the main points from the reasons of the Divisional Court of which Armstrong J.A. expressed approval:

- A finding that Quiznos engaged in conduct amounting to price maintenance under s. 61 of the *Competition Act* would resolve a substantial ingredient of liability under the *Competition Act*, thereby advancing the litigation.

- Similarly, even if the plaintiffs could not establish the fact of loss on a class-wide basis, all of the other elements of civil conspiracy are common issues that would advance each franchisee's claim and avoid duplication of fact-finding and legal analysis.

- A significant number of factual and legal issues that are integral to the breach of contract claim are also common issues, the resolution of which could advance the litigation.

Armstrong J.A. also agreed with the Divisional Court on the issues relating to ss. 23(1) and 24(1) of the *Class Proceedings Act*. He held that, while it is true that those provisions cannot be used in proving liability, on a certification motion, a plaintiff is only required to establish that "there is a reasonable likelihood that the preconditions in s. 24(1) would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues" (quoting from *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 44). Armstrong J.A. also reaffirmed the previous holding of the Court that the ultimate decision on whether ss. 23 and 24 would be available rested with the trial judge.

It thus appears that it may be difficult for a defendant in a proposed class proceeding to successfully resist certification by arguing that: (1) proof of damages is essential to establishing

liability based on the statutory cause of action created by s. 36 of the *Competition Act*; and (2) proof of damages cannot be a common issue. Moreover, if the other elements of the cause of action are found to give rise to common issues, the court would likely take the view that certification should be granted even if the damages issues could only be determined on an individual-by-individual basis. In this regard, the following statement by Armstrong J.A. is of interest:

> I am also of the view that a class proceeding in this case will satisfy at least two of the objectives of the *Class Proceedings Act* of judicial economy and access to justice. It seems to me that this case involving a dispute between a franchisor and several hundred franchisees is exactly the kind of case for a class proceeding.

This passage suggests that, notwithstanding some problems relating to the common issues requirement for certification, the Court will be inclined to grant certification if it considers that a class proceeding would achieve judicial economy by advancing the litigation and provide the plaintiffs better access to justice. The likely overall result would seem to be the lowering of the threshold for certification in these types of cases.