

CITATION: 1758939 Ontario Ltd. v. Weston Bakeries, et al., 2024 ONSC 5434
COURT FILE NO.: CV-19-2426CP
DATE: 20241001

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1758939 Ontario Ltd., Plaintiff

AND:

Weston Bakeries Limited, Weston Foods (Canada) Inc., and
George Weston Limited, Defendants

BEFORE: Justice H.A. Rady

COUNSEL: David Klein, Matthew Baer, Nicola Hartigan and Jonathan Bradford, for the
Plaintiff

Marcus Kremer, for the Defendants

HEARD: February 27 and 28, 2024

ENDORSEMENT

Introduction

- [1] The plaintiff seeks an order certifying this national action and appointing it the representative of the class.
- [2] The plaintiff alleges that class members suffered substantial damages as a result of the defendants' participation in and their public acknowledgement of an illegal conspiracy to fix the price of fresh bread.
- [3] The plaintiff submits that the five criteria necessary for certification are met. There is a viable cause of action, an identifiable class, the claims raise common issues the resolution of which will advance the litigation, it is the preferable procedure, and the proposed representative plaintiff is suitable.
- [4] The defendants advance formidable arguments in opposition to certification. They submit that the proposed action is fatally flawed and would be unmanageable as a class proceeding for several reasons.
- [5] First, no tenable cause of action is pleaded. Second, the plaintiff cannot establish causation and damages on a class-wide basis and as a result, the number of individual issues will overwhelm any common issues that exist. The defendants submit that the proposed class is overbroad because it would include persons with no possible claim.

- [6] They also say a class action is not the preferable procedure because no judicial economy would be achieved given the number of individual issues. Behaviour modification is not required given the defendant's cooperation with the Competition Bureau and the fact Loblaw Companies Limited (LCL) has issued payment cards to customers who purchased bread products. The cards are said to be worth tens of millions of dollars. Moreover, there are no access to justice concerns because the proposed class members have claimed damages that are sufficiently large to litigate on an individual basis.
- [7] The only concession they make is that the proposed class representative is unobjectionable.

The Evidence

- [8] The evidentiary record is fairly extensive. The plaintiff has filed affidavits from Kara-Lee Jess, the president of the proposed class representative; Rick McCaig, the president of 1397444 Ontario Inc., another independent distributor contracted with Weston Bakeries Limited (WBL); and Brandon Schaufele, who provided an expert opinion respecting the calculation of damages. Dr. Schaufele is an Associate Professor in Business, Economics and Public Policy at the Ivey Business School in London, Ontario.
- [9] The defendants filed an affidavit from Martin Hanstead, the Vice-President Finance – Omni Channel at LCL and who has worked for the George Weston Limited (GWL) group of companies for over twenty years. He is a Chartered Accountant and Financial Analyst.
- [10] The affiants were cross-examined, and the transcripts were filed.

The Parties

- [11] The proposed representative plaintiff (175) entered into an independent distributor's (ID) agreement with WBL on February 29, 2008. It operates a delivery route in southwestern Ontario in the Tillsonburg area. The plaintiff proposes to represent a class defined as:
- All persons resident in Canada who entered into a distribution agreement with the Defendant, Weston Bakeries Limited, during the period between January 1, 2001, and the date of certification.
- [12] The contracts at issue were between IDs and WBL, which manufactured and sold bread and bakery products to customers. It contracted with the plaintiff and other IDs to have them purchase and deliver those bread products. There were approximately 400 IDs operating across Canada as of the end of 2020.
- [13] Prior to January 2020, WBL was a wholly owned subsidiary of the defendant Weston Foods (Canada) Inc. (WFCI). WFCI was a wholly owned subsidiary of GWL. In January 2020, WBL was amalgamated into WFCI. In July 2021, WFCI was amalgamated into GWL. In December 2021, the bakery business operated by WBL and WFCI was sold to an arm's length corporation that operates under the name Wonder Brands.

The Contracts

- [14] Prior to the sale of the bakery business, WBL contracted with IDs to sell and distribute bread products to retailers, food service customers and institutions across Canada. The ID contracts were all substantially the same. By their terms, IDs received the exclusive right to distribute bread products within fixed routes. IDS purchased their routes either directly from WBL or other IDs who owned them. The purchase price was the subject of negotiation but typically reflected the annual revenues from the routes, the cost of equipment and sometimes the cost of the delivery vehicle.
- [15] IDs sold bread products in two ways. The first was by cash transactions where IDs purchased bread from WBL and sold them to customers, earning revenues on the price differential. IDs decided how many bread products to purchase from WBL and to whom to sell on their routes.
- [16] The second way was through corporate transactions. IDs delivered products to customers which paid WBL. WBL would pay IDs amounts calculated as percentages of revenues, which could vary depending on location, customer and merchandise sold.
- [17] IDs were also permitted to sell fresh baked products made by third parties, subject to WBL approval, thereby earning additional revenues.

Allegations of Price Fixing

- [18] In 2015, allegations of price-fixing in the market for commercial packaged bread surfaced. GWL and its subsidiary Loblaw Companies Ltd. (LCL) self reported to the Competition Bureau of Canada. They cooperated as immunity applicants in a Competition Bureau investigation. The Bureau executed search warrants in October 2017, which became public in December 2017.
- [19] The public learned that the Bureau was investigating an alleged price-fixing scheme among WBL, LCL and others to raise the retail and wholesale prices of certain bread products between 2001 and 2015.
- [20] At the same time, GWL and LCL issued a press release disclosing that they had been cooperating as immunity applicants in the investigation. The release described what steps GWL and LCL had taken in response including issuing payment cards to customers who had purchased bread during the relevant time.
- [21] The plaintiff alleges that as a result of this disclosure, Walmart and Sobeys decided to discontinue carrying WBL products. The defendants respond that those decisions were made for commercial reasons unrelated to the disclosure. They submit that the plaintiff has provided no evidence to demonstrate there is some basis in fact to support the claim.

The Statement of Claim

[22] The plaintiff alleges two causes of action: breach of contract and breach of the *Arthur Wishart Act*, S.O. 2000, c. 3 (*AWA*).

[23] With respect to the first, the plaintiff pleads:

54. The Distributors' Agreements are contracts between the Defendants and the distributors, including the Plaintiff and class members. Parties to a contract owe one another a duty of good faith in contractual performance. As such, the Defendants owed the Plaintiff and class members a duty of good faith in the performance of the Distributors' Agreements.
55. As described above, the Defendants have breached their duty of good faith to the Plaintiff and class members. The Defendants have not behaved reasonably or honestly in dealing with the Plaintiff and class members. The Defendants have unilaterally and arbitrarily exercised authority to cause harm to the Plaintiff and class members.
56. The Plaintiff and class members are entitled to be put in the position they would have been in had the Defendants fulfilled their duties, in the full amount of their losses.

[24] With respect to the second, the plaintiff pleads that WBL is a franchisor, and WFCI and GWL are franchisor associates. The plaintiff and class members are franchisees. It pleads as follows:

46. Under s. 3(1) of the *Arthur Wishart Act*, every franchise agreement imposes on each party a duty of fair dealing in the performance and enforcement of the agreement, including in relation to the exercise of rights under the franchise agreement. The duty of fair dealing includes a duty to act in good faith and in accordance with reasonable commercial standards. Under s. 3(2) of the *Arthur Wishart Act*, a party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing.
47. Under s. 5 of the *Arthur Wishart Act*, a franchisor shall provide a prospective franchisee with a disclosure document and the prospective franchisee shall receive the disclosure document not less than 14 days before the earlier of (a) the signing by the prospective franchisee of the franchise agreement or any other agreement relating to the franchise and (b) the payment of any consideration by or on behalf of the prospective franchisee to the franchisor or the franchisor's associate relating to the franchise.
48. Under s. 7(1) of the *Arthur Wishart Act*, if a franchisee suffers a loss as a result of the franchisor's failure to comply with its statutory disclosure obligations, the franchisee has a right of action for damages against the franchisor, the franchisor's agent, the franchisor's broker (if applicable),

the franchisor's associate and every person who signed the disclosure document...

52. As described above, the Defendants have breached their duty of fair dealing to the Plaintiff and class members in the performance and enforcement of the Distributors' Agreements. As such, the Plaintiff and class members are entitled to statutory damages under s. 3(2) of the *Arthur Wishart Act* in the full amounts of their losses.
55. In addition, the Defendants have breached their obligation to provide prospective franchisees with disclosure documents in compliance with s. 5 of the *Arthur Wishart Act*. As such, the Plaintiff and class members are entitled to statutory damages under s. 7(1) of the *Arthur Wishart Act* in the full amount of their losses.

Damages

[25] The plaintiff alleges that it has sustained damages including:

- lost sales to retailers who terminated their accounts with the Defendants;
- lower sales volumes due to adverse customer reaction to the Defendants' actions;
- decrease in capital value of the Plaintiff's and Class Members' businesses as a going concern;
- inflation in the price paid by Class Members for distribution rights from the Defendants; and
- business interruption, administrative expenses, and special costs to deal with the fallout from the Defendants' misconduct.

Expert Reports

[26] The plaintiff retained Brandon Schaufele and Adam Fremeth, both professors at the Ivey School of Business at Western University. They were asked to provide an opinion as to whether there was a methodology to quantify class members' alleged losses.

[27] In their first report, they concluded that the diminished value method was appropriate to determine the economic harm to class members. This method involves measuring the difference between the "as-is" situation where price-fixing occurred and the "but-for" situation where price-fixing did not occur.

[28] The defendants rely on the Hanstead affidavit and assert that the plaintiff has failed to lead evidence of a methodology that could determine damages on a class-wide basis. They say the plaintiff's experts have not used the correct "but for world". In other words, their causation analysis is based on an incorrect assumption. Because the plaintiff alleges that the defendants breached their obligations under the contracts or pursuant to the *AWA*,

they say damages would be measured by comparing their real life situation to one where the defendants continued to engage in price fixing without disclosing it.

[29] Finally, the defendants say that even if the plaintiff's theory is accepted, the calculation of damages can only be done on an individual basis given each ID's unique circumstances.

[30] In response to the Hanstead affidavit, Drs. Schaufele and Fremeth provided a second report. They reiterate that a methodology exists to quantify the loss to class members and that their damages go beyond the loss of contracts with major retailers.

The Law

[31] The law respecting class actions and certification is well developed. The *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (*CPA*) is remedial legislation and is to be interpreted generously and purposively. In its analysis, the Court must consider judicial economy, access to justice and behaviour modification.

[32] In order to achieve certification, the following five criteria must be satisfied:

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

[33] If the five criteria are satisfied, certification must follow. There is ample and long-standing authority establishing that a certification motion is not about the merits of the action or the prospects for its success. Rather, it is a procedural motion focusing on the *form* of action. See, for example, *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 and *Hollick v. Toronto (City)*, 2001 SCC 68.

[34] In *Pro-Sys*, the court has affirmed that the some basis in fact standard does not require the court to resolve conflicting facts and evidence at the certification stage, because the court

is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight. Moreover, the certification stage decidedly does not involve an assessment of the merits of the claim and is not intended to be a pronouncement of the viability or strength of the action. Rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding: *Pro-Sys, supra*, at para. 99. The Court also noted at para. 100:

The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. McLachlin C.J. did, however, note in *Hollick* that evidence has a role to play in the certification process. She observed that “the *Report of the Attorney General’s Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification” (para. 25).

- [35] The Court has an important but limited gatekeeper role at the certification stage.
- [36] The Court does not decide contested factual issues at the certification stage in the same way it would as the trier of fact. The outcome of a certification application is not predictive of the success of the action at the common issues trial. The action must be certified where the plaintiff adduces evidence that meets the “some basis in fact” threshold. While the defendant may dispute the plaintiff’s evidence, the certification stage is not the place for resolving the issue.

Section 5(1)(a): Do the pleadings Disclose a Cause of Action?

- [37] In approaching this question, the Court must presume the alleged facts are true. No consideration of the evidence is to be undertaken. The claim should be permitted to proceed unless it is “plain and obvious” that it cannot succeed: *Pro-Sys, supra*, at para. 63; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; and *Transamerica Life Canada Inc. v. ING Canada Inc.*, [2003] O.J. No. 4656 (C.A.).
- [38] The analysis is similar to that under Rule 21 of the Rules of Civil Procedure. Accordingly, the following principles guide the Court’s analysis:
- no evidence is admissible for the purposes of the s. 5(1)(a) criterion;
 - all allegations of fact pleaded, unless patently ridiculous or manifestly incapable of proof, must be accepted as proven and thus assumed to be true;
 - the novelty of a cause of action will not militate against the plaintiff;
 - matters of law not fully settled in the jurisprudence must be permitted to proceed; and
 - the pleading must be read generously to allow for inadequacies due to drafting deficiencies and the plaintiff’s lack of access to key documents and discovery information.

Breach of Contract

- [39] The plaintiff alleges that Class Members entered into IDs with the Defendants and that the IDs are essentially the same for all putative Class Members.
- [40] The plaintiff recites the material terms of the IDs at paragraph 24 of the Amended Statement of Claim. It alleges as follows:
- a. WBL has developed or acquired the rights to formulas, receipts, trademarks and tradenames with which it manufactures, distributes, sells and markets various fresh baked bread, rolls, cakes or similar food products through much of Canada;
 - b. the distributor has purchased from either a predecessor distributor or from WBL the distribution rights to a geographically-defined sales area;
 - c. the distributor is given distribution rights for WBL fresh bread products;
 - d. WBL controls the tradenames and names for fresh bread products to be sold and grants distributors a limited licence to use these trademarks and names in connection with the operation of their distributorships;
 - e. WBL is designated as the distributors' agent to make sales to grocery store chains;
 - f. the distributor agrees to sell WBL fresh bread products to outlets within the sales area;
 - g. the distributor agrees to pay WBL on or before Friday each week for all products delivered to the distributor during the week; and
 - h. WBL receives payment for bread products delivered by the distributors directly from customers, remitting a margin, determined by WBL, to distributors.
- [41] The plaintiff relies on *Bhasin v Hrynew*, 2014 SCC 71, where the Supreme Court of Canada concluded that good faith contractual performance is a general doctrine of contract law. Part of the good faith principle is a common law duty which applies to all contracts to "act honestly in the performance of contractual obligations." (para. 33). Failure to do so constitutes a breach of contract: *CM Callow Inc. v. Zollinger*, 2020 SCC 45, at para. 50.
- [42] Accordingly, the duty of honest performance is violated and constitutes a breach of contract when a party lies or knowingly misleads the other party about matters directly linked to the performance of the contract: see *Bhasin*, at para. 73.
- [43] To reiterate, the plaintiff pleads that the defendants participated in an illegal conspiracy to fix the price of fresh commercial bread between 2001 and 2015. The defendants revealed their participation in the illegal price-fixing conspiracy to the public on December 19,

2017. Prior to their public acknowledgment the plaintiff and class members had no knowledge of the illegal price-fixing conspiracy.

[44] In my view, the plaintiff has sufficiently pleaded material facts that the defendants knowingly misled the plaintiff and class members through its concealment of its participation in the illegal-price fixing conspiracy thereby breaching its duty of good faith and therefore, the IDs.

Breach of Statute

[45] The plaintiff has also pleaded that the relationship between the class members is one of franchisee and franchisor and that the *AWA* and parallel franchise legislation elsewhere in Canada applies.

[46] The plaintiff alleges that the IDs are franchise agreements within the meaning of the *AWA* and the parties' business arrangement is a franchise. It has also pleaded the duty of fair dealing applies and a right of action is conferred by the relevant legislation. For example, section 3(1) of the *AWA* provides as follows:

3 (1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.

(2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement.

(3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

[47] In *Spina v. Shoppers Drug Mart Inc.*, 2012 ONSC 5563, at para. 145, the Court observed that the *AWA* "is remedial legislation, designed to address the power imbalance between franchisor and franchisee, and it is entitled to a generous interpretation to give effect to its purpose..."

[48] In *1117304 Ontario Inc. (Harvey's Restaurant) v Cara Operations Limited*, [2008] O.J. No. 4370 (S.C.J.), Kershman J. summarized at para. 68 what the duty of good faith in franchise relationships requires of the parties:

(a) A party may act self interestedly, however in doing so, that party must also have regard to the legitimate interests of the other party;

(b) If A owes a duty of good faith to B, as long as A deals honestly and reasonably with B, B's interests are not necessarily paramount;

(c) Good faith is a minimal standard, in the sense that the duty to act in good faith is only breached when a party acts in bad faith. Bad faith is conduct that which is contrary to community standards of honesty, reasonableness or fairness (e.g. serious misrepresentations of material facts);

- (d) Good faith is a two way street. Whether a party under a duty of good faith has breached the duty will depend, in part, on whether the other party conducted itself fairly.

See also *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252, at para. 502.

- [49] The plaintiff alleges that the defendants failed to provide prospective franchisees with the disclosure documents mandated by the *AWA*, which are required in order for a potential franchisee to decide whether to proceed with the purchase. The essence of the allegation seems to be that the failure to disclose the price fixing conspiracy, which self evidently would have an impact on a potential purchaser's decision whether to proceed, constituted a breach of the *AWA*.
- [50] I am persuaded that the plaintiff has sufficiently pleaded the material facts in support of its claim for breach of statute.

Section 5(1)(b): Is there an identifiable Class?

- [51] The proposed class is defined in the plaintiff's factum as follows:

... all persons resident in Canada who carried on business under a distribution agreement with the defendant, Weston Bakeries Limited, during the period between January 1, 2001 and the date of certification.

- [52] *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, instructs that the purpose of the definition is to identify those who have a potential claim for relief; those who should be bound by the result of the litigation; and those who are entitled to notice of the action.
- [53] In this case, the proposed definition meets those requirements. The criteria are objective and bear a rational relationship to the proposed common issues. The proposed class has clear boundaries and is not unlimited in scope. It is also important to bear in mind that a definition is not overbroad because it may include those who will not have a successful claim. Support for these propositions is found in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, and *Silver v. Imax Corporation* (2009), 184 A.C.W.S. (3d) 28 (Ont. S.C.J.).
- [54] It bears noting that, in fact, the identity of class members is known to the defendants. I was advised that they number roughly 400.
- [55] The proposed definition meets the requirements of s. 5(1)(b) of the *CPA*.

Section 5(1)(c): Are there common issues?

- [56] The plaintiff has reproduced the proposed common issues at paragraph 77 of its factum and they need not be repeated here. The law respecting the s. 5(1)(c) requirement is very well settled. *Pro-Sys, supra*, described the commonality requirement in this way:

[t]he central notion of a class proceeding [...] individuals who have litigation concerns ‘in common’ ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

...

In order to establish commonality, evidence that the acts alleged occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether [the common issues] are common to all the class members.

- [57] The cases repeatedly emphasize that resolution of the entire action or even some legal claims is not required. Rather, the court must ask whether the class action avoids duplicative fact-finding or legal analysis. If claimants have issues in common, they should be permitted to have them resolved in one proceeding and not in multiple proceedings.
- [58] Turning then to the common issues respecting breach of statute, they focus on the nature of the relationship between the class members and the defendants created by the ID that is substantially similar among them. It has been observed that franchise claims are particularly amenable to a class action given the commonality of the franchise agreement. In *Trillium Motor World Inc. v. General Motors of Canada Limited*, 2011 ONSC 1300, Justice Strathy made this observation:

A typical franchise relationship involves a common contract, a common “system” and common treatment of franchisees by the franchisor. These attributes may give rise to common issues that can be decided without reference to the individual circumstances of the franchisee, thereby making the proceeding particularly suitable as a class action. The court must nevertheless ask whether there are indeed issues common to the claims of all class members and whether the resolution of those issues will sufficiently advance the action and avoid duplication of fact-finding and legal analysis, even though individual issues remain to be determined.

- [59] One might ask whether the fact that the ID is not explicitly said to be a franchise agreement is fatal. I have concluded that it is not. The Court must examine the substance of the agreement and not its label in order to determine whether the ID meets the statutory definition, which as the plaintiff notes is quite “expansive”. The IDs in this case are substantially similar.
- [60] In *Fyfe v. Vardy (Dial A Bottle)*, 2018 ONSC 5066, the Court followed a three-step test to determine whether an agreement meets the elements of a franchise agreement. The steps are described in this way:
- (a) whether the plaintiff made payment or continuing payments in the course of operating the business or as a condition of acquiring the business or commencing operations;

- (b) whether the defendant granted rights to sell, offer for sale or distribute goods or services that are substantially associated with the defendant's trademark; and
- (c) whether the defendant exercised significant control over, or offer significant assistance in, the plaintiff's method of operation.

[61] In my view, the plaintiff has established at this stage of the proceeding that whether the IDs are properly seen as franchise agreements is common to all class members. Bearing in mind that the evidentiary requirement is not what it would be at trial, the affidavit evidence shows that there is a relationship between IDs and the defendants in which the latter exercises considerable control over the IDs' territory, routes, the products and their pricing and to whom they may be sold.

[62] The issue of whether the IDs are franchise agreements as defined so that the *AWA* and its parallel statutes apply is common. So too is whether the *AWA* was breached by the defendants' conduct.

[63] Whether there was a breach of contract is clearly a common issue. The ID agreements are similar and whether they have been breached is a common issue that would significantly advance the litigation and avoid the duplication of fact finding and legal analysis.

[64] Finally, the Court is asked to consider whether the assessment of damages is common. The fact that individual assessments may be required does not bar certification. As already noted, the plaintiff has led evidence from Dr. Schaufele and Dr. Fremeth that there is a methodology for calculating damages on a class wide basis. The defendants have tendered no expert evidence in response but as already noted, they take serious issue with the assumptions underlying their methodology.

[65] I am not persuaded that the experts have in fact proceeded on the basis of the wrong assumption. As I understand the plaintiff's contention, the methodology involves a comparison between the situation where price fixing occurred versus that where it did not. I see nothing objectionable with this approach – at least at this stage of the proceeding and without expert evidence from the defence. At the very least, it is a triable issue. The fact that individual assessments may be required is not an impediment to certification, particularly where the class size is readily quantifiable. This is not a case involving thousands of claimants.

Section 5(1)(d): Is a Class Action the Preferable Procedure?

[66] This criteria involves an assessment of the goals of class proceedings, namely judicial economy, access to justice and behaviour modification. I am satisfied that this proposed class action meets all three objectives. With respect to the first, one judge would rule on the issues of liability and damages generally. I do not agree that the prospect for individual damage assessments overwhelms the process.

[67] As to the second, the defendants argue that the claims are of sufficient value that individuals could pursue their remedies individually. I disagree. First, there is no

evidence as to the potential value of individual claims. Second, the submission overlooks the fact that litigation is very costly and the expense of retaining experts alone would be significant. The expense is better absorbed by a class. It also makes little sense to litigate the issue of liability, for example, several hundred times with the attendant expense and risk of inconsistent verdicts. In addition, the Court has recognized the “inherent vulnerability in the dependent ongoing nature of the relationship between franchisor and franchisee that may militate against a willingness to commence an individual action”: *Landsbridge Auto Corp. v. Midas Canada Inc.*, 2009 CanLII 13628 (ON SC) at para. 80.

[68] While I agree that behaviour modification may have been achieved to some extent by the distribution of payment cards, the programme has not addressed the claims of IDs. Furthermore, at the risk of being accused of cynicism, the defendants’ cooperation with the Competition Board might have been more motivated by the benefit conferred by immunity than behaviour modification.

[69] I see no realistic alternative to a class proceeding.

Section 5(1)(e): Is there a Suitable Class Representative?

[70] The proposed plaintiff’s suitability is not contested by the defendants.

[71] The proposed Litigation Plan seems adequate at this stage. It is similar to other plans that have been approved in the past. It may well require amendment and refinement pursuant to the Court’s ongoing case management authority.

Conclusion

[72] For these reasons, the claim is certified as a class action. If the parties cannot agree, I will receive brief written costs submissions not exceeding three pages by October 31, 2024.

Justice H.A. Rady

Date: October 1, 2024