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INDIVIDUAL TO GROUP TO CLASS DISPUTES IN FRANCHISING – CONSIDERATIONS FOR RESOLUTION

1. Introduction

Though a critical mass of franchise class proceedings in Ontario has been slow to develop, a number of class actions in the franchise context have been certified over the course of the past decade. With the recent certification of another franchise class proceeding, and several additional actions currently at the certification hearing stage, more and more franchisees are seeking to avail themselves of the ability to band together as a class to resolve disputes against their franchisors.

In light of the recent spike in activity in franchise class proceedings and franchise litigation in general, both franchisees and franchisors need to be aware of the procedural advantages and pitfalls of class actions and the various other avenues and for resolving franchise-related disputes. This is particularly true in light of provincial legislation, such as Ontario's *Arthur Wishart Act (Franchise Disclosure), 2000* that generally requires franchisors to disclose the existence of litigation to prospective franchisees.[2] The disclosure of class proceedings, in particular, may significantly reduce the value of a given franchise, or deter prospective franchisees from joining the franchise system altogether.

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[2] See, for example, the Alberta *Franchises Act*, R.S.A. 2000, c. F-23; the Ontario *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c.3 [*Arthur Wishart Act*]; and the P.E.I. *Franchises Act*, Chapter F-14.1; (Note: underlined authorities contain hyperlinks to CanLII and other publicly accessible databases, except where decisions are unavailable).

With a particular focus on the developing body of case law in the franchise class certification context, the purpose of this paper is to examine approaches to franchise class proceedings from the perspective of both franchisees and the franchisor. In light of the state of the law of franchise class actions, and with regard to the various other available procedural options, this paper will consider whether class actions are the preferable means for resolving franchise disputes.

2. Current State of Franchise Class Proceedings

As mentioned above, though the *Arthur Wishart Act* was introduced in 2000, there was little immediate class action activity in the franchise context. The 2002 decision of Justice Winkler (as he then was) to certify a class of A&P franchisees against their franchisor in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd.* marked the first certification of a franchise class action in the *Arthur Wishart Act* era.[3] In the years following *A&P*, there was little activity in terms of franchise class proceedings, with only *Landsbridge Auto Corp. v. Midas Canada Inc.*,[4] and *2038724 Ontario Ltd. v. Quiznos Canada Restaurant Corp.*[5] having been certified in Ontario. Although the Government of Ontario is exempt from the application of the *Arthur Wishart Act*, its network of private drivers license issuers have had their claims against Ontario certified as a class proceeding over the compensation paid to them

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[3] *1176560 Ontario Ltd. v. Great Atlantic & Pacific Company of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 5, aff'd (2004) 70 O.R. (3d) 182 (Div. Ct.), leave to appeal denied (C.A.) [*A&P*]. (Osler, Hoskin & Harcourt LLP acted for A&P. Sotos LLP acted for 1176560 Ontario Ltd.)

[4] *Landsbridge Auto Corp. v. Midas Canada Inc.* (2009), 73 C.P.C. (6th) 10 (Ont. S.C.J.) [*Midas Certification*] (Sotos LLP acted for Landsbridge Auto Corp).

[5] *2038724 Ontario Ltd. v. Quiznos Canada Restaurant Corp.* (2009), 96 O.R. (3d) 252 [*Quizno's Div. Ct.*] (Sotos LLP acted for 2038724 Ontario Ltd.).

under their forms of agreement in *Mayotte v. Ontario*.[6] Leave to appeal the certification decision was denied on September 24, 2010.

However, with the very recent certification of a class of franchisees in *578115 Ontario Inc. v. Sears Canada Inc.*[7], and five other certification hearings in franchise cases scheduled in the coming months, it would appear that the flood gates have opened.[8] Given that the Ontario Court of Appeal has recently declared that class actions involving hundreds of franchisees suing their franchisor over a common franchise agreement are "exactly the kind of case for a class proceeding," we must expect that this trend will continue.[9]

3. The Nature of Typical Franchise Disputes

Whether issued pursuant to class proceedings legislation or not, every statement of claim seeks to assert claims that an individual franchisee has against its franchisor or vice versa. The types of claims that a franchisee may assert against its franchisor by way of legal action are broad and varied. As franchising is typically a contractual matter between two parties, franchise disputes cover the gamut of contractual issues. Litigation can arise between a franchisor and a franchisee for various reasons, including: disputes over the very existence of the contract, which can raise all manner of issues relating to the formation of the contract; the performance and enforcement of the contract, including the termination thereof; any claims seeking relief from the forfeiture of the franchise agreement; and statutory claims for breaches of franchise specific legislation, including claims for statutory rescission.

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6 *Mayotte v. Ontario*, 2010 ONSC 3765, leave to appeal to Div. Ct. denied September 24, 2010 per Sachs J [*Mayotte*]. (Sotos LLP acted for Mayotte).

7 *578115 Ontario Inc. v. Sears Canada Inc.*, 2010 ONSC 4571 [*Sears*].

8 See Appendix A for a list of certified and proposed class proceedings in Ontario.

9 *Quizno's Canada Restaurant Corporation v. 2038724 Ontario Ltd.* 2010 ONCA 466 at para. 62 (C.A.) [*Quiznos C.A.*].

Given the myriad of rights and obligations involved in the typical franchise agreement, it is also common for litigation to arise relating to intellectual property rights, the protection of information disclosed in the context of the franchise relationship, and the enforceability of non-competition and non-solicitation covenants. Lawsuits in the franchise context often involve claims, defences and counterclaims in cases where money is allegedly owed by one party to the other, and often involve claims for prospective damages where one party asserts that the other party has breached the contract and brought it to an end.

Every action, whether commenced by way of intended class proceeding or not, involves individual issues as between a single franchisee and its franchisor. When drafting a new form of franchise agreement to be utilized by a franchisor within its franchise system, prudent counsel will discuss with their franchisor client the advantages and disadvantages of various dispute resolution possibilities that a franchisor may want to consider for use within its franchise agreement and franchise system. Such provisions may include the requirement that the parties engage in good faith mediation before any legal proceedings can be commenced. Similarly, franchisors may prefer to require various disputes to be arbitrated with a view to preserving at least some degree of confidentiality concerning the dispute and to allow the parties to select the individual who will adjudicate their dispute.

At the same time, certain complaints found in a statement of claim may be of a type that goes beyond an individual franchisee. In various cases where issues may apply to one or more franchisees, those issue may be said to exist for a class of franchisees or they may be said to be systemic or system-wide. The resolution of so-called “systemic” issues and disputes may be better suited to group proceedings or to class actions, particularly if there are a large number of affected franchisees.

4. Extra-Judicial Fora for the Resolution of Franchise Disputes

In many franchise systems, either or both of the franchisor or the franchisees may have established organizations specifically intended to consider issues that arise in the context of the relationship between the franchisor and the franchisees as groups or as a whole. For example, franchisors often establish franchisee advisory committees or councils that include franchisees selected by the franchisor from the franchisee body. These councils serve as a means for franchisors and franchisees to address issues that go beyond their individual franchise agreements in the development of the franchise system.

The agenda for such committees or councils may be set by franchisors unilaterally or with the input of franchisees. To the extent that franchisee input is incorporated, it often includes contributions from franchisees who are not members of the committee, and is typically communicated by those franchisees through their designated representatives on such committees. In addition to and apart from franchisee advisory councils, franchisees often form their own incorporated and unincorporated franchisee associations, providing a forum for franchisees to consider all manner of issues that may be common to more than one franchisee across the franchise system. Moreover, in many franchise systems, apart from having established a formal organization, franchisees often collect as a group through internet communications to discuss issues affecting one or more of the franchisees in the operation of their franchised businesses. As such, although franchising is by its nature a matter of individual contract, parties to the franchise system have recognized the need for and have established processes for dealing with matters that apply to the franchise system, in whole or in part, through a collective of franchisees.

5. Resources Available to Pursue Litigation

In the typical franchise situation, the resources available to a franchisor to litigate a dispute usually exceed those available to a franchisee by many multiples. In addition, franchisors

may be able to utilize numerous rights and powers that they have imposed under their franchise agreements and attempt to influence the manner in which a franchisee raises a dispute against the franchisor.

Given the power usually reserved to a franchisor within a franchise agreement, franchisors often have a broad ability to impose terms and conditions in the operation of a franchise after the parties have entered the franchise agreement itself. Franchisors will often have no obligation to inform their franchisees of the reason for any imposition of certain terms and conditions or changes to the franchise system. Further, it is inherent in most franchise agreements that the franchisor has the right to make changes to the franchise system that can seriously alter the nature of the franchise relationship from when it was initially established at the time of the entering into of the franchise agreement. It is therefore very rare for franchisees to raise these issues with the franchisor without first consulting with one another.

6. Effectiveness of Franchisee Advisory Councils, Franchisee Associations and other Informal Fora for the Discussion and Resolution of Issues within a Franchise System

Franchisor management constantly debate among themselves and with their legal counsel the extent to which franchisees should be involved in what is typically seen to be the business of the franchisor. It is the franchisor who typically reserves for itself the right to establish and make changes to its franchise system. Yet it is often recognized that franchisee input regarding the franchise system can have various degrees of value. Whether that value should be crystallized into a right of the franchisee to participate in decision making affecting the franchise system is a matter that each franchisor must consider in the establishment and development of its franchise system.

The choices a franchisor makes in designing this aspect of its franchise system have a significant impact on how issues are ultimately addressed when those issues might affect more than one franchisee. Franchise systems are inherently well positioned to prevent franchise litigation, given that franchising represents a form of relationship that usually involves constant communication between a franchisor and its franchisees, individually and collectively. This is particularly true if litigation is properly viewed as a last resort for resolving issues between a franchisor and its franchisees. All parties have the ability to determine the effectiveness of their relationship in this regard, and within a context where the law imposes an overriding duty on those parties to carry out their contractual obligations in good faith.

Franchise systems usually include mechanisms for the distribution of information as between a franchisor and its franchisees, both individually and collectively. The ability to inform one another can provide a valuable tool in the prevention or resolution of misunderstandings or disputes outside of any legal process.

7. Intervention of Legal Counsel into a Dispute Between a Franchisor and a Franchisee

Both franchisors and franchisees typically have access to legal advice with respect to issues that may give rise to disputes and ultimately to litigation. For most franchisors, communications with their legal counsel, including the potential existence of in-house counsel, is an everyday occurrence. In the case of franchisees, a relationship with legal counsel is usually established at the time a contractual relationship with the franchisor is formed. Typically, when a franchisee raises issues it has experienced in dealing with its franchisor or within the franchise system, the franchisee's counsel will inquire as to whether those issues or concerns are shared by other franchisees within the franchise system. This inquiry will assist counsel to assess one factor that may contribute to the franchisee's ability to have the matter resolved in its favour.

In this regard, the various provincial legislatures that have passed franchise legislation have seen it advisable and necessary to protect the ability of franchisees to associate with one another. In so doing, legislatures have recognized that it may be of significant value for franchisees to come together to address issues and concerns that they may have in common, and to form groups for the advantage of not only the group but of each individual within the group.

8. Relationship between Franchisor and Franchisees

Many franchisees are vulnerable as individuals given the imbalance in the powers and resources available to franchisors. However, the fact of vulnerability does not automatically result in the misuse of powers and resources by the franchisor in order to impose its will upon a franchisee in the resolution of any potential or existing dispute with the franchisee. Indeed, many franchisors are sensitive to this vulnerability, and will attempt to work with franchisees to reach equitable resolutions of issues and disputes. Further, it is important to recognize that many franchisees are highly sophisticated businesspeople who may own dozens of franchise locations and have access to significant resources to pursue litigation. In these situations, a single franchisee can bring significant leverage to bear in a dispute with a franchisor.

Nevertheless, the ability of the franchisee to participate in a group is considered an important means for franchisees to level the playing field in many cases. When considering whether to introduce class proceedings legislation in Ontario, Ontario's Law Reform Commission undertook and published a report. Released in 1982, the Law Reform Commission made the following statement:

> Even small businesses may be reluctant to sue more powerful companies where, for example, in a franchisor-franchisee situation, they must deal continuously with such companies on a basis of dependence. [10]

[10] Ontario Law Reform Commission, Report on Class Actions (1982) Vol. 1, Ministry of the Attorney General, 1982, at p.128.

Franchisees' lack of financial wherewithal to commence a major lawsuit, combined with their general reluctance to antagonize a much larger corporation, have been recognized as important reasons for ensuring the availability of class proceedings to franchisees.

9. Group versus Class Proceedings

Apart from the class proceedings process, the various provincial rules of civil procedure provide for parties to be able to combine in single proceedings in order to pursue claims or issues that they share in common. Therefore, it is generally possible for multiple franchisees to join together to commence group litigation, rather than proceed by way of a class action, against their franchisor.[11]

There are a number of differences between the litigation of an action by a group of plaintiffs and the litigation of an action as a class proceeding. The most obvious difference is the requirement that, in order for an action to proceed as a class proceeding, an individual or group of individuals must initiate the action pursuant to class proceedings legislation. The action will then require certification as a class proceeding at a later date. The exception to that process is in the province of Quebec, where a potential plaintiff to a class action must obtain the court's initial consent to proceed by way of class proceedings before the claim is served.

By contrast, no special procedure through the Ontario *Class Proceedings Act* or similar legislation is required to proceed in a group action.[12] A group of plaintiff franchisees who join together to sue their franchisor do not have to battle to be certified at a certification hearing, and any challenge to the legitimacy of the joinder of the plaintiff group must be initiated by the

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[11] See, for example, *1318214 Ontario Ltd. v. Sobeys Capital Inc.*, [2010] O.J. No. 3211 (S.C.J.) in which a small group of Sobeys franchisees have claimed breach of contract and breach of the duty of fair dealing under the *Arthur Wishart Act* (Sotos LLP is acting for the plaintiff franchisees).

[12] *Class Proceedings Act, 1992*, S.O. 1992, c. 6 [*CPA*].

defendant. Once the statement of claim has been issued and served, the litigation proceeds normally, pursuant to the provincial procedural rules.

Expediency is therefore one of the key advantages to proceeding by group action, rather than by a class proceeding. When a statement of claim is issued pursuant to class proceedings legislation, the litigation is effectively at a standstill until the class proceeding is certified. In the vast majority of cases, the defendant franchisor will not deliver its statement of defence until after the certification decision has been rendered. Given that parties frequently appeal certification decisions, it is not uncommon for several years to pass between the issuance of the statement of claim and the final certification outcome.[13] Even if the action is finally certified as a class proceeding, it is important to note that certification merely constitutes the court's blessing for an action to go forward as a class proceeding, and that no determination on the merits of the case has been made.

For franchisees who have limited access to resources to fund the litigation, the potential for a drawn-out and expensive certification process is a factor to consider. Similarly, franchisees seeking to use litigation as an instrument for effecting systemic change must be aware that the certification hurdle (as well as the possibility for appeals) looms as a significant barrier. To attempt to reduce the often significant delays associated with class proceedings, the *CPA* establishes that a single judge will be appointed to monitor all aspects of the class proceeding, including all scheduling issues, to ensure the timely prosecution of the action in accordance with the approved plan of proceeding.

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[13] See Appendix A for an illustration of the possible delays between the issuance of the statement of claim and the final decision regarding certification. For example, in *Fairview Donut Inc. and Brule Foods Ltd. v. The TDL Group Corp. and Tim Hortons Inc*., 2008 CanLII 60983 (Ont. S.C.J.), the statement of claim was issued in June, 2008 and the certification motion has not yet been heard.

As alluded to above, in group litigation, it is open to the franchisor to challenge the franchisees' joinder of their claims. Although the test for joinder of claims is different from the certification tests in a class action, it is not an absolute right for franchisees to combine to pursue group litigation as an alternative to proceeding by way of class proceedings. By way of a recent example, General Motors of Canada Limited sought various relief, including severance of the joined claims, against a group of nineteen General Motors Dealers who were presented with an agreement for the winding-down of their businesses which they refused to accept.[14] After considering the test for joinder of claims set out in the Ontario *Rules of Civil Procedure*, and having acknowledged that there were numerous differences among the plaintiffs in the group, Justice Pepall declined to sever the group of plaintiffs and held that "if the claims are severed, there would be an increase in the cost and length of each proceeding."[15]

The prosecution of a claim as a group proceeding is procedurally different and involves different considerations from the prosecution of an action as a class proceeding. Apart from the issue of requiring certification, the procedural rules applying to the two proceedings are markedly different. For example, while all plaintiffs in a group action are susceptible to being examined for discovery, only the representative plaintiff in a class proceeding is subject to being examined for discovery unless the court orders other members of the class to be examined.[16] Further, all plaintiffs in a group action are susceptible to paying the defendant's legal costs if the

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[14] *Stoneleigh Motors Ltd. v. General Motors of Canada Ltd.*, [2010] O.J. No. 1621 (S.C.J.) (Osler, Hoskin & Harcourt LLP acted as counsel for General Motors of Canada Ltd.).

[15] *Id.*, at para. 79.

[16] In light of the focus on expediency in the updated Ontario *Rules of Civil Procedure*, it is unlikely that the right to examine every member of a plaintiff group would stand as a significant barrier in terms of timing and expense. The new proportionality rules for discovery in Rule 29.2 and the requirement that the parties reach a discovery plan in Rule 29.1 should help to alleviate delays associated with group proceedings. Further, Rule 31.05.1 states that no party shall exceed seven hours for its examinations, regardless of the number of parties to be examined, except with consent or with leave.

action is not successful. By contrast, only the representative plaintiff risks having to pay the franchisor's costs in an unsuccessful class proceeding. Moreover, in Ontario, a fund is available through the Law Foundation of Ontario to cover disbursements that are required to prosecute a class action proceeding. In return, the Law Foundation acquires a financial interest in the outcome of the litigation. For example, the disbursements of the plaintiff class in the *Midas* class action are being funded by the Law Foundation of Ontario. These funds are not available to a plaintiff group in a group proceeding.

The possibility to effect system-wide change is potentially more significant in a class proceeding than it is in a group proceeding, principally because the settlement of a class proceeding binds all members of the class except those potential members who have chosen to opt out of the action. Given that settlements must be approved by the court in a class action and that, once approved, those settlements are binding upon all members of the class, there is a greater availability on the part of a franchisor to resolve the dispute by offering to implement broad changes that will apply across the system. By contrast, the resolution of a group proceeding affects only the parties to the litigation themselves. Nevertheless, in relatively small franchise systems, all or nearly all of the franchisees may be able to join together in a group action, rather than as a class. Further, it is worth noting that plaintiff franchisees (whether proceeding as a group or as a class) do not always seek system-wide change. Even within the franchise context, it may be that simple damages are the only (or the principal) relief sought from the litigation.

10. Court-Enunciated Principles affecting Franchise Class Actions

As mentioned above, according to a recent unanimous decision of the Ontario Court of Appeal, class actions involving hundreds of franchisees suing their franchisor over a common franchise agreement are "exactly the kind of case for a class proceeding."[17]

The Ontario Court of Appeal also recently confirmed that the statutory right of association contained in Section 4 of the *Arthur Wishart* Act includes the rights of franchisees to bring a class action in relation to alleged systemic breaches by their franchisor.[18] Thus, the Ontario Court of Appeal has indicated that the legislature intended to accord special status of protection to franchise class actions.

In an action on behalf of a group of franchisees alleging improper withholding of supplier monies by their franchisor, Justice Winkler (as he then was) found that case to involve "overwhelming commonality" and "judicial economy" which was "patently obvious" despite their being only 60 franchisees in the system.[19]

11. Test for Certification

In order to be certified as a class proceeding in the various provincial jurisdictions that have class action legislation, a proposed representative plaintiff must satisfy the legislative test for certification. In Ontario, the test for certification is contained in Section 5(1) of the CPA and involves five key parts, as set out in the statute:

> 5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

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17 *Quiznos C.A.*, *supra*.

18 *405341 Ontario Limited v. Midas Canada Inc.*, 2010 ONCA 478 [*Midas C.A.*] (Sotos LLP acted for 405341 Ontario Limited).

19 *A&P*, supra.

> (a) the pleadings or the notice of application discloses a cause of action;
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> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
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> (c) the claims or defences of the class members raise common issues;
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> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
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> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests 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. [20]

In applying the test for certification in the franchise context, courts take into account considerations that arise in light of the unique relationship between franchisee and franchisor. As set out above, in Ontario, the four most prominent certification decisions involving a class of franchisees suing a franchisor are *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*,[21] *Landsbridge Auto Corp. v. Midas Canada Inc.*,[22] *2038724 Ontario Ltd. v. Quiznos Canada Restaurant Corp.*[23] and the recent decision in *578115 Ontario Inc. v. Sears Canada Inc.*[24] The following is an examination of each stage of the certification test in light of these decisions as well as other cases outside of the franchise context.

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[20] *CPA*, at s. 5(1).

[21] *A&P*, supra.

[22] *Midas Certification*, *supr*a.

[23] *Quizno's Div. Ct.*, *supra*.

[24] *Sears*, *supra*.

A. Cause of Action (Section 5(1)(a)):

According to the Ontario Divisional Court in *Abdool v. Anaheim Management Ltd.*, the application of section 5(1)(a) of the *CPA* involves the same test as Rule 21 of the *Ontario Rules of Civil Procedure*,[25] meaning:

(a) all allegations of fact in the statement of claim, unless patently ridiculous or incapable of proof, must be accepted as proved;

(b) the defendant, in order to succeed, must show that it is plain, obvious and beyond doubt that the plaintiff cannot succeed;

(c) the novelty of the cause of action will not militate against the plaintiff; and

(d) the statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.[26]

Expert evidence is clearly inadmissible to rebut the existence of a cause of action. Just as at trial, parties cannot call expert evidence as to the meaning of a contract, even when the expert is genuinely knowledgeable about an industry. As the Alberta Court of Appeal recently stated:

> For example, the respondent proposes to tender evidence to demonstrate that the industry would expect that if the methodology in the M & M Report changed, the price marker would change. This is an attempt to provide direct evidence on what the parties intended Article 5.8 to mean, in the guise of "context". What the industry would have intended to contract for is an attempt to have the court draw an inference of subjective intent from external evidence. It goes one step further, because it suggests that the expectations of the industry as a whole could

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[25] *Anderson v. Wilson* (1999), 175 D.L.R. (4th) 409 at para. 16 (Ont. C.A.).

[26] As summarized in *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 at 469 (Div. Ct.).

> override the intentions of these two parties as expressed in the wording of this particular contract.[27] (Emphasis added)

B. Identifiable Class (Section 5(1)(b)):

In order to satisfy the requirement under Section 5(1)(b) of the *CPA* that there is an identifiable class, the proposed class definition: (i) must be objective and not merits based; (ii) must contemplate a rational relationship between the class and common issues; (iii) must identify the person to have a potential claim against the defendant who will be bound by the court's judgment on the common issues; and, (iv) must establish a class which is not unlimited.[28]

C. Common Issues (Section 5(1)(c)):

Section 1 of the *CPA* defines "common issues" 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.

The definition of "common issues" in section 1 of the *CPA* reflects a conscious effort by the Legislature to avoid setting the certification bar too high. Courts have had regard to that intention in stating that the "common issues" requirement is a "low bar". The real issue is whether a class proceeding will avoid duplication of fact finding or legal analysis.[29]

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[27] *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126 at para. 23.

[28] *Hollick v. Toronto (City)* (2001), [2001] 3 S.C.R. 158 at para. 17 [*Hollick*]; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 45, leave to appeal denied, [2005] S.C.C.A. No.50 [Cloud]; *Western Canadian Shopping Centres Inc. v. Dutton* (2001), [2001] 2 S.C.R. 534 at para. 38 [*Western Canadian*]; and *Bywater v. T.T.C.*, [1998] O.J. No. 4913 (Gen. Div.).

[29] *Hollick*, *supra* at paras. 16, 18, 25; *Carom v. Bre-X Minerals Ltd.* (2000), 196 D.L.R. (4th) 344 (C.A.) at paras. 40-41, leave to appeal denied, [2008] S.C.C.A. No.660 [*Bre-X*]; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.) [*Cloud*].

A plaintiff must adduce "some basis in fact" to show that the issues in the litigation are common.[30] The underlying question is whether allowing the suit to proceed will avoid duplication of fact finding or legal analysis. Although the *CPA* is silent in respect of the quality or nature of the common issues that must exist, courts will not consider an issue to be "common" within the meaning of the test unless the issue is a substantial ingredient of each class member's claim. At the same time, common issues do not have to determine liability but need only be issues of fact or law that will move the litigation forward. Similarly, the resolution of the common issues does not have to be sufficient to support relief. All that is required is that, for any member of the class to succeed, the common issues must be determined in his or her favour.[31]

The existence of issues that are individual rather than common is not a bar to certification.[32] Nor is the possibility that damages will need to be assessed individually.[33] As Justice Strathy held in the *Sears* decision:

> I note that in *Rosedale Motors*, above, the existence of some individual issues did not prevent the court from certifying the proceeding because the common issues would materially advance the action – the same is true here.[34]

The proper approach to the common issues assessment is not to focus on how many individual issues there might be. Instead, the Ontario Court of Appeal held in *Cloud* that courts should analyze whether there are "any issues the resolution of which would be necessary to

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30 *Hollick*, *supra* at para. 25.

31 *Campbell v. Flexwatt Corp.* (1997), [1997] B.C.J. No. 2477 at para. 53 (C.A.); *Bre-X*, *supra* at para. 41.

32 *CPA*, *supra* at ss. 6 and 25.

33 *CPA*, *supra* at ss. 24 and 25. See, also, *Cassano v. The Toronto-Dominion Bank* (2007), 87 O.R. (3d) 401 (C.A.) at para. 37, leave to appeal denied. [2008] S.C.C.A. No. 15 [*Cassano*]; *Quiznos C.A.*, *supra* at paras. 54-9.

34 *Sears*, *supra* at para. 51.

resolve each class member's claim and which could be said to be a substantial ingredient of those claims."[35]

a. Factors Militating in Favour of a Finding of Common Issues

In franchise litigation, typically all class members are or were parties to a franchise agreement that is identical in respects material to the litigation. This is an obvious and important factor in considering whether the issues raised by the action are common. As the Divisional Court found in *Quizno's*, while each franchisee may have suffered different damages, the conduct giving rise to liability was "systemic." According to the Court, "every franchisee is subject to the same contract, pricing structure and distribution."[36] Similarly, in *A&P*, the court found the franchisor's argument that there were numerous individual issues unpersuasive, holding that "although there are 70 Franchise Agreements at issue, each is a standard form contract, identical in all material respects to each other agreement."[37]

Franchise contracts typically adopt the law of a single jurisdiction. Where, for instance, parties to a franchise agreement adopt the law of Ontario, they are subject to the relationship provisions of the *Arthur Wishart Act*, including the duty of fair dealing under Section 3 and the right of association under Section 4, regardless of where the franchisee carries on business.[38]

Each of the following common issues involves questions of fact and law that would have to be proven by any individual member of the class asserting a claim. Each has been found to be suitable for certification in previous franchise certification motions:

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35 *Cloud*, *supra* at para. 55.

36 *Quizno's Div. Ct.*, *supra* at para. 49.

37 *A&P*, *supra* at para. 37.

38 *Midas C.A.*, *supra*.

(a) breach of a common franchise agreement in relation to the supply of products to franchisees;[39]

(b) failure of a franchisor to pass on supplier rebates and allowances;[40]

(c) breach of the common law contractual duty of good faith in relation to the supply of products by a franchisor;[41]

(d) breach of the statutory duty of good faith under the *Arthur Wishart Act* in relation to the prices charged on supplies;[42]

(e) breach of the statutory duty of good faith under the *Arthur Wishart Act* in relation to the failure of the franchisor to disclose rebates from suppliers;[43]

(f) whether a Franchise Agreement imposes a common law duty on a franchisor to charge commercially reasonable prices and whether such duty has been breached;[44]

(g) whether conduct by a franchisor in relation to the distribution of products to franchisees can give rise to unjust enrichment;[45]

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39 *A&P* and *Quiznos C.A.*, *supra.*

40 *A&P*, *supra*.

41 *A&P* and *Quiznos C.A.*, *supra.*

42 *A&P*, *supra*.

43 *Sears*, *supra*.

44 *Quiznos CA.*, *supra.*

45 *Midas Certification*, *supra*.

(h) whether damages relating to overcharging on supplies and improper withholding of supplier monies can be determined in the aggregate;[46] and

(i) whether a duty was owed to a network of dealers to adjust the compensation paid to the dealers.[47]

Cases in which the determination of the common issues will leave few, if any, individual inquiries to be undertaken are ideally suited for class treatment.[48] For example, in circumstances where the proposed representative plaintiff seeks an interlocutory and permanent mandatory order requiring compliance by the franchisor with its obligations under the franchise agreement and where that relief would be common to all franchisees, that would be a factor in favour of certification.[49]

Not all proceedings in the franchise context raise common issues, however, even if the claims involve standard form agreements. The analysis is necessarily fact driven. In *909787 Ontario Limited v. Bulk Barn Foods Ltd.*, the high level of individuality among franchise claims proved a bar to certification.[50] Although the case was certified at first instance, that certification was overturned on appeal. The plaintiff alleged that the franchisor, Bulk Barn, had breached its standard form franchise agreement, which contained a provision stating that supplies to franchisees would be priced at a level "generally charged or realized by other competitive

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46 *A&P* and *Quiznos C.A.*, *supra.*

47 *Mayotte*, *supra*.

48 *Cassano*, *supra*.

49 *Quizno's Div. Ct.*, *supra*.

50 *909787 Ontario Limited v. Bulk Barn Foods Ltd.* (2000), 2 C.P.C. (5th) 61 (Ont. Div. Ct.), rev'g (199), 90 A.C.W.S. (3d) 352 (Ont. S.C.J.) [*Bulk Barn*] (Osler, Hoskin & Harcourt LLP acted for Bulk Barn Food Ltd.).

suppliers in the general market area."[51] The appellate court had particular difficulty in seeing commonality amongst franchisees, all of whom were from different general market areas:

> The network of stores as has been noted is spread out over a substantially large geographical area in Canada. The wording of the contract ties the whole question of comparable price to those "generally charged or realized by other competitive suppliers in the general market area or region in which the franchise business is located." There was no evidence before the court and certainly no reason to expect that local prices would be the same in St. John, New Brunswick as they would in Sarnia, Ontario or for that matter within a large heavily populated area such as the Greater Toronto area or the Hamilton/Burlington area. The possible differences in each locale raise the very distinct possibility that there are no common issues which can be manageably tried together and which will advance the litigation. [52]

It is important to note, however, that the force of the ruling in *Bulk Barn* has likely been diminished by the Supreme Court of Canada's decision in *Hollick* which emphasized the "low bar" for certification. Further, the record in *Bulk Barn* was of a very different nature than what has been commonly found in the cases that have followed *Hollick*. Finally, leave to appeal the Divisional Court's decision to the Ontario Court of Appeal was granted, but the action settled prior to the hearing.

b. Damages

The fact that damages cannot be determined without individual inquiries is not a bar to certification. For example, in certifying common issues relating to the assessment of damages in the *Sears* decision, Justice Strathy held that "while individual assessments may be required, the determination of a common method of assessment will advance the claim of every class member."[53] Further, in *A&P*, Justice Winkler (as he then was) held on the certification motion:

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[51] *Id.*, at para. 5.

[52] *Id.*, at para. 25.

[53] *Sears*, *supra* at para. 50.

> Although *A&P* argues that there are substantial individual inquiries necessary to determine individual entitlement, if the plaintiffs are successful in proving their allegation that Rebates have been wrongfully withheld, the distribution process is but a matter of accounting.[54]

Generally speaking, in franchise litigation involving systemic or system-wide issues, common issues relating to damages are likely more readily determined in the aggregate and therefore more likely to be certified. This is particularly true where damages can be readily calculated or are capable of proof with resort to the records of the franchisor.[55] By contrast, determinations of damages arising from misrepresentations and breaches of contract are less likely to be certified as common issues.[56]

It is also important to note that a franchisee's individual profitability is irrelevant to the common issues analysis. In deciding a refusals motion in the context of the *A&P* litigation, the court specifically found that the franchisees' profit was not relevant to a claim against their franchisor where it withheld supplier rebates and allowances:

> I do not regard the level of profit made by the plaintiffs to be relevant to the common issues. In the counterclaim, A&P claims it has overpaid members of the class and claims the plaintiffs have benefited from largesse by A&P. The finances of the plaintiffs are relevant to the counterclaim but I do not agree there is relevance to the profits made by each franchisee in the common issues phase of the trial.[57]

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54 *A&P*, *supra* at paras. 37 and 52.

55 *Quizno's Div. Ct.*, *supra*.

56 In *Caponi v. Canada Life Assurance Co.* (2009), 72 C.P.C. (6th) 331 at para. 41 (Ont. S.C.J.), the Ontario Superior Court of Justice refused to allow the application of section 24(1) of the CPA. The plaintiff alleged that the defendant's wind-up of a supplemental pension plan was a breach of contract. In holding that damages could not be calculated in the aggregate, M.C. Cullity J. stated: "I am not satisfied from the evidence that a determination of the aggregate liability to the Class members could be effected without calculating the loss suffered by each member. In consequence, it appears that the precondition to an aggregate assessment in section 24(1)(c) would not be satisfied."

57 *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*, [2003] O.J. No. 5703 at paras. 27-32 (S.C.J. Master).

D. Preferable Procedure (Section 5(1)(d)):

The *CPA* is remedial legislation. It is to be construed generously to give full effect to the benefits foreseen by its drafters, particularly at the certification stage. Its three procedural goals of judicial economy, access to justice and behaviour modification are intended to ensure the just and expeditious resolution of large, complex cases.[58] In light of this, the Supreme Court of Canada has emphasized that "preferable" is to be construed broadly and is meant to capture two ideas: first, whether or not a class proceeding would be a fair, efficient and manageable method of advancing the claim; and second, whether a class proceeding would be preferable in the sense of preferable to other procedures such as joinder, test cases, consolidation, etc.[59] The question in the preferability analysis is not whether there should be any litigation at all, but whether or not a class proceeding is the preferable procedure for resolving the dispute.[60]

The Supreme Court of Canada has held that the preferability inquiry is to be conducted with a view to the three principal goals of class proceedings outlined above.[61] The goal of judicial economy will not be served where, for example, individual concerns would overwhelm common issues. In terms of behaviour modification, a court may determine that a class action would not further this goal where, for example, the alleged wrongs are system-specific and no longer on-going, or where the types of transactions at issue are governed by a regulatory scheme.

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58 *Hollick*, *supra* at paras. 14-16.

59 *Id.*, at para. 28.

60 *A&P*, *supra* at para. 45.

61 *Hollick*, *supra* at para. 27.

Class actions relating to allegations of system-wide breaches by a franchisor have been found to promote all three objectives of the *CPA*.[62] Indeed, as stated above, the Ontario Court of Appeal has recently found that such cases are "exactly the kind of case for a class proceeding."[63] Further, in the *Sears* decision, Justice Strathy highlighted the inequality between the franchisor and the franchisees as a key consideration in determining that a class proceeding was the preferable procedure:

> In view of the power imbalance between the franchisor and the franchisees, the very concern that the [*Arthur Wishart Act*] was designed to address, there is a significant impediment to access to justice by way of individual action, particularly where some of the franchisees remain a part of the Sears system.[64]

The behaviour modification factor arises frequently in franchise class action litigation. In *Quizno's*, for example, the Divisional Court noted that the motion judge characterized the relationship between the franchisees and franchisor as acrimonious, and that the efforts of franchisees to bring their concerns to Quizno's attention were "thwarted with threats and intimidation."[65] Similarly, the court in *A&P* found evidence that A&P had "consistently failed to produce proper records to the franchisees despite repeated requests and A&P's obligations to do so in accordance with its duty of utmost good faith as franchisor." In the *A&P* decision, Justice Winkler (as he then was) went on to comment on various tactics deployed by the franchisor to prevent a class action, both in the context of the behavior modification consideration under the *CPA* and the duty of utmost good faith owed by a franchisor to its franchisees:

> Here there are allegations of misconduct of A&P that if proven, would entitle the class members to a recovery. Moreover, there is evidence that A&P has

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62 *A&P*, *supra* at paras. 51-58; *Midas Certification*, *supra* at paras. 80-82; *Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada* (2004), 48 O.R. (3d) 753 (Div. Ct.) at para. 16; *Quizno's Div. Ct.*, *supra* at paras. 141-144; *Quiznos C.A.*, *supra* at para. 62.

63 *Quizno's C.A.*, *supra* at para. 62.

64 *Sears*, *supra* at para. 68.

65 *Quizno's Div. Ct.*, *supra* at para. 72.

> consistently failed to produce proper records to the franchisees despite repeated requests and A&P's obligations to do so in accordance with its duty of utmost good faith as franchisor. The litigation plan proposed by the plaintiffs coupled with the availability, and suitability, of an aggregate assessment should they be successful in their claims, augur in favour of a conclusion that a class proceeding could achieve behavioural correction.[66]

E. Class Representative (Section 5(1)(e)):

In *Western Canadian*, McLachlin C.J.C. described the factors to be considered in assessing whether a class representative is appropriate:

> The **motivation** of the representative, the **competence** of the representative's counsel, and the **capacity of the representative to bear any costs** that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will **vigorously and capably prosecute** the interests of the class.[67] (Emphasis added)

The fact that a representative plaintiff may appear to be acting independently of the other franchisees may be a factor militating in favour of the suitability of the proposed class representative. In *A&P*, the franchisor attempted to use the plaintiffs' independence against them. Justice Winkler (as he then was) stated as follows:

> [...] A&P highlights the admitted "independence" of the three proposed representative plaintiffs. It is common ground that the plaintiffs are prosperous, unencumbered by debt to A&P and not intimidated by A&P's counterclaim. Simply put, A&P contends that these characteristics distinguish the plaintiffs from the putative class members and, as such, not only renders them unsuitable as representatives, but mandates a decision from the court that individual actions are a preferable method of resolving the claims of the class. …
>
> Further, these are exactly the type of plaintiffs that may be required to prosecute a class action lawsuit in the context of a franchise relationship, with the inherent vulnerability in the dependent ongoing nature of the relationship between franchisor and franchisee. This aspect of the commercial realities of franchise arrangements has been commented upon in the context of class proceedings. In recognizing that access to justice is a major impediment for franchisees, the Ontario Law Reform Commission, Report on Class Actions (1982) Vol. 1 Ministry of the Attorney General, 1982 states at p. 128:

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66 *A&P*, *supra* at para. 58.

67 *Western Canadian*, *supra* at para. 41.

> Even small businesses may be reluctant to sue more powerful companies where, for example, in a franchisor-franchisee situation, they must deal continuously with such companies on a basis of dependence.[68]

F. Workable Plan of Proceeding (Section 5(1)(e)(ii)):

It is the responsibility of the representative plaintiff to set out a method of advancing the action on a timely basis on behalf of the class and notifying the class members of the action. The certified franchise class actions to date all contain examples of workable plans of proceeding incorporated into the order for certification, even when those plans contained limited detail in certain respects.[69]

The existence of a plan of proceeding when combined with the presence of a class proceedings judge ensures a timely prosecution of a class proceeding with the availability of the judge at all times to address all matters that may arise in the context of the judge's experience with the case. The class proceedings judge has wide powers to manage the proceeding as provided for under the *CPA*.[70]

12. Management of Groups and Classes

There are significant differences in the obligations upon and challenges facing counsel when representing a group of franchisees or a representative plaintiff in a class proceeding.

In a group action, counsel represent each and every member of the group. Counsel are expected to address with the group in advance how the following matters will be addressed:

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[68] *A&P*, *supra* at paras. 28 and 41.

[69] See, for example, the *Sears* decision, *supra* at paras. 90-92.

[70] See *CPA*, at s. 12.

a) the handling of information provided by one group member which that group member may want treated confidentially from the other group members;
b) settlement opportunities which may exist for any particular group member independently of the other group members;
c) processes for communicating developments and seeking instructions;
d) the handling of conflicting instructions from among group members;
e) the sharing of legal costs and expenses; and
f) negotiating and dividing up any potential settlement.

In a class proceeding, the class representative alone is responsible for providing instructions to class counsel both before and after certification. Nevertheless, it is not uncommon for the class representative to be supported in his or her efforts by a large group of franchisees and potentially by a franchisee association. Counsel have obligations to the class representative but also to the class members before and after certification. Counsel need to distinguish between the interests of existing and former franchisees all of whom may be in a putative class. Franchise associations may be utilized to fund disbursements in a class proceeding. That fact may suggest to a franchisee association or its executive that the association is entitled to have a say in the conduct of the class proceeding. Counsel must be certain to establish from the outset how such associations or executives will be managed while the class action proceeds.

Firms acting for plaintiff classes in class proceedings typically establish a communication system on their firm websites for franchisees to access. Certain parts of the website may be password protected. It is common in class proceedings that communications with class members occur apart from formal website postings and court-sanctioned notices. It is important for class counsel to recognize their obligations to potential class members before certification and their

obligations to class members after certification when providing advice and information concerning the proceeding.

Although it is easier to manage the process of advising and obtaining instructions from a single class representative or limited number of class representatives as compared to the management of a group retainer, the communication process with class members is significantly complex and requires careful management.

It is of fundamental importance when advising franchisees, whether on an individual, group or class basis, that franchisee counsel appreciate that the advice they give and the actions they take may have a significant impact on the franchise system. Indeed, the advice given may not be perceived to be and may not in fact be in the interest of all franchisees or the franchise system itself. For this reason, it is particularly incumbent on franchisee counsel to take a longer term perspective of the dispute and to consider strategies which may preserve the longer term interest of the franchisee client(s) in the franchise system. Since the franchise client(s) may well continue to be a part of the franchise system long after the dispute with the franchisor has been resolved, franchisee counsel should assess how the consuming public may react towards the franchisor's brand given the issues in dispute.

The very fact that franchisee-franchisor disputes often occur in the context of an ongoing relationship and may potentially receive interest from the media and the public places further responsibility on counsel advising franchisees. Counsel should carefully consider the wide array of potentially available strategies to address and resolve the concerns of the initial client who first raised the franchise dispute. Even in cases where the issues appear systemic in nature, counsel has the primary duty to the initial client contact to act in that client's best interests. In

many instances, those interests may be better advanced by not pursuing the claims of others who may be similarly situated.

13. Franchisor Responses to Group and Class Proceedings

This subtopic could easily be the subject matter of its own plenary session and cannot be fully addressed within the confines of this paper. When facing class or group proceedings, franchisors typically seek to individualize as many of the issues in dispute as possible with a view to avoiding certification or severing the group claim. It is common for franchisor counsel to employ a "divide and conquer" campaign in the hopes of destroying or at least weakening the group dynamic. However, now that the Court of Appeal in *Midas* has recognized that section 4 of the *Arthur Wishart Act* extends to the right to commence a class action, attempts by a franchisor to interfere with a class or group proceeding could very well expose a franchisor to a claim for damages under subsection 4(5) of the *Arthur Wishart Act*. Of course, as mentioned earlier, just because franchisees have the statutory right to associate that extends to the right to bring a class action does not mean that every franchise class action should be certified. Again, the test for certification under the *CPA* must be satisfied, and any group action by franchisees must be properly joined within the requirements of provincial rules of civil procedure.

Similarly, in light of the Court of Appeal's statement in *Midas* regarding the suitability of class proceedings for the resolution of franchise disputes, franchisors would do well to narrow their resistance to certification to those issues for which they feel their positions are strongest. Though every case is different, a franchisor should carefully evaluate its strengths and weaknesses for the certification hearing and define its approach accordingly, rather than expend tremendous resources in an attempt to defeat certification across the board.

14. Summary

Disputes that arise in the context of an ongoing business relationship present particular challenges and particular opportunities for resolution. Without question, the courts have recognized that franchising disputes involving systemic issues are well suited for class action treatment. Though that may be true, franchise disputes are also well suited to be resolved in a whole manner of alternative means. Counsel on both sides of a franchise dispute should always explore opportunities to resolve the matter outside of court, especially when the litigation is in the form of a costly class or group proceeding. With creativity, discipline and experience, counsel can hopefully identify a practical and efficient approach to resolution.

In those cases in which alternative means of dispute resolution are unsuccessful or impossible, franchisees have available a significant ability to level the playing field against their franchisors by pursuing class and group proceedings. Though the body of certification decisions in the franchise context is small, both franchisees and franchisors should pay close attention over the course of the next several months to the numerous certification hearings scheduled. If the current trend continues, we expect to see many more franchise class proceedings commenced - and certified - in the coming years.

Appendix A

Ontario Franchise Litigation - Certified and Pending Class Proceedings

Case Name	Date Statement of Claim Issued	Certification Motion Hearing Date / Date of Decision	Certification
1176560 Ontario Ltd. V. Great Atlantic & Pacific Company of Canada Ltd.	April 11, 2002	Divisional Court: March 8, 2004 Certification decision: December 9, 2002	Yes
Quizno's Canada Restaurant Corporation v. 2038724 Ontario Ltd.	May 12, 2006	Court of Appeal: June 24, 2010 Divisional Court: April 27, 2009 Certification decision: March 4, 2008	Yes
Landsbridge Auto Corp. and 405341 Ontario Ltd. v. Midas Canada Inc. and Midas International Corporation	June 29, 2007	March 26, 2009	Yes
Fairview Donut Inc. and Brule Foods Ltd. v. The TDL Group Corp. and Tim Hortons Inc.	June 12, 2008	November 29-December 3, 2010	Awaiting Hearing
6323588 Canada Ltd. v. Panzerotto Pizza & Wing Machine	June 20, 2008	No certification hearing scheduled	N/A
578115 Ontario Inc. v. Sears Canada Inc.	May 15, 2009	August 23, 2010	Yes
1250264 Ontario Inc. v. Pet Valu Canada Inc.	December 9, 2009	October 21-22, 2010	Awaiting Decision on Certification
T A & K Enterprises Inc. v. Suncor Energy Products Inc. and Suncor Energy Inc.	January 18, 2010	November 15-16, 2010	Awaiting Hearing

Trillium Motor World Ltd. v. General Motors of Canada Ltd. and Cassels Brock & Blackwell LLP	February 12, 2010	December 15-17, 2010	Awaiting Hearing