A class action allows the court to resolve in a single proceeding the claims of a number of plaintiffs who allegations that they have suffered a substantially similar wrong at the hands of a common defendant. Thus, class actions are laudable in that they conserve social resources. In order to capitalize upon this promise of judicial economy, however, there must always be a sufficient level of commonality between the claims of the putative class. Indeed, under Canadian law, a sufficient level of commonality between the claims of the putative class is demonstrated by the presence of a common defendant. Thus, the relationship between franchisee and franchisor is governed by a franchise agreement that is usually standard throughout the particular franchise system. Hence, the relationship between a franchisor and its franchisees is one defined in large part by commonality.

The franchisee does business in the style, under the trademark, and in the name of the franchisor. Through co-ordinated marketing efforts, many independent franchisees function in similar uniform ways under a single trademark. By functioning as a single system, independent, local business people gain the advantages of operating as part of a larger organization that assists in establishing the business and which provides continuing support and assistance.

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Canadian legal commentators have noted that the franchisor-franchisee relationship is spawning an ever increasing amount of litigation in Canada. Because of the nature of franchising one might expect that these legal disputes are well suited for class actions. Canadian law in this area of litigation, although newly emerging, has not seen an easy union between the two. Indeed, a review of Canadian case law shows that, in the eyes of the Canadian courts, claimants in disputes arising in the context of franchise relationships are not always able to demonstrate sufficient commonality of issues to support a class action. Nevertheless, given the publicity surrounding certain high-profile, high-stakes certified claims, success in other class action proceedings will likely excite considerable enthusiasm for class proceedings in the franchise context.

Class Actions and the Franchise Relationship in Canada: Are the Floodgates Now Open?

Sarah Millar and Frank Zaid

A class action allows the court to resolve in a single proceeding the claims of a number of plaintiffs who allege that they have suffered a substantially similar wrong at the hands of a common defendant. Thus, class actions are laudable in that they conserve social resources. In order to capitalize upon this promise of judicial economy, however, there must always be a sufficient level of commonality between the claims of the putative class. Indeed, under Canadian law, a significant part of the test for determining whether a class action is the appropriate proceeding for resolving a set of claims is the degree of commonality between the claims of the proposed class members.

Franchising is a business model whereby franchisees, in exchange for the assistance and know-how offered by a franchisor, conform to a standard method of conducting business. Michael Garner described the operation of the model as follows:

The franchisee does business in the style, under the trademark, and in the name of the franchisor. Through co-ordinated marketing efforts, many independent franchisees function in similar uniform ways under a single trademark. By functioning as a single system, independent, local business people gain the advantages of operating as part of a larger organization that assists in establishing the business and which provides continuing support and assistance.

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Canadian legal commentators have noted that the franchisor-franchisee relationship is spawning an ever increasing amount of litigation in Canada. Because of the nature of franchising one might expect that these legal disputes are well suited for class actions. Canadian law in this area of litigation, although newly emerging, has not seen an easy union between the two. Indeed, a review of Canadian case law shows that, in the eyes of the Canadian courts, claimants in disputes arising in the context of franchise relationships are not always able to demonstrate sufficient commonality of issues to support a class action. Nevertheless, given the publicity surrounding certain high-profile, high-stakes certified claims, success in other class action proceedings will likely excite considerable enthusiasm for class proceedings in the franchise context.

Canadian Class Action Law

Class action legislation is in place in most Canadian provinces. A decade ago only Ontario, under the Class Proceedings Act, 1992 (CPA), and Quebec had laws expressly dealing with class proceedings. Over the last few years British Columbia and, more recently, Saskatchewan, Manitoba, Newfoundland, and Alberta have implemented class action legislation.

The remaining provinces are likely to follow suit by enacting statutes that expressly permit class actions and regulate their conduct. All provinces require the would-be representative plaintiff to bring a motion to have the action certified as a class proceeding. In Ontario, once certification is granted, there is no automatic right to appeal the order. Rather, the defendant must seek leave to appeal the order from the Divisional Court of the Ontario Superior Court of Justice.

Certification criteria are fairly uniform across Canadian common law jurisdictions. As such, the features of Ontario’s class action law with regard to the requirements for certification described below will, for the most part, illustrate the state of the law in Canada generally.

The CPA sets out five criteria in section 5(1) that must be met in order for the court to grant certification. Section 5(1) provides as follows:

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

a) the pleadings or the notice of application discloses 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 interests of other class members.

An uneven amount of judicial attention has been devoted to the various section 5(1) requirements. For example, a
Great deal of judicial consideration has been given to whether the plaintiff’s claim raises sufficient issues common to all class members, as required under section 5(1)(c), or whether a class proceeding is the preferable procedure to resolve the common issues, as required under section 5(1)(d). Some of the other criteria, such as the appropriateness of the representative plaintiff set out in section 5(1)(e), have received comparatively less attention.

The first criterion for certification under section 5(1)(a) of the CPA requires that the claim sought to be certified as a class action contain a cause of action. Historically, this requirement has embodied a fairly low threshold. That is, the requirement is not a preliminary merits test; rather, it will be met unless it is “plain and obvious” that no claim exists on the face of the plaintiff’s statement of claim. The test established to meet this first criterion is therefore akin to that found under Rule 21 of Ontario’s Rules of Civil Procedure, which permits any pleading to be struck for disclosing no reasonable cause of action.

Under the second criterion, the proposed class action must identify a class of two or more persons to be represented by the proposed representative plaintiff. Under this requirement the class members need not be individually identifiable. Instead, the proposed class action will typically meet this criterion so long as the class definition forwarded by the proposed representative plaintiff allows the court to determine with some degree of certainty whether a given person falls within the proposed class, is based on objective criteria and is not determined by the merits of the action.

The Supreme Court of Canada in Hollick v. Toronto (City) accepted a class definition that included some 30,000 individuals actually had a claim, or at least a relationship between the class as identified (here the 30,000 people living in the defined area) and the common issue (liability for emissions). In Hollick, it was determined that there were enough complaints—although certainly nothing approaching 30,000—against the noise and pollution from the landfill from different areas within the geographical boundary to satisfy the commonality requirement.

Under section 5(1)(d) of the CPA, the proposed representative plaintiff must demonstrate that a class action is the preferable procedure for the resolution of the common issues. This requirement is often a great source of controversy in certification motions. Many commentators agree that it is under this requirement that courts are able to exercise the most discretion as to whether to certify an action as a class action. In fact, some commentators even suggest that a court’s analysis of preferability often “makes or breaks” class certification.

Although the preferability criterion only requires that the class proceeding be preferable for the resolution of the common issues, the Supreme Court in Hollick held that “the question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole.” One indicator of the preferability of a class action that is often discussed in Canadian law is the number of individual issues that would be left to be resolved after the class proceeding on the common issues has concluded. Where a large number of individual issues are “left over,” the efficiency and desirability of moving forward by way of a class proceeding is called into question. For example, in Hollick, although it was true that in order to recover, each class member had to establish that the landfill emitted pollution, there was no reason to suspect that the pollution was emitted evenly and at the same intervals across the geographical area. Thus, some individuals likely were more affected by pollutants than others, by virtue of their location or due to timing. Addressing the issue common to each claim, namely establishing that the landfill did emit pollution, would only contribute slightly to the resolution of each claim. The issues facing individual claimants after resolution of this common claim would simply be overwhelming. A class action in this case would not save judicial resources. In Hollick, the class action was, accordingly, not certified.

Rounding out the criteria for certification under the CPA is the requirement that the proposed representative plaintiff be an appropriate person to bring the class action. That is, the plaintiff must: (1) be able to represent the interests of the class fairly and adequately; (2) have produced a workable plan for the litigation; and (3) with regard to the common issues, have no interest in conflict with those of the members of the class. This requirement has generally received comparatively less attention from Canadian courts than some of the other criteria listed in section 5(1) of the CPA. Recently, however, courts have begun to review the financial ability of a proposed representative plaintiff to bring the class action. Nevertheless, rarely do the courts
Class Actions and Franchising in Canada

As noted, in order for a class action to be certified in Canada, the claims of the putative class must share common issues, the common issues must be a substantial part of the class members’ overall claims, and a class action must be the preferable method for resolving these common issues in the context of the claims as a whole. Given that commonality is the basis of Canadian class action law, franchise law practitioners are likely to ask the following question: does the commonality inherent in the relationship between a franchisor and its franchisees mean that disputes arising from this relationship lend themselves to class actions? In Canadian law, unfortunately, the answer to this question is not clear. Canadian courts certainly have found franchise disputes well suited for class proceedings where the claims brought on behalf of the putative class embody common issues common to each class member. This is particularly so when the court accepts the class claims as stemming from a franchise agreement that is standard throughout the franchise system.

Nevertheless, there are cases in which the courts have rejected a class action as the appropriate proceeding for resolving a franchise dispute. In such cases, the nature of the claims forward have compelled the court to look not only at the uniformity imposed by the franchise system, but also to the individual experiences of each class member. When this was done, the individual experiences of the franchisees proved to be too different to form the basis of a set of common issues that were appropriately resolved through a class action. Simply put, the commonality imposed by the franchise system in these cases had less significance for the resolution of the class members’ claims than the individual experiences of the class members themselves. Finally, it is possible that the union of franchise disputes and class actions will be even less harmonious in the future if Canadian courts continue with the recent trend of scrutinizing the proposed representative plaintiffs under section 5(1)(e). Thus, defendants, in their attempts to stop certification, have started to point to the differing interests that can be present between franchisees, notwithstanding the uniformity of the franchise agreement and the franchise system, to demonstrate that the representative plaintiff is in conflict with the class and thus not the appropriate person to bring the class action.

Does the Commonality of a Franchise Create Common Issues?

The first case brought in Ontario under the CPA that involved a franchisor-franchisee dispute was *Rosedale Motors Inc. v. Petro-Canada Inc.* 21 Originally, Rosedale merely sold the products of Petro-Canada from a service station and garage that it leased from Petro-Canada. Eventually, however, Rosedale entered into a franchise agreement with Petro-Canada to operate under its Certigard franchise system—a franchise based on successful garage operations in the United States. Unfortunately for Rosedale, it did not prosper as a Certigard franchisee. It brought a class proceeding against Petro-Canada on behalf of all persons in Ontario who entered into an agreement with Petro-Canada to operate as a Certigard franchisee. Rosedale’s principals claimed that when they made the decision to enter into the franchise arrangement with Petro-Canada, they relied on presale representations made by Petro-Canada as to the viability of the Certigard franchise system that were false and misleading.

The motions court found that the action brought by Rosedale was not appropriate for a class proceeding. Although Rosedale was successful in demonstrating that there was a cause of action and an identifiable class, it could not prove a sufficient level of commonality between the claims of the class members. It was true that class members were subject to some similar promotional representations on the part of Petro-Canada, as most had received the same brochure promoting the viability of the Certigard franchise system. Nevertheless, the franchisees were also subject, on an individual basis, to other representations made by Petro-Canada. Thus, the claims of all class members did not turn on a “single common representation.” Instead, the claims of the various plaintiffs rested “in large part upon what was said by individual Petro-Canada representatives to individual class members in separate meetings that led to the creation of relatively complex business relationships.”

Even if there were predominant common issues, the court in *Rosedale Motors* held that a class proceeding was still not the preferable method for adjudicating the franchise dispute because of the numerous individual issues that would be left to be resolved after the determination of the common issues. In fact, according to the court, little would be achieved by determining that statements made by Petro-Canada in its promotional brochure were false or misleading. It would still be necessary to examine with the usual care and scrutiny what statements were made and what statements were relied upon in the creation of some 40 different contractual relationships.

Further, of course, the individual damages claims of the franchisees would differ significantly.

Rosedale appealed the decision of the motions judge. 24 The appellate court certified an action on the following narrow issues: (1) whether Petro-Canada had a legal duty to use reasonable care to ensure that the market research that it conducted before implementing the franchise system was sound; (2) whether Petro-Canada breached that duty; and
Manitoba case of Petro-Canada. The court disagreed with this assessment and allowed for a class proceeding because "the claims arise from the standard franchise agreement alleged to have been breached by the franchisor. While the plaintiff was suing for breach of the franchise agreement on behalf of all Bulk Barn franchisees across Canada, the provision of the franchise agreement in dispute, however, mandated that any markups on products supplied by Bulk Barn would be reasonable in relation to the markups adopted by other suppliers in the general market area or region in which the franchisee operated. It was likely that price differences existed from locale to locale, which meant that as between a class member from St. John, New Brunswick and a class member from Sarnia, Ontario, there would be no common issues."

Not all claims stemming from the standard franchise agreement have been certified. In 909787 Ontario Ltd. v. Bulk Barn Foods Ltd., a franchisee sued Bulk Barn for breach of contract. The franchisee sought to have the action certified as a class action on behalf of over fifty other franchisees of Bulk Barn. The franchisee claimed that Bulk Barn breached a provision of the franchise agreement that limited Bulk Barn's mark-ups on the products it supplied to its franchisees to those "generally charged or realized by other competitive suppliers in the general market area or region in which the [franchisee] is located." The motions court certified the class action. Bulk Barn appealed. The appellate court reversed the certification order.

Although the appellate court treated the dispute between the franchisees and franchisor as founded on a breach of a contract common to all franchisees, it also determined that there was insufficient commonality between the proposed class members to permit a class action. More specifically, the proposed class action did not properly set out a class of two or more persons as required under section 5(1)(b) of the CPA that would have common issues to be resolved. This was due primarily to the definition of the class in relation to the provision of the franchise agreement alleged to have been breached by the franchisor. While the plaintiff was suing for breach of the franchise agreement on behalf of all Bulk Barn franchisees across Canada, the provision of the franchise agreement in dispute, however, mandated that any markups on products supplied by Bulk Barn would be reasonable in relation to the markups adopted by other suppliers in the general market area or region in which the franchisee operated. It was likely that price differences existed from locale to locale, which meant that as between a class member from St. John, New Brunswick and a class member from Sarnia, Ontario, there would be no common issues.

In the A&P case, the plaintiff franchisees claimed that the franchisor breached the provision of the franchise agreement that dealt with the distribution of supplier rebates to franchisees. The prospective representative plaintiffs claimed that the case should be certified because "the claims arise from the standard form Franchise Agreement, executed by all members of the putative class and because under [the Franchise Agreement], 'the distribution of [Rebates] shall be 'the same for all franchisees of [A&P]. . .'" The plaintiffs presented the following common questions at the certification motion: (1) does the franchise agreement require the franchisor to distribute the rebates to the franchisees; (2) if so, what is the amount of rebates that the franchisor is required to distribute; (3) what, if any, rebates has the franchisor distributed to the franchisees; and (4) does the franchise agreement permit the franchisor to retain any of the rebates? Despite the efforts of the franchisor to demonstrate that the complexity and uniqueness of the arrangements between itself and each of its franchisees made a class action inappropriate, the motions judge certified the class. He held that the case was simply one of contract interpretation, and, therefore,

there is a core of commonality to the claims in that they all stem from the interpretation and effect to be given to para. 11 of the Franchise Agreements. . . . There are common issues the resolution of which will in all probability determine, if the plaintiffs are successful, not only liability but also the aggregate amount of the damages.

Commonality and the Representative Plaintiff
The last requirement of the CPA is concerned with the appropriateness of the representative plaintiff. According to section 5(1)(e), the representative plaintiff must be someone who can...
fairly and adequately represent the interests of the class, and who does not have, on the common issues presented, an interest in conflict with the interests of other class members. As indicated earlier, this requirement has received comparatively less attention by the judiciary than other requirements of section 5(1). Recent case law has, however, seen the court consider whether the proposed representative plaintiff has the financial wherewithal to pursue the class action. The appropriateness of the proposed representative plaintiff has also been raised in a franchise class action as well.

In the A&P case, the franchisor argued that the franchisees who brought the class action were incapable of fairly representing the class and had a conflict of interest with the rest of the class. The representative plaintiffs sought to recover supplier rebates to which they claimed that all franchisees were entitled under the franchise agreement. The representative plaintiffs were successful franchisees under the franchisor’s grocery banner. At the time the action was brought, the plaintiffs were no longer indebted to the franchisor for their initial start-up costs. In fact, the plaintiffs enjoyed much greater profits and retained more earnings from their franchise than the average franchisee under the grocery banner. Therefore, unlike many of their counterparts, the plaintiffs did not rely on any subsidies from the franchisor to ensure that their stores remained afloat. In opposing the motion for certification, the franchisor submitted that this independence made the representative plaintiffs unable and unwilling to represent adequately the interests of those class members, particularly newer franchisees, who received a significant amount of ongoing financial aid from the franchisor. Moreover, the franchisor intended to pursue counterclaims against the putative class members. These counterclaims would have little effect on the representative plaintiffs but could be expected to have a large effect on some of the other class members.

Because the issue of whether a franchisee, with interests different from those of the other franchisees in the class, makes an appropriate class representative had not been considered by Canadian courts, the franchisor in A&P drew upon American case law on the subject. For example, the franchisor pointed to U.S. cases that have found that counterclaims would have little effect on the representative plaintiffs but could be expected to have a large effect on some of the other class members.

The development of class action proceedings in franchise cases has been slow in Canada. Nevertheless, now that the A&P case has been certified, it is likely that more franchise disputes will follow the class proceedings route. Given the high stakes involved—the franchisor defendants are often very visible companies, franchisee class counsel are taking such cases on a full or partial contingency basis, and the media give relatively active coverage of such cases—franchisors should be prepared for continuing threats of class actions in franchise disputes in Canada. It does indeed look like the floodgates are starting to open.

**Endnotes**

3. Under the Canadian Constitution, the provinces have jurisdiction over the administration of justice and thus can create laws permitting and regulating class actions.
6. Class Proceedings Act, [RSBC 1996] CHAPTER 50; The Class Actions Act, Chapter C-12.01 of the Statutes of Saskatchewan, 2001; The Class Proceedings Act, C.C.S.M. c. C130; Class Actions Act, S.N.2001 CHAPTER C-18.1; and Class Proceedings Act, Chapter C-16.5, respectively.

7. Quebec is not a common law province but rather a civil law jurisdiction, and its class action regime differs from that of the common law provinces. Under Article 1003 of Quebec’s *Code of Civil Procedure*, a class action may be certified (or “authorized” as it is called in Quebec) by the court if the following four conditions are met:

   (a) the recourse of the members raise identical, similar or related questions of law or fact;

   (b) the facts alleged seem to justify the conclusions sought;

   (c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and

   (d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

Under the first criterion, it is sufficient if the claims of the class members raise some questions of law or fact that are sufficiently similar or related. The second condition is not a merits test; rather, the court must decide whether the facts as alleged in the motion seem to justify a class action. The purpose of this provision is to eliminate frivolous or vexatious proceedings. The third requirement speaks to whether the claim could be resolved through other procedural avenues such as joinder.

As a general rule, under Quebec law, a large number of class members are required before a class action will be authorized. Section 5(1)(b) of the CPA appears to be more permissive in this respect, as it allows a small number of persons (as few as two) to proceed with a class action. The last requirement has been interpreted as requiring the representative to be one who does not have a conflict of interest with the members of the class and one who is similar to that found in section 5(1)(e)(iii) of the CPA. In January 2003, Quebec amended its class actions legislation. These amendments did not change the four conditions required for the authorization of a class action but have streamlined the plaintiff’s burden of proof. These new changes may make Quebec the jurisdiction of choice for class action plaintiffs.

Good Faith and Fair Dealing in Canada

(continued from page 229)


22. Jirna Ltd. v. Mr. Donut of Canada Ltd., [1973] O.R. 629 (H.C.J.);


26. In the passage quoted, the words in brackets appear only in the Alberta provision, while the italicized words appear only in the Ontario provision. Otherwise, they are identical.


30. Despite the mutuality of the duty of fair dealing, it is interesting to note the paternalism inherent in these provisions, applying as they do to protect the franchisee, but not the franchisor, from potential vulnerability.


32. RUTH SULLIVAN, STATUTORY INTERPRETATION ch. 2 (1997).

33. BLACK’S LAW DICTIONARY 616 (7th ed. 1997).

34. See, e.g., section 26 of the Architect’s Act, R.S.O. 1990, c. A.26; subsection 70(2) of the Business Corporations Act, R.S.O. 1990, c. B.16; and section 42 of the Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34. The word “fiduciary” appears in a over a dozen Ontario statutes.